SAMPLE PACA REPARATION CASES
BY
SUBJECT MATTER

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(1) Office of Administrative Law Judges, Judicial Decisions
http://www.oaljdecisions.dm.usda.gov/agriculture-decisions-publication
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(4) The National Agricultural Law Center, University of Arkansas School of Law
www.NationalAgLawCenter.org
(5) www.lexisnexis.com
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Table of Contents

1. ABANDONMENT

The current state of the law simply does not allow for any situation in which a perishable commodity, which still retains commercial value, can be abandoned by the parties. The ultimate responsibility for not allowing such abandonment falls upon the receiver as the party in closest proximity to such commodity." *Dew-Gro, Inc. v. First Nat'l Supermarkets, Inc.*, 42 Agric. Dec. 2020, 2025-26 (1983).

2. ACCEPTANCE OF PRODUCE

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 Exp., Inc. v. Rialto Distrib., Inc.*, 60 Agric. Dec. 840, 903 (2001); *World Wide Imp-Exp., Inc. v.* Jerome *Brokerage Distrib., Co.*, 47 Agric. Dec. 353, 355 (1988); *Matthews v. Quong Yuen Shing & Co.*, 46 Agric. Dec. 1681, 1683 (1987).

In a "delivered Miami" sale, where the airline took possession of the product after completion of the shipper's contract to deliver the product to the Miami airport, the airline was in effect acting as the buyer's

agent and effectuated a legal acceptance of the product. *Pass Farm, Inc. v. Gouda*, 40 Agric. Dec. 824-25 (1980).

a. DIVERSION

Diversion of a shipment by the buyer while shipment is in transit constitutes acceptance thereof. *Salinas Mktg. Coop. v. Tom Lange Co.*, 46 Agric. Dec. 1593, 1597 (1987); *Magic Valley Potato Shippers, Inc. v. C.B. Marchant & Co.*, 42 Agric. Dec. 1602, 1606 (1983); *Lindemann Farms, Inc. v. Food Fair Stores*, 36 Agric. Dec. 92, 95 (1977); *Peller v. Bonnie Bee Super Food Mart, Inc.*, 16 Agric. Dec. 1018 (1957).

Where strawberries were billed to intermediate destination for consolidation with other produce and accepted at such destination by buyer, but invoice and bill of lading stated more distant destination in addition to the intermediate destination, it was held that the acceptance at the intermediate point did not void the suitable shipping condition rule and that such rule was applicable to the more distant destination. Breach found on basis of inspection at ultimate destination which was three thousand miles removed from intermediate acceptance point. *Bud Antle, Inc. v. Pac. Shore Mktg. Corp.*, 50 Agric. Dec. 954, 958 (1991).

See 7 C.F.R. § 46.2(dd)(1)

b. FAILURE TO REJECT IN A REASONABLE TIME

Failure to reject produce in a reasonable time is an act of acceptance.

UCC § 2-602(1)
7 C.F.R. § 46.2(dd)(3)

Pac. Lettuce Co. v. M & C Produce Co., 24 Agric. Dec. 532, 534 (1965); *Conn & Scalise Co. v. Frank J. Crivella & Co.*, 20 Agric. Dec. 415, 419 (1961).

c. UNLOADING OR PARTIAL UNLOADING

The unloading or partial unloading of the transport is an act of acceptance.

UCC § 2-606(1)(c)
7 C.F.R § 46.2(dd)(1)

M.J. Duer & Co. v. J.F. Sanson & Sons Co., 49 Agric. Dec. 620, 623 (1990); *Jim Hronis & Sons v. M. Pagano & Sons, Inc.*, 46 Agric. Dec. 1010, 1011 (1987); *Harvest Fresh Produce, Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703, 706 (1980); *Crown Orchard Co. v. Mid-Valley Prod. Corp.*, 34 Agric. Dec. 1381, 1385 (1975); *Theron Hooker Co. v. Ben Gatz Co.*, 30 Agric. Dec. 1109, 1112 (1971); *Conn & Scalise Co. v. Frank J. Crivella & Co.*, 20 Agric. Dec. 415, 419 (1961); *Charles P. Tatt Fruit Co. v. Mac's Produce*, 9 Agric. Dec. 802, 805 (1950).

Where tomatoes were unloaded prior to inspection, and respondent, after seeing the results of the inspection, notified complainant that the load was being rejected, it was held that respondent's attempted rejection was illegal and ineffective because the unloading of the tomatoes amounted to an acceptance. *J & J Produce Co. v. Weis-Buy Serv., Inc.*, 58 Agric. Dec. 1095, 1099 (1999).

Where respondent gave notice of rejection following the unloading of produce the rejection was ineffective, and the load was deemed to have been accepted. *Lionheart Group, Inc. v. Sy Katz Produce, Inc.*, 59 Agric. Dec. 449, 456 (2000).

Where truckload of perishables was unloaded at several locations, first act of unloading constituted acceptance. Inspection two days after acceptance did not show condition at time of delivery. *Veg-A-Mix v. Tom Lange Co.*, 46 Agric. Dec. 1171, 1173 (1987).

See below: **WHEN UNLOADING IS NOT AN ACCEPTANCE**

d. PLACING ON CONSIGNMENT

Placing purchased goods on consignment constitutes acceptance. *Berks-LeHigh Co-Op v. Adams*, 15 Agric. Dec. 677, 679-80 (1956).

e. PRELUDES SUBSEQUENT REJECTION

Where A sold to B, B sold to C, and C sold to D, a rejection by D to C was effective even though it occurred following C's acceptance of the lot of produce, because lot was accepted by unloading at C's warehouse, and D was on hand to reject when the lot was unloaded. However, following C's acceptance C could not reject to B, nor could B reject to A. It was found that in fact no such rejection had been attempted, but that C and B had merely communicated the fact that D had rejected to C. A's subsequent repossession of three-fourths of the lot of produce was wrongful, and precluded A from entitlement to the contract price as to more than the one-fourth of a lot in C's possession even though the entire lot had been accepted. *Phoenix Vegetable Distrib. v. Randy Wilson Co.*, 55 Agric. Dec. 1345, 1348-49 (1996); *Hawman v. G & T Terminal Packing Co.*, 46 Agric. Dec. 1544, 1552 (1987).

f. RESALE

When a buyer consigns or resells produce, absent other considerations, such action is an act of dominion constituting acceptance. *See Dave Walsh Co. v. Tom Lange Co.*, 42 Agric. Dec. 2085, 2088 (1983).

g. REVOCATION

Where Complainant delivered onions to Respondent that were grown in fields treated with the pesticide Furadan after it expressly warranted that the onions sold to Respondent would be Furadan-free, Complainant materially breached the contract. Respondent's subsequent communication to Complainant concerning the unfitness of the onions, its refusal to pay Complainant's invoices, and its demand for a refund of the sums it had already paid, constituted a revocation of acceptance. As the nonconformity of the onions, which was both difficult to discover and obscured by Complainant's assurances, substantially impaired the onions' value to Respondent, and the revocation was communicated to Complainant within a reasonable time after the breach was discovered, Respondent's revocation was held permissible. *Froerer Farms, Inc. v. Select Onion LLC*, 71 Agric. Dec. xxxiv, l (USDA 2012), *published in* 72 Agric. Dec. xxxiv, l (USDA 2013).

h. UNLOADING INTO WAREHOUSE OR COLD STORAGE

Transfer of produce from a trailer into cold storage is an act of acceptance. *Dunlap v. Israel Klein Co.*, 17 Agric. Dec. 992, 1000 (1958); *Peller v. Bonnie Bee Super Food Mart, Inc.*, 16 Agric. Dec. 1018, 1021-22 (1957).

i. WHEN UNLOADING IS NOT ACCEPTANCE

Where complainant was notified prior to unloading and specifically requested an unrestricted inspection. Under limited circumstances such as unloading for the purpose of inspection or to retrieve other produce from the nose of the truck, and where the product is then placed back on the truck within a reasonable time, unloading will not be deemed an acceptance. *Pope Packing & Sales, Inc. v. Santa Fe Vegetable Growers Coop. Ass'n*, 38 Agric. Dec. 101, 104 (1979).

3. ACCEPTANCE OF REJECTION

A seller can refuse to "accept a rejection" (that is, a seller may refuse to retake possession of purportedly rejected produce) when the rejection is ineffective (but not when it is effective but wrongful). An offer to conditionally accept an ineffective rejection does not impose a positive duty on the seller to retake possession of produce unless the terms of the conditional offer are accepted. *Fresh W. Mktg., Inc. v. McDonnell & Blankfard, Inc.*, 53 Agric. Dec. 1869, 1875 (1994).

Where buyer made an effective rejection of load of strawberries the title automatically reverted to seller, and seller had burden of proving contractual warranty inapplicable. Seller's refusal to accept rejection was meaningless, and seller had a primary duty to dispose of goods. Where seller did not dispose of goods, buyer's duty to dispose of goods was contingent upon seller having no agent or place of business in market of rejection, and burden of proof was on seller to establish that it had no such agent or place of business. However, where buyer assumed duty of resale, it was assumed that duty did rest on buyer, but buyer was held only to good faith standards in making resale. *Crowley v. Calflo Produce, Inc.*, 55 Agric. Dec. 674, 681 (1996).

Tomatoes were unloaded prior to inspection, and respondent, after seeing the results of the inspection, notified complainant that the load was being rejected. Complainant refused to accept the rejection. Respondent's attempted rejection was held to be illegal and ineffective. Complainant's refusal to accept the rejection amounted merely to notice that the rejection was not deemed to be effective, and that complainant would not accede to it in such manner as to constitute a modification of the contract. *J & J Produce Co. v. Weis-Buy Serv., Inc.*, 58 Agric. Dec. 1095, 1099 (1999).

4. ACCORD AND SATISFACTION

Accord and satisfaction requires a *bona fide* dispute, plus tender which is clearly made as payment in full. 1 Am. Jur. Accord & Satisfaction, § 22 *et. seq.* *See also Louis Caric & Sons v. Ben Gatz Co.*, 38 Agric. Dec. 1486, 1498 (1979); *Mendelson-Zeller Co. v. Michael J. Navilio, Inc.*, 34 Agric. Dec. 903, 907-08 (1975); *Kelman Farms, Inc. v. Bushman Brokerage, Inc.*, 34 Agric. Dec. 1146, 1152-53 (1975); *Mendelson-Zeller Co. v. Season Produce Co.*, 31 Agric. Dec. 1288, 1290-92 (1972).

"To constitute an accord and satisfaction it is necessary that the money be offered in full satisfaction of the demand, and be accompanied by such acts and declarations as amount to a condition that the money, if accepted, is accepted in satisfaction and it must be such that the party to whom it is offered is bound to understand therefrom that, if he takes it, he takes it subject to such conditions. The mere fact that the creditor receives less than the amount of his claim, with knowledge that the debtor claims to be indebted to

him only to the extent of the payment made, does not necessarily establish an accord and satisfaction." *Spada Distrib. Co. v. Frank Kenworthy Co.*, 17 Agric. Dec. 347, 355-56 (1958). Quoted in *Mendelson-Zeller Co. v. Season Produce Co.*, 31 Agric. Dec. 1288, 1290-92 (1972).

a. BANK WAS AGENT FOR ACCEPTANCE OF CHECK

Creditor was deemed to have appointed bank its agent for purpose of accepting full payment check, where bank's address was placed on creditor's invoices underneath creditor's name. Accord and satisfaction resulted from bank's deposit of check. Bank had apparent authority. Apparent authority was defined as "authority 'which, though not actually granted, the principal knowingly permits the agent to exercise, or which he holds the agent out as possessing.'" *Gulf-Western Food Prod. Co. v. Prevor-Mayrsohn Int'l Inc.*, 34 Agric. Dec. 1911, 1915 (1975). The holding was the same in *Unifrutti of America, Inc. v. William Rosenstein & Sons Co.*, 48 Agric. Dec. 717, 719-720 (1989), where the remittance address on the invoices was simply the name of complainant, a P.O. Box number, and the city, but, unknown to respondent, the P.O. box was that of complainant's bank. (The harshness of this rule is mitigated by UCC § 3-311(c)(2). *See* 4i, RETURN OF CHECK.)

b. CONDITIONAL TENDER NECESSARY

Words: "This check is in settlement of the following invoices . . ." and words, "This check is in settlement of the following. If incorrect please return." did not constitute clearly conditional tender. *Half Moon Fruit & Produce Co. v. N. Am. Produce Distrib., Inc.*, 40 Agric. Dec. 1610, 1612-13 (1981); *Horvitz Bros. v. Goldsamt*, 20 Agric. Dec. 391, 401 (1961).

Words: "Payment in Full" or "similar words" held effective. *Kelman Farms, Inc. v. Bushman Brokerage, Inc.*, 34 Agric. Dec. 1146, 1152-53 (1975); *Southmost Vegetable Coop. v. M & G Tomato*, 28 Agric. Dec. 966-68 (1969); *Johnson & Allen v. Fernandez Bros.*, 27 Agric. Dec. 1127, 1129-30 (1968); *Zinno v. Marvin*, 24 Agric. Dec. 396, 398-99 (1965); *Nat'l Produce Distrib., Inc. v. Stewart Produce Co.*, 21 Agric. Dec. 955, 959 (1962). (Transaction lacked *bona fide* dispute, and check was not offered in good faith where accord language was pre-printed on the check).

In *C.H. Robinson Co. v. Trademark Produce, Inc.*, 53 Agric. Dec. 1861, 1867-68 (1994), the words, "Full and Final Payment" were pre-printed on all of respondent's checks in very small type. Referencing Official Comment 4 to UCC § 3-311, it was held that clear notice that the payment was being offered as full settlement of the disputed claim had not been given, and there was no accord and satisfaction.

c. GOOD FAITH DISPUTE NECESSARY

Although respondent's partial payment checks stated that the checks were tendered as payment in full, it was found that no accord and satisfaction existed as to several transactions because respondent had not proven that a dispute existed between the parties as to such transactions. *Eustis Fruit Co. v. Auster Co.*, 51 Agric. Dec. 865, 884-86 (1992).

Where a respondent presented evidence of a breach by the complainant, this was not enough to show that there had been a dispute. *Ruiz v. Pac. Sun Produce Co.*, 48 Agric. Dec. 1105-06 (1989). (In context of a one load claim, the remainder of the decision is highly questionable in finding that the conditional tender was insufficient because it failed to specify what transaction it concerned.)

d. GOOD FAITH TENDER NECESSARY

Debtor tendered payment in one check for six produce transactions. Four of the transactions were undisputed, and the check covered these transactions in their full amount. The remaining two transactions were disputed and as to these, the check tendered only partial payment. The creditor negotiated the check and then sought to recover the balance alleged due on the disputed transactions. The debtor pled accord and satisfaction. It was held that the good faith tender requirement of U.C.C. § 3-311 would not be met by such a check, especially in view of the "full payment promptly" requirement of the Act and Regulations. The situation was distinguished from that in which the parties maintain a running account. *Lindemann Produce, Inc. v. ABC Fresh Mktg., Inc.*, 57 Agric. Dec. 739, 743 (1998).

In *C.H. Robinson Co. v. Trademark Produce, Inc.*, 53 Agric. Dec. 1861, 1867-68 (1994), the words "Full and Final Payment" were pre-printed on all of respondent's checks in very small type. Referencing Official Comment 4 to U.C.C. § 3-311, it was held that the requirements of "good faith tender" had not been met, and there was no accord and satisfaction.

e. LATE PAYMENT

U.C.C. § 3-311(a) includes several requirements for accord and satisfaction, the first of which is that the payment be tendered in "Good Faith." We were unable to find that Respondent's late payment was made in "Good Faith" as defined in U.C.C. § 3-103(a)(4). "Good Faith" as defined in U.C.C. § 3-103(a)(4) means honesty in fact and the observance of reasonable commercial standards of fair dealing.

The payment terms in Complainant's invoice were PACA prompt, which means within ten days after acceptance. 7 C.F.R. § 46.2(aa)(5). Respondent's check is dated far beyond ten days. There is nothing to indicate that Respondent objected to the payment terms stated in Complainant's invoice. In the absence of a timely objection by Respondent, the payment terms stated in Complainant's invoice became incorporated into the sales contract. U.C.C. § 2-207(2). *Interfresh, Inc. v. B. Sayers, Inc.*, 71 Agric. Dec. a, g (USDA 2012), *published in* 72 Agric. Dec. a, g (USDA 2013).

f. MUST BE PLEADED

James Macchiaroli Fruit Co. v. Ben Gatz Co., 38 Agric. Dec. 565, 570 (1979).

g. MUST BE TENDERED AS PAYMENT IN FULL

Esch Farm v. Packers Canning Co., 50 Agric. Dec. 930, 934 (1991).

Although respondent's partial payment checks stated that the checks were tendered as payment in full, it was found that no accord and satisfaction existed as to one transaction because there was no manifested intent that the payment should apply to all the items on the invoice where respondent paid in full for one of the types of fruit. *Eustis Fruit Co. v. Auster Co.*, 51 Agric. Dec. 865, 882-83 (1992).

h. RETENTION OF CHECK

Retention of a settlement check for a substantial period of time without negotiation thereof amounts to an acceptance of such check and constitutes an accord and satisfaction when all other necessary elements of an accord and satisfaction have been met. *Dixon Tom-A-Toe Produce v. Kaleck*, 37 Agric. Dec. 1794, 1797 (1978).

Retention of check not somehow marked as full payment does not effect accord and satisfaction. *Branix Trucking v. Cumberland Produce Co.*, 41 Agric. Dec. 1814, 1816 (1982).

i. RETURN OF CHECK

Under UCC § 3-311, the return within 90 days of an amount paid in full satisfaction of a claim disputed in good faith precludes the discharge of the claim unless the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim. *Pac. Tomato Growers v. Am. Banana Co.*, 60 Agric. Dec. 352, 370-71 (2001).

j. UNLIQUIDATED AMOUNT

Where, following a poor arrival, the parties entered into a modification of the contract to price after sale, the acceptance of the tender of a check offered in full accord, accompanied by an accounting of the sales, accomplished an accord and satisfaction. *Friedrich Enter., Inc. v. Benny's Farm Fresh Distrib.*, 57 Agric. Dec. 1695, 1702 (1998).

k. VERBAL COUNTERMAND OF EFFECTIVE

All necessary elements for accord and satisfaction present, but after receipt of the check, the creditor contacted the debtor by phone and was told to go ahead and deposit the check and the balance would be paid in full. Held no accord and satisfaction. *Apple Jack Orchards v. M. Offutt Brokerage Co.*, 41 Agric. Dec. 2265, 2267 (1982).

l. VOIDING OF

When accord is entered on basis of misrepresentation of material fact, it may be voided. *Central Farms v. Ag-West Growers*, 38 Agric. Dec. 889, 891 (1979).

m. WHERE PAYMENT DID NOT SPECIFY ACCOUNT FOR APPLICATION

Where a partial payment check was tendered on the condition that it be accepted as payment in full, but the debtor did not specify to what debt it was to be applied, and there were several open accounts at the time of tender, the creditor was within its rights when it applied the payment to an open freight bill, and no accord and satisfaction of the produce debt was accomplished. *DeSomma v. All World Farms, Inc.*, 61 Agric. Dec. 821, 833 (2002). *See* APPLICATION OF PAYMENTS, this Index.

5. ACCOUNTS STATED

Not present. No evidence to show that parties struck a balance. No evidence statements actually rendered. *Anthony Gagliano & Co. v. Jennaro*, 27 Agric. Dec. 1343, 1346-47 (1968).

6. ACCOUNTS OF SALE

a. ASSIGNMENT OF LOT NUMBERS

"The rendering of an accounting implies that records have been kept such as would enable an accurate accounting to be rendered. That is, that records must be kept in such a way that the commodity which is the subject of dispute may be identified and distinguished from other lots or shipments of the same commodity." *Bonanza Farms, Inc. v. Tom Lange Co.*, 51 Agric. Dec. 839, 847-48 (1992).

b. FAILURE TO SHOW DATES OF RESALE

Where accounting failed to show when the product was sold, the accounting was held not to furnish adequate proof of the value of the produce. *Elggren & Sons Co. v. Wood Co.*, 11 Agric. Dec. 1032, 1038 (1952).

In a later case, it was stated, "Although the resale date of the apricots is unknown, there has been no contention that such resale was unreasonable in light of the amount of decay present, or that complainant did not use due diligence in reselling the apricots. Accordingly, we accept the results of such resale." *Frank Gaglione & Son v. Theron Hooker Co.*, 30 Agric. Dec. 528, 532 (1971).

Where the other party objected to the absence of dates, the accounting has been held inadequate. *Sunkist Growers v. Fishman Produce Co.*, 41 Agric. Dec. 133, 136 (1982); *Mut. Vegetable Sales v. Joseph Notarianni & Co.*, 29 Agric. Dec. 1049, 1054 (1970).

Where no individual resale dates were shown and the other party objected, **but the resales were otherwise shown to have occurred within a reasonable time,** the accounting was allowed. *Stoops & Wilson v. Wholesale Produce Exch.*, 41 Agric. Dec. 290, 293 (1982).

c. MUST BE MORE THAN SUMMARY STATEMENT

To be accepted as an accurate reflection of the price received for produce, the statement rendered must be more than a summary statement. *Supreme Berries, Inc. v. McEntire*, 49 Agric. Dec. 1210, 1217 (1990).

Accountings that show only an average price are commonly not used to show the value of consigned goods or the value of damaged goods resold by a buyer. However, where the accounting showed that the average price realized was the same as the current market price and the amount of goods lost on repacking was less, as a percentage, than the condition defects shown on the arrival federal inspection, an exception was made, and the accounting was used to show the proper returns under a consignment contract. *Great Am. Farms, Inc. v. William P. Hearne Produce Co.*, 59 Agric. Dec. 466, 469-70 (2000).

See **DAMAGES - ACCEPTED GOODS** - Paragraph B, subparagraphs (a), (b), and (c) - this index.

7. ACT OF GOD

See **CONTRACTS - IMPOSSIBILITY OF PERFORMANCE** - this index.

8. ADMINISTRATIVE PROCEDURE ACT

"5 U.S.C. § 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved - (1) a matter subject to a subsequent trial of the law and the facts de novo in a court; . . ."

Some sections held not applicable to PACA reparation proceedings. *Eady v. Eady & Assoc.*, 37 Agric. Dec. 1765, 1766 (1978).

Although ". . . proceedings under the Act are excepted from certain provisions of the APA…many of the provisions of the APA . . . are based upon fundamental principles of due process enunciated long before the passage of the APA." - citing cases. ". . . we do not believe we can lightly dismiss the general principles of due process expressed (in such cases)." *James Macchiaroli Fruit Co. v. Ben Gatz Co.*, 38 Agric. Dec. 1477, 1484-85 (1979).

9. AGENCY

See **BROKERS** - this index.

a. APPARENT AUTHORITY

Receipt of Complainant's invoices by Respondent's authorized agent constituted Respondent's receipt of Complainant's invoices. *Coliman Pac. Corp. v. Sun Produce Specialties LLC*, 73 Agric. Dec. 639, 645 (2014).

When a party acts in a manner which creates apparent authority in an agent it may be bound by the acts of the agent. It is a maxim of agency law that a principal is responsible for its agent's actions, even where the agent exceeds the scope of its actual authority. *La Valenciana Avocados Corp. v. Tomato Specialties, LLC*, PACA Docket No. W-R-2013-403, decided July 22, 2015; *L & M Companies, Inc. v. Panama Banana Distrib. Co.*, 71 Agric. Dec. i, x-v (USDA 2012), *published in* 72 Agric. Dec. i, x-v (USDA 2013).

When a party acts in a manner which creates apparent authority in an agent, it may be bound by the acts of the agent. *A.P.S. Mktg. v. M. Degaro Co.*, 59 Agric. Dec. 416, 420 (2000); *Joe Phillips, Inc. v. City Wide Distrib., Inc.*, 44 Agric. Dec. 468, 474 (1985); *W. Cold Storage v. Schons*, 38 Agric. Dec. 903, 906 (1979); *Johnson Produce, Inc. v. R.L. Burnett Brokerage Co.*, 37 Agric. Dec. 1743, 1746 (1978); *George Arakelian Farms, Inc. v. Leonard O'Day Co.*, 31 Agric. Dec. 1395, 1401 (1972); *G. Fava Co. v. Parkhill Produce Co.*,19 Agric. Dec. 928, 933 (1960); *Johnson v. Fritchey*, 16 Agric. Dec. 1082, 1085 (1957); *Tri-State Sales Agency v. Palmetto Fruit & Produce Co.*, 14 Agric. Dec. 1140, 1143 (1955).

It is the maxim of agency law that principal is responsible for its agent's actions even where the agent exceeds the scope of its actual authority. *Westside Produce Co. v. E.L. Kempf & Sons*, 39 Agric. Dec. 727, 733-34 (1980).

It was held that the manager of a cold storage facility of the PACA licensed firm, had the apparent authority to accept and sell consigned produce from the cold storage facility. The firm provided insufficient notice to the consignor that the manager did not have the actual authority to a handle produce on consignment. Therefore, the firm was liable for the manager's actions, even though it was unaware of the consignment and did not authorize the manager to handle produce on consignment. *Magallon v. Pac. Sun Distrib., Inc.*, 69 Agric. Dec. 848, 861 (2010).

Respondent not liable where firm using its name did not have apparent authority to do so even though it had made purchases at respondent's old address. *Bud Antle, Inc. v. Spruton, Inc.*, 47 Agric. Dec. 1619, 1622-23 (1988).

Where the buyer had given the broker authority to order produce in his name and terminated the grant of authority without notifying the produce industry, the buyer was estopped from denying the apparent authority of the broker to purchase further shipments of produce. *Sun Valley Packing Co. v. Guinta*, 45 Agric. Dec. 768, 774-75 (1986).

It is the act and control of the principal, and not those of the agent, that must be relied upon to show apparent authority or the scope of authority generally. *Louis Caric & Sons v. Garden Fresh Mkt., Inc.*, 35 Agric. Dec. 412, 415 (1976); *Gulf W. Food Prod. Co. v. Prevor-Mayrsohn Int'l Inc.*, 34 Agric. Dec. 1911, 1915 (1975); *Cent. & S. Am. Imports Co. v. W. Indies Foods & Importing, Inc.*, 34 Agric. Dec. 1015, 1019-20 (1975); *Hunter Produce v. L.A. Potato Distrib., Inc.*, 31 Agric. Dec. 1415, 1418 (1972); *Martin Produce, Inc. v. Basil Co.*, 30 Agric. Dec. 836, 843-44 (1971); *Paramount Citrus v. Cent. Wash. Produce*, 23 Agric. Dec. 256, 261-62 (1964); *Senini v. Fruit Supply Co.*, 19 Agric. Dec. 394, 397 (1960); and *Nash DeCamp Co. v. Albertson Co.*, 13 Agric. Dec. 283, 287-89 (1954).

The burden of any necessary diligence to ascertain the agent's authority rests upon the party dealing with the agent. *Cal-Mex Distribs., Inc. v. Delray Produce Corp.*, 47 Agric. Dec. 470, 473 (1988); *Pasco County Peach Ass'n v. J. F. Solly & Co.*, 146 F.2d 880 (4th Cir. 1945).

Mere negotiation of contracts is inadequate to support agent's claims for commission against its principals. Agent must first demonstrate that the principal authorized the agent to act on the principal's behalf. *Pearl Ranch Produce LLC v. Desert Springs Produce LLC*, 67 Agric. Dec. 1465, 1474-75 (2008).

b. BAILMENT

Where Respondent took possession of product sold by Complainant to a third party, Kingston, solely for the purpose of "cross-docking," i.e., segregating the product into smaller lots so that it could be shipped, following consolidation with product from other shippers, to Kingston, found that Respondent and Kingston were engaged in a bailment. Although Respondent agreed to take billing for the commodities, the sales prices were negotiated between Complainant and Kingston, with Respondent billing Kingston an additional $0.25 per carton for its cross-docking fee. Since Kingston was the true purchaser of the commodities, found that Respondent, as part of the bailment arrangement, was acting as agent for Kingston, its disclosed principal, when it agreed to taking billing, and that Respondent did not incur any liability under the contracts absent any indication that it specifically agreed to pay for the commodities in the event that Kingston did not pay. *Metz Fresh LLC v. D'Arrigo Bros. Co. of Cal.*, 69 Agric. Dec. 906, 914 (2010).

c. DISCLOSURE OF PRINCIPAL

Broker in a sale to an undisclosed or partially disclosed buyer (seller did not know buyer's identity) is liable as a principal on the contract. *A.R.Z. Potato v. Frank Donia Co.*, 39 Agric. Dec. 961, 962 (1980); *Ucon Produce v. Jimmy Shmon Produce Broker*, 37 Agric. Dec. 1747, 1749 (1978), where we quoted *Mawer-Gulden-Annis, Inc. v. Brazilian & Columbian Coffee Co.*, 49 Ill. App. 2d 400, 199 N.E.2d 222 (1964):

> It is a settled rule in verbal contracts, if the agent does not disclose his agency and name his principal, he binds himself and becomes subject to all liabilities, express and implied, created by the contract and transaction, in the same manner as if he were the principal in interest . . . And the fact that the agent is known to be a commission merchant, auctioneer, or other professional agent, makes no difference. The duty is upon the agent, who wishes to avoid liability, to disclose the name or identity of his principal clearly and in such a manner as to bring such adequately to the actual notice of the other party, and it is not sufficient that the third person has knowledge of the facts and circumstances which would, if reasonably followed by inquiry, disclose the identity of the principal.

An agent who acted on behalf of a disclosed principal subjected the other party to liability to the same extent as if the principal had conducted the transaction. *Big Apple Pineapple Corp. v. Fashion Fruit Co.*, 58 Agric. Dec. 1106, 1112 (1999).

Buyer undisclosed in *Lake Region Packing Ass'n v. A.J. Sales Co.*, 50 Agric. Dec. 1034, 1036 (1991). *See also J. Schaller Co. v. J. Schlanger & Sons*, 35 Agric. Dec. 153, 156 (1976).

Seller undisclosed to buyer by collect and remit broker in *Mountain River Produce, Inc. v. Potato Specialties, Inc.*, 56 Agric. Dec. 959, 962-63 (1997). Broker negotiated a partial payment check marked payment in full, and seller was bound. Broker was held liable to seller for purchase price less damages flowing from seller's breach as to condition of produce because it failed to issue confirmation of sale.

Although a collect and remit broker for an undisclosed seller can bind the seller by acceptance of a partial payment check (as in *Mountain River Produce*, above), once the principal is disclosed, such a broker does not have standing to bring a legal action to collect on the debt incurred when the sale was brokered. *Produce Serv. & Procurement, Inc. v. Vestal*, 55 Agric. Dec. 1284, 1286 (1996).

Where a complainant sought reparation against an agent for an undisclosed principal, and complainant had, in a previous case, counterclaimed based on the same transactions and legal theory against the undisclosed principal, and lost, complainant is deemed to have lost his claim against the agent under the principles of the law of agency, and mutuality of parties is not necessary for the doctrine of collateral estoppels to also bar the claim. *Wholesale Produce Supply Co. v. Sam Relan Sales*, 50 Agric. Dec. 1933, 1937-38 (1991).

When a principal is undisclosed, payment to a third party may be justified. *Cook Sales Co. v. Triangle Produce Co.*, 42 Agric. Dec. 1241, 1243-44 (1983); *Fowler Packing Co. v. Assoc. Grocers Co. of St. Louis*, 36 Agric. Dec. 87, 90 (1977).

An undisclosed principal may sue in its own name to collect the contract price. *Waverly Growers Coop. v. Mitchell*, 24 Agric. Dec. 967, 970 (1965).

A transaction between an agent intending to act for an undisclosed principal and acting within his power to bind the principal, subjects the other party to liability to the principal takes the contract subject to all the defenses that would be available against the agent. *See* W. Seavey, *Handbook of the Law of Agency*, § 111, p. 198 (1964). *See Diazteca Co. v. Players Sales, Inc.*, 53 Agric. Dec. 909, 912 (1994), where this rule was applied.

In *Sunshine State Produce v. Mackey*, 50 Agric. Dec. 1860, 1864 (1991), the situation was characterized as "not the usual case of an agent for an undisclosed principal, but rather what might be characterized as a principal with an undisclosed agent." It was stated, quoting W. Seavey, *Handbook of the Law of Agency* § 136A (1964):

> An agent who makes a contract for a disclosed principal is normally not a party to it and his right to compensation does not give him such an interest in its performance, that he can maintain an action in his own name. A Fortiori, a principal cannot, except by assigning the claim, authorize an agent who has no connection with the transaction to bring an action in his own name.

See **STANDING AND PRIVITY OF CONTRACT -** this index.

d. EMERGENCY POWER OF AGENT AFTER TERMINATION OF AUTHORITY

A broker can have emergency power to adjust price or sell produce after termination of his authority if conditions warrant. However, he must make effort to contact principal. *Kirk Produce, Inc. v. Dispoto*, 40 Agric. Dec. 1371, 1375-76 (1981).

Burden on broker in such situation to show effort to contact principal. *Blue Anchor, Inc. v. S. Central Brokerage, Inc.*, 43 Agric. Dec. 1312, 1315 (1984).

e. EMPLOYEE OR AGENT OF PRINCIPAL

According to section 16 of the PACA (7 U.S.C. § 499p), the "act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person." *Valenciana Avocados Corp. v. Tomato Specialties, LLC*, PACA Docket No. W-R-2013-403, decided July 22, 2015; *L & M Companies, Inc. v. Panama Banana Distrib. Co.*, 71 Agric. Dec. i, x-xi (USDA 2012), *published in* 72 Agric. Dec. i, x-xi (USDA 2013).

f. FIDUCIARY DUTIES

Duty to disclose actual cost of freight. *Pappas & Co., v. Papazian Distrib. Co.*, 46 Agric. Dec. 1882, 1885 (1987); *In re Ben Gatz Co.*, 38 Agric. Dec. 1038, 1039-40 (1979); *See* F.O.B. - FREIGHT - this index.

Sales agent has duty to file trust notice and failure to do so in timely fashion is a violation of the PACA. *Griffin-Holder Co. v. Smith*, 49 Agric. Dec. 607, 609 (1990).

The fiduciary duty of an agent who sells to "pool buyers" is treated in *Mission Shippers, Inc. v. Hall*, 32 Agric. Dec. 1849, 1851-52 (1973).

"An agent, who to promote the sale of his principal's goods and hence to increase his commission, pays the obligation of the buyer to his principal, is not entitled to indemnity if the buyer later becomes insolvent." Restatement, Second, *Agency*, § 440(a). *Mission Shippers, Inc. v. Hall*, 32 Agric. Dec. 1849, 1851-52 (1973).

Where an intermediary, Mr. Chaseley, was an employee of both parties to a series of produce transactions, something happened that caused him to begin embezzling funds, and misdirecting checks that were entrusted to him. This was not discovered until the end of the series of transactions. As a part of this behavior pattern, he failed to disclose to either of the parties to the proceeding that he was employed by the other. It was stated that:

> Such employment, of course, hopelessly compromised his loyalty to both employers as far as transactions between the two firms. Since the negotiations in regard to this transaction were all carried on through Mr. Chaseley, such negotiations cannot be viewed to have been in good faith, and are tainted by fraud. Due to the ignorance of both Complainant and Respondent as to Mr. Chaseley's unethical conduct, they cannot be deemed to be tainted by Mr. Chaseley's fraud, but nevertheless, the transactions themselves are so tainted that it would be improper to find that a contract resulted from negotiations so compromised, unless the parties themselves, independent of Mr. Chaseley, clearly acquiesced in the contract or a modification thereof. Such is not the case with this transaction, and we conclude that Respondent is liable to Complainant only for the reasonable value of the grapes.

A.P.S. Mktg. v. R.S. Hanline & Co., 59 Agric. Dec. 407, 412-13 (2000).

g. GROWER'S AGENT

A grower's agent may be held liable for extremely low returns remitted to its principal on consignment when it fails to provide justification for unauthorized adjustments, dumping, and sale for "process." *Rogers Bros. Farms, Inc. v. Skyline Potato Co.*, 69 Agric. Dec. 1599, 1616 (2010).

In the absence of accounts of sale from ultimate receivers or timely, impartial inspections, grower's agent's performance of its duty to the grower is measured against
Market News Service price reports. *Rogers Bros. Farms, Inc. v. Skyline Potato Co.*, 69 Agric. Dec. 1599, 1616 (2010).

Responsibilities of, and liability for failure to perform responsibilities. *Lozano v. Whizpac, Inc.*, 46 Agric. Dec. 658, 660-61 (1987).

Where respondent claimed to be acting as a grower's agent but was actually involved in two separate purchase and sale arrangements, first between respondent and complainant, and second between respondent and its customer, there was no grower's agent relationship in spite of respondent's effort to show that a written grower's agent agreement had been submitted to complainant. *Schulist v. Wysocki Sales, Inc.*, 46 Agric. Dec. 694, 700 (1987).

Grower's agent who failed to secure evidence in the form of inspection certificates to back up allowances was liable to grower for amounts of the allowances. Also, where the parties had previous dealings covered by written contracts, the terms of those contracts, which were identical, were held to be in effect here where they did not formalize a written contract. Previous written contracts contained the wording, "Shipper is authorized to make whatever adjustment or to grant any allowances that in shipper's opinion are justifiable or necessary in order that sales be consummated at destination and car or truck lots be accepted by buyers." Held that this wording did not relieve the agent of liability for

negligent actions such as failure to obtain inspections to establish problems with the product. *Sousa Farms v. San Joaquin Tomato Growers, Inc.*, 46 Agric. Dec. 709, 715-16 (1987).

Where a grower's agent failed to enter into a written agreement with the grower or furnish a written statement of the terms under which it would handle grower's potatoes, allowances granted by the grower's agent were disallowed. However, the fact that the agent was not authorized to make allowances, and nevertheless made allowances, was said to not render the agent liable for the allowances made if, and to the extent that, the allowances were found to coincide with deductions from invoice cost which were supported by damages resulting from breaches of the contract of the sale on the part of complainant. *Big Sky v. S & H, Inc.*, 55 Agric. Dec. 1312, 1323 (1996).

While the terms of the written marketing agreement between Complainant grower and Respondent, the grower's agent, gave Respondent broad discretion to sell Complainant's peppers, Respondent was held to have acted negligently by making large price concessions purportedly based on condition problems without obtaining federal inspections. Regarding those sales in which Respondent did not act negligently, Respondent was held not to be required to obtain the prevailing market price for Complainant's peppers. *Mayoli, Inc. v. Weis-Buy Services, Inc.*, 65 Agric. Dec. 648, 665 (2006).

h. LACK OF AUTHORITY

When one deals through a broker, he runs risk of lack of authority in the broker. *Martin Produce, Inc. v. Basil Co.*, 30 Agric. Dec. 836, 843-44 (1971); *Pasco Cnty. Peach Ass'n v. J.F. Solley & Co., Inc.*, 146 F. 2d 880 (1945).

Actions of the principal are the focus of inquiry when determining the existence of apparent authority in an agent. *Fowler Packing Co. v. Associated Grocers Co. of St. Louis*, 36 Agric. Dec. 87, 91 (1977).

Authority to bring reparation action not included in agency contract authorizing party to invoice, collect and remit. *PurePac Brokers, Inc. v. Procacci Bros. Sales Corp.*, 54 Agric. Dec. 734, 736-37 (1995).
See **STANDING** - this index.

i. LIABILITY OF AGENT OR OTHER PARTY TO PRINCIPAL

See **PAYMENT - PROPER PARTY FOR** - this topic.

Where the other party bought produce from the principal through the agent, and paid the agent who was not authorized to receive payment, and such payment was over the objection of the principal, the other party was liable to the principal for the full value of the produce. The agent who took payment and did not forward it to its principal was liable jointly and severally with the purchaser to the principal for the amount received from the purchaser. Such agent was also not entitled to brokerage fees where it acted without authority in accepting payment for the produce. *Big Apple Pineapple Corp. v. Fashion Fruit Co.*, 58 Agric. Dec. 1106, 1112 (1999).

j. PAYMENT - PROPER PARTY FOR

See **LIABILITY OF AGENT OR OTHER PARTY TO PRINCIPAL** - this topic.
See **STANDING AND PRIVITY OF CONTRACT** - this index.

Complainant sold to respondent through the broker and proved that invoice was mailed to respondent the next day. The broker also invoiced respondent, and respondent paid the broker. Respondent proved that in prior transactions with other sellers through the broker, respondent had paid the broker. Held: respondent failed to prove that complainant authorized the broker to collect and remit. The broker was not entitled to funds received from respondent and became constructive trustee of such funds with duty to pay them to complainant. Joint and several award in complainant's favor against the broker and respondent. *Alexander Mktg. v. Gram & Sons*, 30 Agric. Dec. 439, 441 (1971).

Complainant acted as marketing agent for a shipper, advanced the shipper funds, and was listed in the *Redbook* as salesman for the shipper. Complainant, in order to balance out accounts with the shipper, was given a load of grapes by the shipper which complainant then sold through a broker to respondent. The broker issued a proper memo showing complainant as seller and served such on complainant and respondent. After respondent received the grapes, respondent was telephoned by the shipper and was told to send its payment to the shipper. Respondent noted that the shipper appeared as shipper on bill of lading and then paid the shipper. Respondent was held to have paid the wrong party and reparation was awarded to complainant against respondent. *Adam v. Perma*, 31 Agric. Dec. 431, 433-35 (1972).

Respondent buyer paid the broker after issuance of confirmation showing complainant was seller. Held respondent liable to pay complainant as to accepted goods. *John Livacich Produce, Inc. v. DiGiacomo*, 46 Agric. Dec. 1020, 1022-23 (1987); *Sun World Int'l v. Corgan & Sons*, 45 Agric. Dec. 742, 744-45(1986).

Where a buyer of a partial load paid the trucker for the balance of the load, the buyer was held liable to the seller for the reasonable market value of the balance of the load. *Woods Co. v. Boyd*, 47 Agric. Dec. 1087 (1988).

k. PRIOR COURSE OF DEALING

Agency may be implied from prior, similar dealings. *Hawman v. G & T Terminal Packing Co.*, 46 Agric. Dec. 1544, 1552 (1987); *Woodrow Johns Co. v. Sikeston Fruit & Produce*, 19 Agric. Dec. 547, 551-52 (1960); *Nash DeCamp Co. v. Albertson Co.*, 13 Agric. Dec. 283, 287-89 (1954).

However, even though the seller had allowed the broker to collect and remit in the past, the broker had issued memoranda of sale to that effect. In the instant case, the broker did not issue confirmations of sale, and both broker and shipper invoiced the buyer. After making inquiry of the broker, the buyer paid the broker. Held that buyer paid the wrong party and was still liable to the seller. *Louis Caric & Sons v. Garden Fresh Mkt., Inc.*, 35 Agric. Dec. 412, 415 (1976).

l. PROOF OF CONTRACT

When evidence showed that a licensed grower and its former agent failed to reach an agreement on a grower's agent contract negotiated during the fall of 2005 for the 2006 growing season, evidence of prior course of dealing from 2000-2005, the grower's publication of the agent's name in association with the grower's entries in the Bluebook and the Redbook in the spring and fall of 2006, and written contracts with third parties that did not identify the agent as an agent for grower, were inadequate to show that grower contracted with agent for the 2006 growing season. *Pearl Ranch Produce LLC v. Desert Springs Produce LLC*, 67 Agric. Dec. 1465, 1472-74 (2008).

m. PROOF OF EQUITABLE RELIEF

An agent's mere assertion that his principal had promised to compensate him for principal's decision to contract with a different agent was inadequate to support the first agent's claims for equitable relief. *Pearl Ranch Produce LLC v. Desert Springs Produce LLC*, 67 Agric. Dec. 1465, 1472-74 (2008).

n. RATIFICATION

The silence of a principal after learning that his agent has changed the terms of a contract will constitute a ratification by that principal. *Hawman v. G & T Terminal Packaging Co.*, 46 Agric. Dec. 1544, 1552 (1987). In *Sanders v. Greenberg Fruit Co.*, 32 Agric. Dec. 1856, 1859-60 (1973), it was held that a modification of the original contract, though negotiated by a broker whose authority had terminated at the conclusion of the original contract, was ratified by the seller. This comports with the statement in H. Reuschlein and W. Gregory, *The Law of Agency and Partnerships*, § 27, p. 72 (second ed. 1989), that ratification ". . . is the affirmance of an act done originally without authority." *See Id.*, Chapter 3 on Ratification, § 30 of which summarizes the conditions necessary for ratification to take place as follows:

> In order for ratification to operate effectively at least five general requirements are invariably noted: (a) The contract or act for which ratification is sought must be one which would be valid if the agent had been authorized at the time it was executed or performed; (b) The purported principal must have been in existence when the act was done and he must be legally competent at the time he attempts to ratify; (c) The contract or act must have been executed or performed on behalf of the particular individual later seeking to ratify; (d) The ratification must be effected with the same formalities required for an authorization to execute the contract or perform the act in the first instance; and (e) At the time of ratification, the purported principal must have knowledge of all material facts concerning the transaction.

Although Respondent failed to establish the collection agent was bestowed by Complainant with either actual or apparent authority to negotiate a settlement on Complainant's behalf, Complainant's acceptance of funds the collection agent received from Respondent raised the question as to whether Complainant ratified the settlement agreement the collection agent negotiated with Respondent. It was, however, determined that all the necessary elements of ratification had not been met, as there was no indication Complainant intended to ratify the settlement agreement, nor did it appear Complainant had full knowledge of the terms of the agreement at the time it accepted the funds from the collection agent. *New Generation Produce Corp. v. Rossi Foods, Inc.*, 70 Agric. Dec. 474, 488 (2011).

10. ALLOCATION OF PAYMENTS

Where complainant sold 17 loads of produce to respondent, and it was determined that five were in interstate commerce and 12 were not, a $7,000.00 partial payment not tendered by respondent in payment of any specific invoice was allocated by us to the intrastate shipments. It was stated that in the absence of respondent specifying how the payments should be applied, complainant had a right to allocate the payments to the intrastate shipments, and that "[i]t is a general rule of law that where a debtor does not exercise his power to apply a payment to one of several debts, the law will apply the payments in a way most beneficial to the creditor." *Produce Distrib., Inc. v. Michael Bros.*, 45 Agric. Dec. 814, 817 (1986); *Mendelson-Zeller Co. v. Bleier*, 34 Agric. Dec. 683 (1975). *See J. Segari & Co. v. Farace*, 23 Agric. Dec. 495-96 (1964).

When payment application not specified by parties, it will be applied in manner most beneficial to creditor. *Conway, Inc. v. Ben F. Line*, 16 Agric. Dec. 387, 389 (1957).

Where the debtor does not exercise his power to apply a payment to one of several debts, the law will apply the payments in a way most beneficial to the creditor. *Mendelson-Zeller Co. v. Bleier*, 34 Agric. Dec. 683, 686 (1975).

Where a partial payment check was tendered on the condition that it be accepted as payment in full, but debtor did not specify to what debt it was to be applied, and there were several open accounts at the time of tender, creditor was within its rights when it applied the payment to an open freight bill, and no accord and satisfaction of the produce debt was accomplished. *DeSomma v. All World Farms, Inc.*, 61 Agric. Dec. 821, 833 (2002).

11. ARBITRATION

Grower and grower's agent entered into written "Distribution Agreement" defining terms under which the agent would market grower's garlic, and such Agreement included a paragraph requiring submission of disputes under the Agreement to binding arbitration. The agent, after marketing some of the garlic, refused to market the garlic any further due to alleged quality problems. Thereafter, according to the allegation of the grower, the agent agreed to purchase a quantity of the garlic, and grower brought a reparation complaint for failure to pay according to the terms of the alleged purchase agreement. It was held that under the Federal Arbitration Act the reparation forum was bound to respect the arbitration agreement. It was also stated that the question of whether the Agreement allowed a sale of garlic outside the Agreement to take place between the parties would be a question that could be decided only by an arbitration forum under the Agreement. However, it was stated that if such question were answered in the affirmative, the question of whether there was in fact a sale could not be answered by the arbitration forum since the sale would fall outside the scope of the Agreement between the parties. Therefore, in order to promote efficiency in the administration of justice, the limited factual question of whether a sale of the garlic took place between the grower and agent was considered and decided in the negative by the reparation forum. *Green Acres Turf Farms, Inc. v. Kelly Distrib., Inc.*, 55 Agric. Dec. 1298, 1304-07 (1996).

Perry v. Thomas, 482 U.S. 483, 490 (1987):

> An agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law*, 'save upon such grounds as exist at law or in equity for the revocation of *any* contract.' Thus state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.

12. ASSIGNMENT FOR BENEFIT OF CREDITORS NOT A DEFENSE

Assignment for the benefit of creditors is not a defense in reparation proceedings. *Braman v. B.G. Mktg. Co.*, 46 Agric. Dec. 511, 512 (1987); *Fruit Salad, Inc. v. M. Egan Co.*, 42 Agric. Dec. 664, 665 (1983); *Arbittier Farms v. Top Banana Farmers Mkt., Inc.*, 42 Agric. Dec. 1272, 1274 (1983).

13. BOND REQUIREMENT FOR FOREIGN RESIDENTS

Extensive discussion of requirement and of legislative history in *Provincial Fruit Co. v. Brewster Heights Packing, Inc.*, 39 Agric. Dec. 1514-16 (1980).

H.R. Rep. No. 915, 75th Cong., 1st Sess. (1937), in commenting upon the waiver proviso, subsequently adopted that year, stated:

> The act now requires non-residents of the United States to furnish a bond in double the amount of their claim to take care of costs and attorney's fees of the respondent if he prevails. This amendment also makes the bond cover any reparation award which may be issued against such complainant on any counterclaim by the respondent. The amendment also allows the Department to waive a bond by a complainant who is resident of a country which permits residents of the United States to file complaints in that country without furnishing bond. Canada has a law similar to this act which does not require bonds from residents of the United States who may file complaints against residents of Canada. Canadian officials have protested this unequal treatment, and this amendment will permit the same requirements in both countries. (Comment on Section 9 of the bill, at page 3.)

See also show cause order and subsequent order, in *Blue Anchor, Inc. v. E.M. Mallet, Inc.*, 39 Agric. Dec. 739, 742 (1980), wherein the Judicial Officer refused to allow a PACA complainant which was an American assignee of a foreign firm to avoid a counterclaim filed by the American respondent by a claim of lack of privity of contract. The orders comment on the intent of the bonding requirement. The 1982 amendment included American assignees of foreign firms in the bonding requirement.

14. BREACH OF CONTRACT

See **CONTRACTS** - this index.

a. ANTICIPATORY REPUDIATION

See White & Summers, § 6-2, p. 170.

Where subject matter (unharvested bok choy) of repudiation contract was destroyed through no fault of either party shortly after repudiation by seller, buyer was not entitled to damages. Under UCC § 2 - 713, "learned of the breach" was found to mean "time of [for] performance." - extensive discussion. *V.V. Vogel & Sons Farms v. Cont'l Farms*, 44 Agric. Dec. 886, 895-96 (1985).

Where the buyer repudiates with respect to a part or the whole, the seller may resell the goods concerned, and if such resale is made in a commercially reasonable manner and in good faith, may recover the difference between the resale price and contract price plus any incidental damages incurred. *Washburn Potato Co. v. Rex E. Sparks Produce*, 42 Agric. Dec. 955, 958 (1983); *Ashley v. Cyr Bros. Meat Packing Co.*, 36 Agric. Dec. 401, 409-410 (1977).

Where the buyer, prior to shipment, notified the seller that it would not accept the contract air shipment of strawberries, its rejection (repudiation) was wrongful. However, the shipper's legal remedies at that time did not include going ahead with shipment. *Coastal Berry Corp. v. Hoverson & Sons*, 44 Agric. Dec. 1300, 1303 (1985).

Strawberries under contract were scheduled for delivery in early June. "Frequent inquiry was made by complainant of respondent as to when the berries would be ready for delivery. When it became apparent

that respondent would not make delivery or assure complainant of a definite shipment date, complainant, in order to take care of its commitment, purchased on the open market at a higher price." Held: complainant awarded the difference in cost. *Pierce-Young-Angel Co. v. Turlock Frozen Foods, Inc.*, 18 Agric. Dec. 43, 48-49 (1959).

b. BY REASON OF BRAND

Failure to ship correct brand is a breach of contract, but proof of damages is usually not accomplished. *See Van Buren Cnty. Fruit Exch. of FL. v. B.F. Roberts Farms, Inc.*, 28 Agric. Dec. 1365, 1368 (1969).

Where seller shipped 533 crates of correct brand and 75 crates of wrong brand, it was held that rejection of the entire load was justified. *Garin Co. v. Mitchell*, 30 Agric. Dec. 1534, 1538-39 (1971).

c. BY REASON OF GOVERNMENT STOP SALE ORDER

Government stop sale order issued against Chilean grapes two weeks after their acceptance by buyer was not, in itself, evidence of breach of contract by seller. *Pandol Bros., Inc. v. Burnett Produce Co.*, 49 Agric. Dec. 1207, 1209 (1990).

Where respondent received and accepted watermelons and began sales. When an embargo was placed on the sale of California watermelons due to a possible Aldicarb contamination 18 days later, it was held that the respondent had the duty to show the saleable condition of the remaining melons in order to be relieved of the duty to pay for the entire load. *Myco v. Boise Farmers Mkt., Inc.*, 46 Agric. Dec. 1579, 1581 (1987).

d. MATERIAL BREACH

A material breach, as the term is used in the Regulations (7 C.F.R. § 46.43(1)(m) and (t)), refers to all substantial breaches of contract other than a breach of the warranty of suitable shipping condition. *Martori v. Hous. Fruitland, Inc.*, 55 Agric. Dec. 1331, 1335 (1996). Where the shipper failed to properly load the lettuce, it suffered freezing injury. Held that shipper was responsible for the condition of the lettuce upon arrival and was liable to the receiver for damages. *Cal-Veg Sales, Inc. v. Sears-Schuman Co.*, 40 Agric. Dec. 476, 478 (1981). See **MERCHANTABILITY - WARRANTY OF** – this index.

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. § 2-314). *Conner v. McBryde Produce LLC*, 69 Agric. Dec. 798, 815 (2010).

Where contract terms were f.o.b. acceptance final, the supply of vine ripe tomatoes when the contract specified gassed green tomatoes was a material breach. *DeSomma v. All World Farms, Inc.*, 61 Agric. Dec. 821, 833-34 (2002).

Where the seller's change of billing from "open" to "advise" in an "f.o.b. acceptance final" contract, it was held to be a material breach of contract causing the buyer to be at liberty to consider the agreement repudiated and free to reject the product. *Schumann Co. v. Nelson*, 219 F.2d 627 (1955).

Where the contract called for apples to be 80% to full color and the shipping point inspection stated the color range to be from 66% to full red color, it was held that there was no proof of a material breach of contract since the statement in the federal inspection was a statement of the requirements of the applicable grade and not a determination that the subject apples contained samples with only 66% full red color. *Raymond "Mickey" Cohen & Son, Inc. v. Great Lakes Fruit & Produce, Inc.*, 52 Agric. Dec. 1686, 1699-700 (1993).

In a no grade contract for the delivery of lettuce, the weight of the cartons is not a factor in determining whether the load made good delivery. *Growers Exch., Inc. v. Cumberland Produce Co.*, 42 Agric. Dec. 1547, 1548 (1983).

Where the contract calls for a specific size of product, failure to ship product meeting that specification constitutes a material breach of contract. *E.M. Mallet, Inc. v. Amigo Foods Corp.*, 37 Agric. Dec. 1584, 1588 (1978); *Gronostalski Produce Corp. v. Ernie Johnson & Son*, 37 Agric. Dec. 1600, 1603 (1978).

e. MISBRANDING

Tomatoes were sold by complainant to respondent. A federal inspection at destination showed that some of the tomatoes were misbranded, some were the wrong brand and some were shipped with the wrong color. All of these failings were held to constitute breaches of contract by complainant. *J & J Produce Co. v. Weis-Buy Serv., Inc.*, 58 Agric. Dec. 1095, 1100 (1999).

f. OPEN SALE - BUYER'S BREACH BY SALE TO THIRD PARTY

In an "open" sale, the seller usually expects that the buyer and seller will agree on a price at some point following delivery, often following resale by the buyer. It is therefore implicit in such a contract that the seller expects to be dealing with a particular receiver, namely the receiver disclosed to the seller at the time of sale. For a buyer in such a sale to convey the goods to a third party for resale without the permission of the seller is a *breach of the contract between seller and buyer. Growers Mktg. Serv., Inc. v. J & J Distrib. Co.*, 53 Agric. Dec. 892, 895 (1994).

g. PART PERFORMANCE

"Complainant was under no obligation to accept part performance, and it had the right to refuse tender of a part of the shipment and to maintain an action for the breach of the entire contract." *Pearce-Young-Angel Co. v. Turlock*, 18 Agric. Dec. 43, 48 (1959).

Delivery of 381 cartons where contract called for delivery of "approximately 463" was a breach of contract. *Bearman v. Taplett*, 24 Agric. Dec. 365, 367 (1965).

h. TIMELY NOTICE REQUIRED

Where Respondent waited four days to look at onions received via railcar from Complainant, and upon discovery of a breach at that time gave notice to Complainant through the broker, found that such notice was not timely. We also noted, however, that the load remained intact in the railcar under constant refrigeration between the time of arrival and the time the car was opened. Moreover, after a U.S.D.A. inspection was performed on the onions the following day, Complainant had the opportunity, if the results of the inspection were in question, to request an appeal. Since the timeliness of the notice provided by Respondent therefore did not appear to have prejudiced Complainant's rights with respect

to securing its own evidence of the condition of the onions following arrival, found the untimely notice of breach provided by Respondent should not bar Respondent's recovery of damages resulting from the breach. *Four Rivers Packing Co. v. Sam Wang Produce, Inc.*, PACA Docket No. R-08-089, decided September 4, 2009 (unpublished decision).

To claim damages, a receiver must give the shipper timely notice of a breach of contract. *See* U.C.C. § 2-607(3). *See also Produce Specialists of Ariz., Inc. v. Gulfport Tomatoes, Inc.*, 42 Agric. Dec. 1194, 1197-98 (1983); *Spudco, Inc. v. Yick Lung Co.*, 36 Agric. Dec. 715-16 (1977).

See NOTICE OF BREACH - this index.

15. BROKERS

See **AGENCY** - this index.

See major topic **NOTICE TO BROKER** - this index.

a. ACCOMMODATION BROKERS

Complainant shipped forty-four loads of citrus to two buyers. All negotiations were through a broker, who was found to have purchased only one of the loads for the broker's own account. Complainant alleged that the broker made an oral agreement to guarantee the payment of the buyers. However, where the broker's memorandums of sale disclosed that the buyers were being accommodation invoiced by the broker, it was stated that a guarantee would have to be proven by the most forceful evidence. *Newbern Groves, Inc. v. C.H. Robinson Co.*, 53 Agric. Dec. 1766, 1789 (1994).

Where the broker advanced funds to the seller but was unable to recover payment from the buyer, it was entitled to recover the advanced monies from the seller. *Tom Lange Co. v. Salinas Lettuce Farmers Coop.*, 35 Agric. Dec. 401, 404-07 (1976).

b. ACTS INCONSISTENT WITH AGENCY RELATIONSHIP

Where middleman with apparent knowledge of seller but not of receiver, negotiated a $.25 per cwt. markup plus an additional markup, he was held to be the buyer of the produce in spite of the fact that he issued a broker's memorandum of sale and held himself out as a broker to both of the other parties to the transactions. It was stated that "respondent negotiated for himself a financial stake in the . . . transactions inconsistent with his professed position as broker." *Mountain Valley, Inc. v. Zambito*, 49 Agric. Dec. 613, 614-15 (1990).

c. APPARENT AUTHORITY

The failure to withdraw a previous grant of authority may result in the broker still having apparent authority to act on behalf of its principal. *Antle Bros. & Tanimura Bros. v. Albertson's, Inc.*, 45 Agric. Dec. 2507, 2509 (1986); Jacobsen Produce, Inc. v. R.L. Burnette Brokerage Co., 37 Agric. Dec. 1743, 1745 (1978); *George Arakelian Farms, Inc. v. Leonard O'Day Co.*, 31 Agric. Dec. 1395, 1401 (1972).

Although a broker was found to be a special agent rather than a general agent, such broker was nevertheless clothed with apparent authority by complainant to conclude modifications of contracts with the buyer, and where such modifications were not specifically authorized by complainant, the broker

was found to be in breach of its duty to complainant, and liable for damages. *Newbern Groves, Inc. v. C.H. Robinson Co.*, 53 Agric. Dec. 1766, 1841 (1994).

d. AUTHORITY

A broker's authority normally terminates when the parties have negotiated a contract so that all it can do is relay messages between the buyer and the seller. *Frank Minardo, Inc. v. Finest Fruits, Inc.*, 47 Agric. Dec. 1784-86 (1988); *Kirk Produce, Inc. v. Dispoto*, 40 Agric. Dec. 1371, 1374-76 (1981); *John Livacich Produce, Inc. v. M-K Sons Produce Co*., 37 Agric. Dec. 1798, 1801 (1978); *Fowler Packing Co. v. United Fruit & Produce*, 37 Agric. Dec. 1915, 1919 (1978); *Gonzales Packing v. Price*, 25 Agric. Dec. 390, 397 (1966).

Where broker sold potatoes under "deferred billing" terms rather than obtaining prevailing market prices as agreed with the shipper, broker was held to have exceeded its authority and was held liable for the difference between the lower quotes of the Market News and the proceeds received from the purchasers. *Zoller Distrib. v. Tom Lange Co.*, 36 Agric. Dec. 428, 436 (1977).

e. BREACH OF DUTY

Where Respondent A, a broker, was in violation of the Regulations for hiring a second broker without authority from Complainant to do so, Respondent A was held liable to Complainant for the difference between the original contract price of the produce, and the reduced price paid by the buyer, Respondent B, in accordance with a revised confirmation received from the second broker. Complaint dismissed against Respondent B. *Kinzer v. Nathel & Nathel, Inc.*, 66 Agric. Dec. 876, 879-80 (2007).

A broker may be found liable if it breaches its duty as fiduciary. *See* 7 C.F.R. § 46.28(a). *See also N. Am. Produce Buyers v. Source Produce Distrib. Co., 48 Agric. Dec. 1101-04 (1989)*; *Baker Produce, Inc. v. Ball Brokerage Co.*, 48 Agric. Dec. 689, 692 (1989).

Broker held liable for failure to communicate rejection of proposed contract terms and counter offer. *Mid-Valley Prod. Corp. v. Valley Packing Serv.*, 33 Agric. Dec. 1431, 1436-37 (1974).

Broker held liable for failure to quote price correctly. *Applewood Orchards, Inc. v. C.L. Contreras and Bench Mark Brokerage, Inc.*, 46 Agric. Dec. 94, 96 (1987); *A. Arena & Co. v. George Turner Co*., 10 Agric. Dec. 1258, 1260 (1951).

Where the product was shipped with virtually no decay, broker held liable for damages resulting from his failure to inform the shipper of the destination of the product. *Fred A. Ross Potato & Onion Co. v. Chi. Potato Co.*, 38 Agric. Dec. 435, 438-39 (1979).

Where a broker issued an accommodation invoice to a buyer, without authority from the seller, in a fraudulent and successful attempt to collect the proceeds from the buyer and apply them to an indebtedness owed to the broker by the seller from previous transactions, it was held that the broker was liable jointly with the buyer to the seller for the contract price. *Shelton v. J.A. Besteman Co.*, 50 Agric. Dec. 1854, 1859 (1991); *Shelton v. Mazzola*, 50 Agric. Dec. 918, 928 (1991).

Where a broker was given possession of complainant's plantains for the purpose of selling them and instead turned them over to a third party to sell, it ran afoul of the Regulations which state:

> A broker employed to negotiate the sale of produce may not employ another broker or selling agent, including auction companies, without the specific prior approval of his principal. (7 C.F.R. § 46.28(b))

It was stated that the broker was in very much the same position as a commission merchant (*See* 7 C.F.R. § 46.29(a)) and the rationale for the decision was stated as follows:

> The reason for these regulations is based upon the legal relationship in view, and should be obvious. The broker or commission merchant is an agent selected to perform a specific task. Such agent does not buy produce, but is employed by the owner to sell the owner's produce on the owner's behalf. Until the agent makes the sale the owner retains title to the goods, and following the sale the owner is entitled to the proceeds of the sale less a commission and agreed upon, or reasonable, expenses. The owner selects the person or firm that he or she deems best capable of performing the task, often taking into consideration the clientele to which the broker or commission merchant has access. When an agent is given authority to sell, there is no implied authority for such agent to employ someone else to do the selling. Selling agents are not fungible, but are possessed of differing skills, differing client lists, and access to different markets.

Triton Imports, Inc. v. S.C. Distrib. Co., 52 Agric. Dec. 1678, 1684 (1993).

See **TRUST FUND - LIABILITY OF SALES AGENT** - this index.

f. COMMISSION

A broker is entitled to a reasonable commission as its compensation. *See* Am. Jur. 2d, *Brokers*, §§ 99-100; 7 C.F.R. § 46.27; 7 C.F.R. § 46.28; *A.G. Shore Co. v. Four Seasons Wholesale Produce*, 41 Agric. Dec. 1225, 1232 (1982).

Broker entitled to fee upon negotiation of contract. Subsequent breach by a party thereto does not furnish excuse for not paying such fee. *Victor D. Bendel Co. v. A. Peltz & Sons*, 39 Agric. Dec. 311, 313 (1980); *Clement Jones Co., Inc. v. Cherry Foods, Inc.*, 34 Agric. Dec. 677, 679-80 (1975).

g. CONFIRMATION OF SALE

A broker's confirmation of sale usually receives considerable weight as evidence of the contract terms. *Del Rio Growers, Inc. v. Anthony Gagliano & Co.*, 47 Agric. Dec. 476, 478 (1988).

It is true that confirmations of sale and invoices . . . do not constitute the contracts between the parties. Such documents, however, are considered as evidencing the understanding between the parties when no prompt objection is made to their contents, and are particularly significant if a term such as "inspection and acceptance at destination" is claimed to have been a part of the contract. *J.R. Simplot Co. v. Red L. Foods Corp.*, 17 Agric. Dec. 384, 389 (1958).

Prompt objection to a broker's confirmation of sale usually is given great weight. *Kaiser Diversified Enter., Inc. v. Wallace Fruit & Vegetable Co.*, 32 Agric. Dec. 1523, 1526 (1973).

Confirmation is not the contract between the parties but merely evidence of the contract. *L.S. Taube & Co. v. Palmer*, 38 Agric. Dec. 731, 733 (1979).

A confirmation is not a manifestation of assent to a contract, but rather a memo of assent, or of a contract already in being. It cannot serve as a manifestation of assent. *Brady Farms v. New Era Mktg.*, 37 Agric. Dec. 1962, 1967 (1978).

h. DUTIES

A broker does not have a duty to assure performance on the part of the parties. *H.Y. Minami & Sons v. Shippers Serv. Co.*, 32 Agric. Dec. 892, 894 (1973); *Higgins Potato Co. v. Holmes & Barnes Ltd.*, 20 Agric. Dec. 636, 640-41 (1961).

Absent a showing of negligence, a broker cannot be found liable because the buyer rescinds the contract. *Cal. Artichoke and Vegetable Growers Corp. v. Lowell J. Schy Brokerage*, 47 Agric. Dec. 1324, 1326 (1988). Here, the broker was negligent in that he failed to issue a memorandum of sale; however, it was held that the failure to issue a broker's memorandum was not the causative factor of the damages suffered by complainant.

A broker's undertaking to "take responsibility if in the event of any problems with collections," could not be interpreted as a guarantee of payment, and the words of the broker could simply mean that the broker was agreeing to attempt to collect if there was any difficulty in collection. *Mollenberg v. Custom Fruit Sales, Inc*., 50 Agric. Dec. 942, 943 (1991).

Duty to disclose financial condition of buyer to seller discussed and ruled on in *Frank Donia Co. v. Hous. Produce Distrib. Co.*, 38 Agric. Dec. 848, 850-51 (1979); *T.J. Power & Co. v. C.H. Robinson Co*., 36 Agric. Dec. 460, 466-67 (1977).

See also Mission Shippers, Inc. v. Hall, 32 Agric. Dec. 1849, 1851-52 (1973), which was distinguished in *Eckel Produce v. C.H. Robinson Co.*, 40 Agric. Dec. 1785, 1788 (1981).

i. STATEMENTS OF

Broker's statements are entitled to great weight. *Homestead Tomato Packing Co. v. Mim's Produce, Inc.*, 43 Agric. Dec. 173, 177 (1984).

The broker's sworn affidavit stating that only green and breaker tomatoes were to be shipped was sufficient proof to show that contract specification even though it did not appear on the broker's confirmation. *B & L Produce, Inc. v. Procacci Bros. Sales Corp*., 37 Agric. Dec. 1243, 1246 (1978).

In the absence of the required statement on the broker's memorandum of sale as to who engaged the broker, a broker is presumed to have been engaged by the buyer. This fact should be weighed carefully in regard to the credibility of a broker's statements. In a case where the broker was found to have been engaged by the respondent, the broker's statements in respondent's favor were nevertheless given credence. *Charles Johnson Co. v. Hoversen*, 57 Agric. Dec. 756, 759-60 (1998).

16. BURDEN OF PROOF

a. ACCEPTANCE

Burden on complainant to prove receipt and acceptance where the respondent denies the same. Failure to prove receipt and acceptance held to be a failure to establish a *prima facie* case. *Nobles v. Peraino*, 46 Agric. Dec. 683 (1987).

b. AFFIRMATIVE DEFENSE

Burden on respondent to establish by a preponderance of the evidence. *Jules Produce Co. v. Quality Melon Sales, Inc.*, 40 Agric. Dec. 152, 154 (1981); *Newmiller Farms, Inc. v. Nicolls*, 36 Agric. Dec. 1230, 1232 (1977); *Walker & Hagan Packing House v. Amato Bros. Tomato Distrib., Inc.*, 27 Agric. Dec. 1543, 1545 (1968).

Respondent, who provided evidence from the informal and formal stages of the proceeding that Complainant did not own or have any rights to the grapes that made up the 30 transactions in this proceeding, and that Respondent had already paid the actual grower and rightful owner of the grapes identified in each transaction, in full, met its burden of establishing through a preponderance of the evidence an affirmative defense to Complainant's claims that it was owed money from Respondent for the 30 transactions. *Evans Sales, Inc. v. W. Coast Distrib., Inc.*, 67 Agric. Dec. 1441, 1452 (2008).

c. AGENCY

A party which relies on the statements of an agent has the burden to show that the agent had the authority to make the statements or the commitments on which it relied. *Fowler Packing Co. v. Associated Grocers Co. of St. Louis*, 36 Agric. Dec. 87, 91 (1977); *Martin Produce, Inc. v. Basil Co.*, 30 Agric. Dec. 836, 843-44 (1971); *Gonzales Packing v. Price*, 25 Agric. Dec. 390, 397 (1966).

d. BREACH OF CONTRACT

Burden on buyer to establish breach as to accepted goods. *See* UCC § 2-607(4). *See also Ocean Breeze Exp., Inc. v. Rialto Distrib., Inc.*, 60 Agric. Dec. 840, 903 (2001); *Grower-Shipper Potato Co. v. Sw. Produce Co.*, 28 Agric. Dec. 511, 514 (1969).

Where goods are accepted the buyer has the burden of proof to establish a breach of contract. *See* U.C.C. § 2-607(4). *See also Grower-Shipper Potato Co. v. Sw. Produce Co.*, 28 Agric. Dec. 511, 514 (1969).

e. COMMERCIAL VALUE

All produce is assumed to have commercial value until otherwise shown. *Milton J. Mark, Inc. v. Maunawili Produce, Inc.*, 37 Agric. Dec. 918, 921 (1978).

The receiver has the burden to show that produce has no commercial value. *Homestead Pole Bean Coop., Inc. v. Jones*, 43 Agric. Dec. 1216, 1218 (1984); *Growers Produce v. Star Produce*, 33 Agric. Dec. 693, 696 (1974).

f. CONDITION OF REJECTED GOODS

An effective rejection places the burden of proof as to condition upon the seller. When produce has been rejected by a receiver as not meeting contract specifications the shipper has the burden to show that it was in suitable shipping condition when it was loaded at shipping point. *Heggeblade-Marguleas-Tenneco, Inc. v. Fisher Foods, Inc.*, 33 Agric. Dec. 1443, 1447-50 (1974).

Complainant, as the party alleging rejection without reasonable cause, has the burden of proving the contract terms and its compliance therewith. *Horwath & Co. v. Mim's Produce, Inc.*, 47 Agric. Dec. 332, 334 (1988); *Lipoma v. C.H. Robinson Co.*, 29 Agric. Dec. 499, 508 (1970).

g. CONFLICTING ALLEGATIONS AS TO CONTRACT TERMS

Where the parties put forth affirmative but conflicting allegations with respect to the terms of the contract, the burden rests upon each to establish his allegation by a preponderance of the evidence. *Justice v. E. Potato Dealers of Me., Inc.*, 30 Agric. Dec. 1352, 1356 (1971); *Harland W. Chidsey Farms v. Geurin*, 27 Agric. Dec. 384, 386 (1968).

h. CONTRACT

Complainant, who submitted invoices for grapes from Complainant to Respondent, corresponding bills of lading, and corresponding work orders for 30 grape transactions occurring between August 20, 2002 and November 26, 2002, as *prima facie* evidence of a sale between Complainant and Respondent as to the 30 grape transactions, failed to rebut evidence from Respondent that Complainant did not own or have any rights to the grapes that made up the 30 transactions in this proceeding, and that Respondent had already paid the actual grower and rightful owner of the grapes identified in each transaction, in full. Accordingly, Complainant did not meet its burden of proving by a preponderance of the evidence all of the material allegations of its complaint, including the existence of a contract. *Evans Sales, Inc. v. W. Coast Distrib., Inc.*, 67 Agric. Dec. 1441, 1450 (2008).

Seller has the burden of proving purchase agreement with buyer. *Jones v. Barrage*, 16 Agric. Dec. 1142-1143 (1957).

Complainant's unilateral email proposals to Respondent did not prove the existence of a sales contract for 150 containers of Italian oranges where neither parties' conduct adhered to the terms of the proposed agreement and the oranges were not received or accepted by Respondent. The sender of a written confirmation of an oral agreement must prove that a contract was in fact made orally prior to the sending of the written confirmation. *Paganini Foods LLC v. Westlake Distributors, Inc.*, 69 Agric. Dec. 868, 892 (2010).

i. CONTRACT MODIFICATION

Party which claims the contract was modified has the burden of proof. *Regency Packing Co. v. Auster Co.*, 42 Agric. Dec. 2042, 2045 (1983); *F.H. Hogue Produce Co. v. Singer's Sons*, 33 Agric. Dec. 451, 454 (1974).

Where respondent testified that a consignment agreement was reached and complainant testified that such did not happen, confirming wires sent by respondent and not objected to by complainant decided issue in favor of respondent. *Dan Hart & Son v. Pellegrino & Son*, 28 Agric. Dec. 211, 216 (1969).

Failure to prove poor arrival so as to show motive for seller to modify contracts is a factor to be considered as to whether burden of proof has been met. *E.H. Glueck & Co. v. Franklin Produce*, 16 Agric. Dec. 947-49 (1957).

j. DAMAGES

After receipt and acceptance of produce, burden to prove breach and/or damages is on respondent. *Perez Ranches, Inc. v. Pawel Distrib. Co.*, 48 Agric. Dec. 725-26 (1989); *Santa Clara Produce, Inc., v. Caruso Produce, Inc.*, 41 Agric. Dec. 2279, 2283 (1982); *Theron Hooker Co. v. Ben Gatz Co.*, 30 Agric. Dec. 1109, 1112 (1971).

k. DELIVERY

See this heading - **RECEIPT OF GOODS**

l. FOB – NORMAL TRANSPORTATION

In the absence of the issue of abnormality of transportation service and conditions being raised, either by the evidence on the face of the record or by a party, such transportation is assumed to be normal. *Veg-A-Mix v. Wholesale Produce Supply*, 37 Agric. Dec. 1296, 1299 (1978); *R.C. Walter & Sons v. Gatz*, 31 Agric. Dec. 655 (1972); *James Macchiaroli Fruit Co. v. Thomas Caito Sons*, 21 Agric. Dec. 525 (1962).

However, where the issue is raised as stated above, the burden of proof of normal transportation in f.o.b. transactions is on the buyer if he accepted. *Dave Walsh Co. v. Rozak's*, 39 Agric. Dec. 281, 284 (1980); UCC § 2-607(4).

On the other hand, if the buyer made an effective rejection, then the burden is on the seller to prove that transportation was abnormal. (This becomes important where the rejected goods are shown to have arrived in poor condition, and the seller wishes to show that abnormal transportation voided the warranty of suitable shipping condition so as to show the effective rejection to have been wrongful.) *Bud Antle, Inc. v. J.M. Fields, Inc.*, 38 Agric. Dec. 844, 847 (1979); *Tenneco W., Inc. v. Gilbert Distrib. Co.*, 38 Agric. Dec. 488, 493 (1979); *Bud Antle, Inc. v. Bohack*, 32 Agric. Dec. 1589, 1591-92 (1973).

Two loads of tomatoes, part of a lot federally inspected on the day of shipment and found to be free of insect infestation, were sold f.o.b., and shipped from Florida with a California destination. One load proceeded to destination without incident, and the other load was refused entrance into California by state officials at the border due to an infestation of fire ants, and was caused to be fumigated, which led to subsequent abnormal decay in the tomatoes. It was held that since the California buyer accepted the tomatoes, it had the burden of proving that transportation service and conditions were normal in order to avail itself of the suitable shipping condition warranty, and since the seller submitted evidence showing the tomatoes were not insect infested when inspected on the day of shipment, and it was entirely possible that the truck became infested after leaving the seller's packing facility, the buyer failed to meet its burden of proving that transportation services and conditions were normal, and the suitable shipping condition warranty did not apply. *Mecca Farms, Inc. v. Bianchi Pre-Pack, Inc.*, 50 Agric. Dec. 1929, 1932 (1991). *See also 4 Star Tomato v. REM Brokerage Co., 47 Agric. Dec. 787, 790 (1988).*

See **SUITABLE SHIPPING CONDITION - VOID WHEN TRANSPORTATION NOT NORMAL**, and topic **TRANSPORTATION**.

m. IDENTITY OF GOODS SHIPPED

A claimant who asserts that goods subjected to inspection by a receiver were not the goods shipped has the burden of showing what goods were shipped. *Great Am. Farms, Inc. v. William P. Hearne Produce Co.*, 59 Agric. Dec. 466, 469 (2000).

n. JURISDICTION

Complainant had burden of proving the interstate nature of a transaction so as to establish jurisdiction in the Secretary to hear the matter. *Wide World of Foods v. Trinity Valley Foods Co.*, 34 Agric. Dec. 423, 426-27 (1975).

o. NOTICE OF BREACH

See major topic **NOTICE OF BREACH** - this index.

Burden to prove giving of prompt notice rests on buyer who claims breach by seller. *Hunts Point Tomato Co. v. Md. Fresh Tomato Co.*, 47 Agric. Dec. 773, 778 (1988).

In order to establish its claim buyer must prove "that notice of the breach of promise or warranty was given the seller within a reasonable time after the buyer knew or ought to have known of such breach . . ." *Welchel Produce Co. v. Rosenberg*, 15 Agric. Dec. 452, 455 (1956).

Complainant sold and shipped a load of vine ripe tomatoes and a load of roma tomatoes to respondent, who distributed the tomatoes from each load among three or four customers on the Hunts Point Market. Complainant claimed that no notice of a breach of contract was given as to either load. It was held that since respondent accepted the loads, it had the burden of proof as to notice and had met the burden. *Oceanside Produce, Inc. v. JSG Trading Corp.*, PACA Docket No. R-00-031 decided June 19, 2000, (unpublished decision).

p. NOTICE OF REJECTION

A rejection is not effective unless the buyer seasonably notifies the seller, and the burden of proving seasonable notice rests upon the buyer. *San Tan Tillage Co. v. Kaps Foods, Inc.*, 38 Agric. Dec. 867, 871 (1979).

q. PROPONENT OF CLAIM

The proponent of the contract has the burden to prove the elements of contract, whether established by a writing, an oral agreement, or through a course of dealing. Even where enforcement of an agreement does not require that the agreement be written, a written agreement is strong evidence of both a contract and the contract terms. *Pearl Ranch Produce LLC v. Desert Springs Produce LLC*, 67 Agric. Dec. 1465, 1470 (2008).

The proponent of a claim has the burden of proof. *Sun World Int'l v. J. Nichols Produce Co.*, 46 Agric. Dec. 893-95 (1987); *W.W. Rodgers & Sons v. Cal. Produce Distrib.*, 34 Agric. Dec. 914, 919 (1975); *N.Y. Trade Ass'n v. Sidney Sandler, Inc.*, 32 Agric. Dec. 702, 705 (1973). (This is a very general rule which should be thought of as applying to the overall claim of a moving party. It will be found to be unworkable in some specific situations. For instance, in case where goods were rejected, the seller may

seek reparation and claim [among other things] that no prompt notice of rejection was given. As to the issue of notice of rejection the respondent, not complainant [who is the proponent of the claim that respondent failed to give prompt rejection notice], has the burden of proving that rejection notice was given. Again, where a complainant alleges that it has not been paid by the respondent, the complainant, as the proponent of the claim that it has not been paid does NOT have the burden of proof. Rather, the respondent would have the burden of proving payment.)

Complainant has the burden of proving by a preponderance of the evidence all of the material allegations of its complaint, including the existence of a contract, the terms thereof, a breach by respondent, and damages resulting from that breach. *Haywood Cnty. Coop. Fruit & Vegetable Ass'n, Inc. v. Orlando Tomato, Inc.*, 47 Agric. Dec. 581, 583 (1988); *Justice v. Milford Packing Co.*, 34 Agric. Dec. 533, 535 (1975).

When Respondent's claim that it was impossible for Complainant to have repacked U.S. No. 2 limes to obtain a quantity of U.S. No. 1 limes was rejected and Respondent failed to provide evidence that Complainant actually shipped U.S. No. 2 limes, and Respondent's claim that the contract was breached because the limes were not of a uniform size was also rejected as the contract did not specify that the limes were to be of one particular size but only that they be of uniform shape and that each bag contain 25 pieces of fruit, Respondent's counterclaim and set-off was denied. *Progreso Produce Ltd. LP v. Fresh Group Ltd.*, 66 Agric. Dec. 1492, 1517 (2007).

r. RECEIPT OF GOODS

Burden on shipper to show that a shipment is received by the buyer at destination. *Commodity Mktg. Co. v. Randles Produce*, 33 Agric. Dec. 862, 865 (1974); *Glendale Produce Co. v. Zeiter Food Corp.*, 33 Agric. Dec. 236, 238 (1974).

Where complainant submitted an invoice, a point of origin inspection certificate, and a shipping manifest as proof that respondent received goods, and respondent denied any contract or receipt of the goods, it was held that complainant's proof was insufficient. It was stated that in the "face of respondent's denial of the existence of a contract or receipt of the load of tomatoes, complainant had to do more . . . An affidavit from the trucker would have constituted independent evidence . . ." *Nobles v. Peraino*, 46 Agric. Dec. 683-85 (1987).

s. REJECTED GOODS

Where an effective rejection is made of a commodity, the burden is on the seller to show that such rejection was wrongful. *McKay v. Lusk Onion, Inc.*, 54 Agric. Dec. 721, 724 (1995); *Bud Antle, Inc. v. J.M. Fields, Inc.*, 38 Agric. Dec. 844, 847 (1979); *Heggeblade-Marguleas-Tenneco, Inc. v. Fisher Foods, Inc.*, 33 Agric. Dec. 1443, 1447-49 (1974).

Where a load of produce is effectively rejected, the seller has the burden of proving that it complied with contract. *Bud Antle, Inc. v. Bohack*, 32 Agric. Dec. 1589, 1592 (1973).

When effectively rejected produce was sold f.o.b., the seller had the burden to show transportation service and conditions were not normal. *Sunset Strawberry Growers v. Luna Co.*, 46 Agric. Dec. 1701, 1703 (1987); *Bud Antle, Inc. v. J.M. Fields, Inc.*, 38 Agric. Dec. 844, 847 (1979). The burden on a seller where there is an effective rejection extends to proof of compliance with f.o.b. terms of the contract including burden of proving transit abnormal. *Tenneco W., Inc. v. Gilbert Distrib. Co.*, 38 Agric. Dec.

488, 493 (1979). However, the rule placing the burden of proof on the seller where there is an effective rejection does not extend to proof of the contract terms where existence of the contract was not in dispute. Buyer was held to have burden of proof as to special terms. *World Wide Brokerage, Inc. v. Calhoun Fruit & Produce*, 49 Agric. Dec. 615, 619 (1990).

Where buyer made an effective rejection of load of strawberries, the title automatically reverted to seller, and seller had burden of proving contractual warranty inapplicable. Seller's refusal to accept rejection was meaningless, and seller had a primary duty to dispose of goods. Where seller did not dispose of goods, buyer's duty to dispose of goods was contingent upon seller having no agent or place of business in market of rejection, and burden of proof was on seller to establish that it had no such agent or place of business. However, where buyer assumed duty of resale, it was assumed that duty did rest on buyer, but buyer was held only to good faith standards in making resale. *Crowley & Crowley v. Calflo Produce, Inc.*, 55 Agric. Dec. 674, 681 (1996).

17. CAUSE OF ACTION

A cause of action accrues when a person in whose favor it arises is first entitled to institute a judicial proceeding for the enforcement of his rights. *See Louisville Cement Co. v. I.C.C.*, 246 U.S. 638, 62 L.ed. 914, 38 S.Ct. 408 (1918) where speaking of the similar jurisdiction statute of limitations applicable to reparation proceedings before the Interstate Commerce Commission the Court said:

> [w]hen the statute was enacted the time when a cause of action accrues had been settled by repeated decisions of this court to be when a suit may first be legally instituted upon it [citing cases]; and, since no clearly controlling language to the contrary is used, it must be assumed that Congress intended that this familiar expression should be given the well understood meaning which had been given to it by this court . . . (at p. 644).

"The general rule is that [a cause of action] accrues when the right to institute and maintain a suit arises, and not before." *Boler Fruit & Veg. Co. v. Kenworthy*, 19 Agric. Dec. 226, 229 (1960).

"Contrary to complainant's assertion that a cause of action does not accrue until the facts are known to a complainant, it is well settled that a cause of action accrues at the time that an event occurs and not at the time when a party discovers the facts or learns of his rights thereunder." (citing cases) *Calavo Growers of Cal. v. Int'l Food Mktg., Inc.*, 40 Agric. Dec. 972, 974 (1981).

a. ACCOUNTING

Accounting - when accounting was made. *Wuszke v. Fruit Pak, Inc.*, 42 Agric. Dec. 1207, 1211 (1983). *Tatum v. Harrisburg Daily Mkt.*, 23 Agric. Dec. 1272, 1277 (1964).

A cause of action accrues when suit may first be brought upon it. In the case of an accounting this usually occurs when the accounting is rendered. However, where the accounting is not timely rendered a complainant knows that an action may be brought for an accounting. In such cases the cause of action accrues when the complainant could first bring an action, that is, at the time the accounting was due but not rendered. In this case, the respondent actually paid complainant without rendering an accounting, and complainant was put on notice at that point that something was amiss under the consignment contract and could have brought an action for an accounting at that. *Prime Commodities, Inc. v. J.V. Campisi, Inc.*, 59 Agric. Dec. 461, 464-65 (2000).

b. AS TO FREIGHT CHARGES

Cause of action to sue for freight charges paid to the freight company on respondent's behalf. *Sawyer & Co. v. Rothstein & Sons*, 15 Agric. Dec. 693, 696 (1956). *See also Frank Kenworthy Co. v. D.L. Piazza Co.*, 16 Agric. Dec. 844, 849 (1957).

c. COUNTERCLAIM AS TO FOREIGN COMPLAINANT

Cause of action in counterclaim against foreign complainant did not accrue at time of filing of compliant. Suit could have been brought in foreign forum prior to such time. *Bar-Well Foods Ltd. v. Valley Packing Serv. Int'l*, 39 Agric. Dec. 1200, 1204 (1980).

d. COUNTERCLAIM BASED ON DIFFERENT CAUSE OF ACTION

Counterclaim dismissed for want of jurisdiction because it was based on different transactions than those involved in complaint and was filed more than nine months after causes of action relative to such counterclaim accrued. *Prime Commodities, Inc. v. J.V. Campisi, Inc.*, 59 Agric. Dec. 461, 464-65 (2000); *Se. Farms, Inc. v. Weinstein Produce Sales, Inc.*, 46 Agric. Dec. 97-99 (1987); *Seald-Sweet Growers, Inc. v. Superior Produce, Inc.*, 43 Agric. Dec. 1227, 1229 (1984); *Bar-Well Foods Ltd. v. Valley Packing Serv. Int'l*, 39 Agric. Dec. 1200, 1204 (1980); *B & K Produce Co. v. Shipper's Service Co.*, 33 Agric. Dec. 701, 706 (1974); *Sanders & Drake v. Gardner Bros.*, 31 Agric. Dec. 128, 131-32 (1972); *Hirn v. Sol Fetterman Produce Co.*, 25 Agric. Dec. 258, 263 (1966), petition for reconsideration dismissed 420; *I. Meltzer & Son v. J. Lerner & Son*, 21 Agric. Dec. 685, 690 (1962); *Cardoso Bros. v. Unanue & Son*, 20 Agric. Dec. 1188, 1192 (1961); *R. Dixon & Co. v. Spagnola*, 17 Agric. Dec. 1057, 1061-62 (1958); *Rick's Fertilizer Co. v. M. Dunn & Co.*, 5 Agric. Dec. 194, 197 (1946).

Where A was alleged to have provided consulting services from 1991 to 1996 as to how to grow oriental vegetables to B, in exchange for a portion of the commission B was to paid by the grower of the vegetables, and B was paid each year by the grower, but A did not request payment until April of 1996, and did not file a reparation counterclaim until January of 1997, it was held that the Secretary did not have jurisdiction due to lack of a timely complaint. Although A alleged that there was no agreed time for payment, it was held that A had a cause of action for payment that accrued at the times when B was paid by the grower. *E. Produce, Inc. v. Seven Seas Trading Co.*, 59 Agric. Dec. 853, 863 (2000).

e. FAILURE OF AGENT TO FILE TRUST NOTICE

Cause of action was held to have accrued "in this case" on the date when seller would have learned that the trust filing by the agent was late and that its interests were not protected. "In this case, that date would be the first day after the trust filing was due . . ." i.e., the first day after the last day on which it could have been filed. *Griffin-Holder Co. v. Smith*, 49 Agric. Dec. 607, 612 (1990).

f. RUNNING ACCOUNT

The cause of action accrues at the time of the last transaction in the case of a running account. Where complainant and respondent entered into a joint account agreement for handling of potatoes and sweet potatoes, and complainant paid respondent one-half the profits on every car showing a profit and one-half of the losses were charged against respondent in a running account, and respondent was forwarded a statement of the balance due at the end of the transaction period, it was held that the cause of action on

the losses did not accrue until the rendition of the statement. *Knaebel v. Young*, 1 Agric. Dec. 611, 614 (1942). In *Jolivette v. J.J. Distrib. Co.*, 41 Agric. Dec. 141, 144-45 (1982), the issue was said to be determined by whether the contract was divisible or entire, and Williston on Contracts (Third Edition, section 862 at 272) was quoted, "Where, however, payment of a separate sum is to be made for several articles to be used independently of one another the contract generally will be considered divisible or the transaction held to create several contracts. If payment of a lump sum is to be made on several articles, the contract is necessarily indivisible." The parties engaged in 29 shipments of potatoes, and a separate sum was paid for nineteen shipments, but lump sums were paid covering the remaining nine shipments, and the contract was said to be divisible and not a running account. *See Kenworthy v. Lewis D. Goldstein Fruit & Produce Corp.*, 15 Agric. Dec. 42, 47-48 (1956) where one party argued that, "The transactions were of such nature as not to be compatible with a running account, in that some purchases by me, as a broker, for Goldstein, some were sales by me, as a broker, for Goldstein and some involved carloads shipped to me to handle for our joint account. Each transaction was handled and invoiced separately. At no time did respondent send me a statement showing charges and credits to a running account. Rather, it invoiced me separately on each car load or truckload and I remitted separately as to each account. Neither party treated the transactions as a running account." It was held that the parties did not have a running account.

18. COLLATERAL ATTACK ON STATE COURT JUDGEMENT

Where a reparation respondent brought an action in state court against an out of state reparation complainant, and the reparation complainant was served with process under the forum state's long-arm statute, the judgment of the state court was subject to collateral attack in the reparation forum if minimal contracts were not present between the reparation complainant and the state where the civil suit was brought. *DeSomma v. All World Farms, Inc.*, 61 Agric. Dec. 821, 832 (2002).

19. COLLATERAL ESTOPPEL

The term now generally used to cover this subject area is *issue preclusion.*

A party which has received a judgment in a state court may be collaterally stopped from pursuing the same cause of action in this forum. *Parkland Hosiery Co. v. Shore,* 429 U.S. 322 (1979).

See M.S. Thigpen Produce Co. v. Park River Growers, Inc., 48 Agric. Dec. 695, 699 (1989).

Where a complainant sought reparation against an agent for an undisclosed principal, and complainant had counterclaimed based on the same transactions and legal theory in a previous action against the undisclosed principal and lost, complainant is deemed to have lost his claim against the agent under the principles of the law of agency, and mutuality of parties is not necessary for the doctrine of collateral estoppel to also bar the claim. *Wholesale Produce Supply Co. v. Sam Relan Sales*, 50 Agric. Dec. 1933, 1937-38 (1991). We made the following statement:

> The doctrine of collateral estoppel historically was applied only where there was a mutuality of parties.[1] However, in recent years the mutuality requirement has been rejected by many state and federal courts, "especially where the prior

[1] *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, (1971).

judgment was invoked defensively in a second action against a plaintiff bringing suit on an issue he litigated and lost as plaintiff in a prior action."[2]

Limited jurisdiction of Colorado forum in prior decision concerning same parties and subject matter viewed as allowing subsequent decision by Secretary as to same subject matter and parties. *Shriver v. Mkt. Pre-Pak, Inc.*, 39 Agric. Dec. 290, 304-05 (1980).

20. COMMERCIAL UNIT

A commercial unit is all produce delivered in a single shipment under a single contract. *See* 7 C.F.R. § 46.43 (ii). The underlying rationale for the regulation was the representation of the PACA Division that allows a partial acceptance of a load would have a materially adverse effect on the remainder. *See* U.C.C. § 2-601, comment 1, last sentence. *See also Salinas Lettuce Farmers Coop. v. Larry Ober Co.*, 39 Agric. Dec. 65 (1980).

In an f.o.b. sale of a truckload of lettuce from California which had, in turn, been sold in smaller lots by the buyer to several customers at different drop points at destinations in the East, the buyer alleged and failed to prove a price adjustment. Two of the buyer's customers at the first two drop points were accepted, and the customer at the third drop point had the remainder of the load inspected, and rejected to buyer on basis of such inspection. Buyer then rejected to the seller and the seller refused to accept rejection, but consigned lettuce to commission merchant to preserve value. It was held that under Regulations defining "commercial unit," the buyer's customer could reject to the buyer, but the buyer could not reject to the seller following acceptance of the other lots. *Salinas Lettuce Farmers Coop. v. Ag-West Growers, Inc.*, 50 Agric. Dec. 984, 989 (1991).

Rejection of a partial truckload was allowed where remainder of produce on truck was shipped by a different shipper. *Horwath & Co. v. Mim's Produce, Inc.*, 47 Agric. Dec. 332, 334 (1988); *Senini Ariz., Inc. v. Carnival Fruit Co.*, 38 Agric. Dec. 1602 (1979).

After analysis of the definition of "commercial unit" in the Regulations, and of prior cases holding that lots of similar produce on a load should be averaged to determine if the load as a whole made good delivery, it was held that there is no reasonable basis for continuing to require that a breach pertain to a load as a whole. It was stated that "[t]here is nothing to prohibit rejection of a shipment when the breach exists only as to a portion of the load, and there is no prohibition of finding a breach and damages as to only a portion of a load when the whole load is accepted." The portions of a load which will be considered as subject to a finding of a breach of contract were stated to be those which are distinguished in federal inspections. *Primary Exp. Int'l v. Blue Anchor, Inc.*, 56 Agric. Dec. 969, 984-85 (1997).

A load of roma tomatoes, which were all the same brand and size and shipped from the same packing house, was distributed to four of respondent's customers, but only one lot was subject to federal inspection. This inspection showed 20% soft tomatoes, and respondent asserted that the tomatoes delivered to the other three customers were in good condition. Although under recent precedent, the Commercial Unit Regulation does not generally require that damaged portions of a load be lumped with portions of the load that have no, or less, damage, there is an exception for homogeneous loads which contain no differing lots such as are required to be distinguished in federal inspections. Considering the load as a whole, the roma tomatoes were found to not exceed the amount of condition defects allowed under the suitable shipping condition

[2] *Id.*

warranty. *Oceanside Produce, Inc. v. JSG Trading Corp.*, PACA Docket No. R-00-031 decided June 19, 2000, (unpublished decision).

21. CONFLICT OF LAWS

See **ELECTION OF REMEDIES** - this index.

In *A. Sam & Sons Produce Co. v. Sol Salins, Inc.*, 50 Agric. Dec. 1044, 1055-65 (1991), a seller in New York sold and shipped a load of cabbage to a District of Columbia buyer and, following a good faith dispute, the buyer sent the seller a check for less than the original purchase price marked in full payment, and the seller cashed the check after endorsing it with words of protest and filed a complaint for the balance. Where New York's interpretation of UCC § 1-207 would treat the seller's words of protest as a reservation under such section of any right to go against the buyer for the balance of the original price, and District of Columbia law was assumed to agree with the vast majority of states which have held that UCC § 1-207 does not apply to the negotiation of a conditional payment check where all non-monetary performance has been concluded, it was found that the basic applicable law was federal law, that federal law subsumed state law, that the reparation forum must select its own choice of law rule to determine which jurisdiction's law is applicable, that the choice of law rule selected would be that of UCC § 1-105, that § 1-105 was the equivalent of the significant contacts test of the Restatement (Second) on Conflict of Laws, and that under such test it was appropriate to apply District of Columbia law.

See also Branch v. Mission Shippers, Inc., 35 Agric. Dec. 726, 731-32 (1976); *Nathan's Famous, Inc. v. Merberg*, 36 Agric. Dec. 243, 251-52 (1977).

See discussion at 10 N. Harl, Agricultural Law § 72.10[3].

22. CONSIGNMENTS

a. ADEQUACY OF ACCOUNTING

Complainant sold a truckload of table grapes to respondent on a f.o.b. basis. Following arrival of the grapes, and an inspection showing a breach of warranty by complainant, the parties agreed to respondent's customer handling the grapes on consignment. However, respondent's customer failed to render an accounting. It was held that the percentage of condition defects shown by the inspection could be applied to the average market price of good grapes to arrive at a reasonable price for the grapes. However, since the market quotations available also listed quotations for grapes in only fair condition, such quotations were used as more accurately reflecting the reasonable value of the damaged grapes. *Shipley v. Tom Lange Co.*, 52 Agric. Dec. 679, 683 (1992).

Onions arrived showing breach of delivered sale contract, but were in good enough condition that they would have made good delivery if sale had been f.o.b. As a result of breach, the parties agreed to the receiver handling the onions on a consignment basis. The accounting disclosed that the onions were sorted, and then sold in one lot which contained the same number of sacks as were shipped. Gross proceeds of the resale were less than half of the current market price, but this was stated to not be sufficient cause, in and of itself, to find the accounting improper. The accounting also lumped together as one charge the cost of storage, sorting and commission. It was stated that the sale of the onions in one lot, though not fatal to the accounting, was unusual, and was more questionable when the price appears markedly low relative to market price. The accounting was found to be improper in that it showed no wastage resulting from the sorting, and in that it failed to break out the charges for

commission, sorting and storage. The charge for storage was also stated to be improper. The shipper was awarded reasonable value based on the low price shown by market reports and less the percentage of condition defects shown by the arrival inspection. *DeBruyn Produce Co. v. Lopez*, 56 Agric. Dec. 992, 996 (1997).

Where the consignee's records failed to disclose the full disposition of the consigned goods, the USDA investigator's use of average sales price for the missing cartons was the only course available. *U.S. Gateways, Inc. v. Finest Fruit, Inc.*, 45 Agric. Dec. 2430, 2435 (1986).

b. BREACH OF CONSIGNMENT CONTRACT

Where consignee claimed damages from consignor because 500 cartons out of 1,280 cartons of consigned grapes had to be dumped, and there was no evidence that grapes were agreed to be of good quality, but consignee knew that there was a prior rejection of the load, it was held that no breach of the consignment contract had been proven. *Procacci Bros. Sales Corp. v. B.T. Produce Co.*, 60 Agric. Dec. 341, 346 (2001).

c. CONSIGNOR BOUND BY ACTS OF ITS CONSIGNEE

Absent fraud, or some other breach of its fiduciary obligations, a consignee is not liable to a consignor merely because the goods fetched less on resale than the market price or the amount the consignor expected. *Tex-Sun Produce v. Int'l Produce Distrib., Inc.*, 48 Agric. Dec. 1111, 1114-15 (1989); *Pac. Fruit & Produce Co. v. Wm. C. Denny, Inc.*, 31 Agric. Dec. 1420, 1422-23 (1972); *Monash v. Pearl*, 15 Agric. Dec. 1250, 1254 (1956); *Haven Citrus Sales v. R.H. Dietz & Co.*, 15 Agric. Dec. 1091, 1094-95 (1956).

d. CONSIGNEE'S - DUTIES OF

A consignee has the duty to prompt and properly resell the goods, render an accounting and pay the net proceeds. *Stoops & Wilson v. Wholesale Produce Exch.*, 41 Agric. Dec. 290, 292 (1982); *Collins Bros. Produce Co. v. Dixieland Produce*, 38 Agric. Dec. 1031, 1034 (1979) (sales of perishable fruit begun eight days after arrival not prompt).

A consignee has the duty of keeping the consignor informed of developments and of any inability to make a satisfactory disposition of the goods. Any failure in performing this duty constitutes a breach of duty by the agent to its principal, and the agent is liable for any loss resulting therefrom. *Alford v. Produce Prod., Inc.*, 39 Agric. Dec. 474, 478-79 (1980); *Jobb Packing Co. v. Peter Condakes Co.*, 30 Agric. Dec. 1076, 1083 (1971). *See also A.B. Cohen Co. v. Schley Bros.*, 6 Agric. Dec. 830, 836 (1947), where we quoted Mechem on Agency, 2nd Ed, Section 2532:

> It is the duty of the factor to inform his principal of every fact in relation to his agency which comes to his knowledge, and which may reasonably be deemed important for the principal to know in order to the protection or promotion of his interest; and a factor who negligently omits to give such information will be liable for a resulting loss

A consignee in a consignment transaction has the duty to secure evidence of dumping for all produce dumped in excess of 5%, and any dumped produce in excess of 5% must be brought back into the

accounting at the average price realized for the produce that was not dumped. *Carmack v. Selvidge*, 51 Agric. Dec. 892, 901 (1992).

e. DUTY TO SELL IN CONSIGNEE'S MARKET AREA

Unless the consignor permits otherwise, the consignee must sell the produce in the market area in which the consignee is located. *See* 7 C.F.R. § 46.29. *See also Wholesale Produce v. Auster Co.*, 29 Agric. Dec. 1314, 1317-18 (1970).

Where a consignment contract expressly called for the consignee to handle two carloads of potatoes on consignment, charge a 12% commission, and a $0.25 per box handling charge, and consignee also charged cartage for delivery to somewhat distant buyers, it was held that the charges were proper. The consignor did not complain about the sales to distant buyers or dispute that they were incurred, but only that the cartage charges were not a part of the agreement as to what charges would be made. It was said that when the charges are "a legitimate part of the way a particular commission merchant operates, and are reasonably necessary to enable the sales of the goods to take place," such expenses should be allowed. A case was cited in which "it was indicated (though not decided) that the consignor probably knew, or had reason to know, of the nature of the commission merchant's business, and that sales would be made to a surrounding area." However, we said that, "the principle applies beyond such circumstances." *Joe Phillips, Inc. v. McDonnell & Blankford, Inc.*, 50 Agric. Dec. 1005, 1008 (1991). (It seems to me that the expectation of the parties should control in these circumstances. It should be presumed that a consignee will sell only within the reasonable confines of its municipal area, unless it is shown that it is generally known in the industry that its normal practice is otherwise, or that the consignor had specific knowledge that its custom was to sell beyond those areas.)

In a case that dealt with a broker who was given possession of produce to sell on complainant's behalf, it was stated that the broker was in much the same position as a commission merchant and could not use a third party to effectuate the sales. The rationale for this requirement of the Regulations (*See* 7 C.F.R. § 46.29(a)) was stated as follows:

> The reason for these regulations is based upon the legal relationship in view, and should be obvious. The broker or commission merchant is an agent selected to perform a specific task. Such agent does not buy produce, but is employed by the owner to sell the owner's produce on the owner's behalf. Until the agent makes the sale the owner retains title to the goods, and following the sale the owner is entitled to the proceeds of the sale less a commission and agreed upon, or reasonable, expenses. The owner selects the person or firm that he or she deems best capable of performing the task, often taking into consideration the clientele to which the broker or commission merchant has access. When an agent is given authority to sell, there is no implied authority for such agent to employ someone else to do the selling. Selling agents are not fungible, but are possessed of differing skills, differing client lists, and access to different markets.

Triton Imports, Inc. v. S.C. Distrib. Co., 52 Agric. Dec. 1678, 1684 (1993).

f. LIABILITY OF AGENT FOR ACTS OF SUB-AGENT

Where consignee employed subagents without authority from the consignor to sell consigned produce, the subagents were not liable to the consignor, and the consignee was liable for the negligence of the subagents. *Lee Wong Farms, Inc. v. Joseph Fierman & Son, Inc.*, 27 Agric. Dec. 274, 279 (1968).

g. NEGLIGENCE OF AGENT

Where Complainant sought payment based on its "house average" sales price, and Respondent countered that its liability should be limited to the net sales proceeds collected from its customer, it was noted that Complainant chose Respondent to sell the lemons on its behalf and that, in so doing, Complainant assumed the risk of poor performance on Respondent's part. Accordingly, absent a showing of fraud or other hard evidence of relevant violations of the Regulations, held that Respondent's liability to Complainant should be based on the sales proceeds it collected from its customer, less commission, in accordance with the parties' agreement. This is true even in the case where the sales prices reported by Respondent fell substantially below the relevant prices reported by U.S.D.A. Market News because, again, Complainant bore the risk of Respondent's poor performance. However, in the case where a damage claim was asserted by Respondent's customer, Respondent had a positive duty, as Complainant's agent, to secure evidence that any resulting adjustments granted to the customer were warranted. In the absence of such evidence, Respondent was held liable to Complainant for the original price negotiated with its customer, less commission. Similarly, where Respondent failed to negotiate a sales price with its customer at the time of contracting and later agreed to a substantially reduced price, and there was no evidence that Complainant authorized Respondent to sell the lemons in this manner, it was found that Respondent was liable to Complainant for the fair market value of the lemons as determined based on relevant USDA Market News reports. *Wildwood Produce Sales, Inc. v. Citrusource, Inc.*, 67 Agric. Dec. 704, 803 (2008).

- Where agent resold on price after sale basis and could not furnish reason for agreeing to price substantially below market, agent was liable for difference.
- Where goods were sold at auction (where agency contract explicitly permitted auction sales) at prices substantially below market, agent held not liable.
- Where agent sold on a delivered basis substantially below prices shown by market reports of a distant city, agent was held not liable.

We stated:

> Market circumstances vary widely from time to time and place to place. In addition, perishable commodities can be merchantable and still vary over a wide range as to quality and as to desirability on a given market dependent on many varying characteristics of such produce. [The consignee] was a company chosen by complainant to act as complainant's agent . . . We are very reluctant to subject the performance of complainant's agent to the scrutiny of our hindsight. *La Vern Coop. Citrus Ass'n v. Mendelson-Zeller Co.*, 46 Agric. Dec. 1673, 1678 (1987).

Respondent realized $3.00 per carton for the first load of potatoes, but put two loads, received two days later, in storage. Over a month later, they were dumped. Complainant failed to support its contention that dumped potatoes should have been sold for $3.00 by any reference to market reports. Without using hindsight, there is nothing to show that storing potatoes was not the best procedure to follow. *Pac. Fruit & Produce Co. v. Wm. C. Denny, Inc.*, 31 Agric. Dec. 1420, 1422-23 (1972).

Where produce was shown by federal inspection following arrival and acceptance to be substantially damaged, and parties agreed to change contract from one of sale to consignment, the consignor failed to prove a failure by consignee to perform its fiduciary duties even though the first sale of the produce was made nine days after the agreement was made, and most of the produce was finally dumped. The consignee proved by affidavits from the firms to which the produce was offered that the goods were offered to the trade on the first two days after the consignment agreement and also proved that the consignor participated unsuccessfully in trying to sell the produce. *Premium Valley Produce, Inc. v. Sam Wang Food Corp*., 57 Agric. Dec. 1684, 1688-89 (1998).

Commission allowed even though consignee violated regulations and failed to account: Where market prices were between $12.00 and $12.50 for large peppers and between $9.00 and $9.50 for medium peppers, and consignee returned $7.89 for large peppers and $6.00 for medium peppers; and it was "not clear from the record that respondent ever rendered a timely accounting" and also respondent sold more than half the peppers outside its market area in violation of the regulations (7 C.F.R. §46 29(a)), complainant was awarded market price, and respondent was allowed a commission based on 13% of market price. *Relan v. Ga. Vegetable Co.*, 41 Agric. Dec. 559, 561 (1982).

Wide latitude allowed consignee in *Cooney & Korshak, Inc. v. M. Trombetta & Sons, Inc.*, 19 Agric. Dec. 890, 892-93 (1960); *Monash v. Pearl*, 15 Agric. Dec. 1250, 1254 (1956); *Haven Citrus Sales v. R.H. Dietz & Co.*, 15 Agric. Dec. 1091, 1094-95 (1956); *Anonymous*, 11 Agric. Dec. 388, 391-92 (1952).

Consignee found liable in *Artco v. Mandell*, 24 Agric. Dec. 1155, 1158 (1965), a load of no grade lettuce was consigned to respondent with the understanding that respondent was not to sell unless the proceeds would exceed expenses. A Railroad Perishable inspection on arrival showed the lettuce to have an average of *10%* damage by tipburn and no decay. This was confirmed by another private inspection service. Respondent made no sales of the lettuce. Market News report at the time reported sales of "poorer" quality lettuce at $2.25 to $3.00 per carton. It was held that respondent failed to act promptly in attempting to dispose of the lettuce. The decision stated that the lettuce was properly characterized as being in fair condition and awarded complainant the lowest of the prices quoted for fair condition lettuce, or $2.33 per carton.

In *Wolverine Fruit Co. v. Boehmer*, 27 Agric. Dec. 1153, 1159 (1968), a load of two varieties of apples was federally inspected on arrival and one of the varieties was found to have bruising and quality defects totaling *14%*, whereas only *10%* is allowed under the grade standards. The parties agreed to the entire load being handled on consignment. Respondent sold the apples at $0.50 per carton. Testimony at the hearing indicated the market value of the apples, considering the bruising, would have been over twice what respondent realized, and it was held that Respondent failed to make a prompt and proper resale of the apples.

The consignee was found to have not promptly and properly resold the produce where the consignee's summary accounting did not list individual sales, and the consignor was held to be entitled to the reasonable value of produce as shown by applicable market reports, less expenses. *Idaho Bonded Produce & Supply Co. v. Farm Mkt. Serv., Inc.*, 42 Agric. Dec. 1679, 1682 (1983).

Consignee was found negligent where peppers were repacked, a portion sold locally for positive returns and the balance shipped to Canada, where much lower returns were derived. *E. Vega & Sons Produce v. Alex Bordges Co.*, 39 Agric. Dec. 750, 752-53 (1980).

h. PERMISSION TO HANDLE

"Think best thing to do is get car handled for our acct. rite [sic] where it is…." "Here is a definite and unequivocal authorization by complainant to rescind the contract and to have respondent resell the defective merchandise for complainant's account." *United Packing Co. v. D.L. Pizza Co.*, 18 Agric. Dec. 161, 167-168 (1959).

However:

Use of words such as "work out the load" or "sell the product and we will settle at a later date" by the seller are not sufficiently specific to constitute an authorization that the buyer handle the produce on consignment. *Granada Mktg., Inc. v. Jos. Notarianni & Co.*, 47 Agric. Dec. 329, 331 (1988); *Royal Packing Co. v. Class*, 42 Agric. Dec. 2077, 2080 (1983); *B & L Produce of Ariz. v. Mim's Produce, Inc.*, 37 Agric. Dec. 201, 204 (1978).

"Do the best you can" does <u>not</u> constitute permission to handle on consignment. *Relan Produce Farms v. Rushton & Co.*, 38 Agric. Dec. 1636, 1639 (1979); *B & L Produce, Inc. v. Harry Becker Produce Co.*, 36 Agric. Dec. 913, 919 (1977); *Barkley Co. of Ariz. v. Ifsco, Inc.*, 31 Agric. Dec. 279, 282 (1972).

Nor does:

"the buyer should work it out" - *Frank Gaglione & Son v. Theron Hooker Co.*, 30 Agric. Dec. 528, 531-32 (1971).

or "handle best possible" or "handle to best advantage" - *Ralph Samsel Co. v. L. Gillarde Sons Co*., 19 Agric. Dec. 374, 376-78 (1960).

or "handle" or "open" - *Carmack v. Selvidge*, 51 Agric. Dec. 892, 896 (1992).

or respondent "should keep the shipment, [and] do with it what respondent could . . ." *Chiquita Brands, Inc. v. Joseph Williams, Jr. Co*., 45 Agric. Dec. 374, 376-77 (1986).

The phrase "Customer will keep+Work Out" did not signify an agreement that the load could be handled on a consignment basis. *Lionheart Group, Inc. v. Sy Katz Produce, Inc.*, 59 Agric. Dec. 449, 458-59 (2000).

Lionheart Group, Inc. v. Sy Katz Produce, Inc., 59 Agric. Dec. 449, 458-59 (2000) ("Customer will keep + Work Out"); *Carmack v. Selvidge*, 51 Agric. Dec. 892, 896 (1992) ("handle" or "open"); *Chiquita Brands, Inc. v. Joseph Williams, Jr. Co.*, 45 Agric. Dec. 374, 376-77 (1986) (respondent "should keep the shipment, [and] do with it what respondent could . . ."); *Relan Produce Farms v. Rushton & Co*., 38 Agric. Dec. 1636, 1639 (1979) ("do the best you can"); *B & L Produce of Ariz. v. Mim's Produce, Inc.*, 37 Agric. Dec. 201, 204 (1978) ("work out the load"); *Barkley Co. of Ariz. v. Ifsco*, Inc., 31 Agric. Dec. 279, 282 (1972) ("Do the best you can"); *Frank Gaglione & Son v. Theron Hooker Co.*, 30 Agric. Dec. 528, 531-32 (1971) ("the buyer should work it out"); *Ralph Samsel Co. v. L. Gillarde Sons Co*., 19 Agric. Dec. 374, 376-78 (1960) ("handle best possible" or "handle to best advantage").

i. REJECTION

No right to reject consigned merchandise absent a breach of the agency contract. *Cal-Mex Distrib., Inc. v. Tom Lange Co.*, 46 Agric. Dec. 1113, 1120 (1987).

j. SALE ON OPEN BASIS DISTINGUISHED FROM

Bonanza Farms, Inc. v. Tom Lange Co., 51 Agric. Dec. 839, 845-47 (1992).
Cal-Mex Distrib., Inc. v. Tom Lange Co., 46 Agric. Dec. 1113, 1119-20 (1987).

23. CONSTITUTIONALITY OF ACT

The PACA preserves the constitutional right of trial by jury by providing for de novo trial in District Court on basis of pleadings filed before Secretary of Agriculture. *Potato Sales, Inc. v. Perfection Produce*, 38 Agric. Dec. 273, 280 (1979).

"Respondent also asserts as a jurisdictional defense that the Department's entire proceeding is unconstitutional, in that it purports to assume common law jurisdiction and render judgment without affording respondent its constitutional right to a jury trial. We have held on other occasions that the question of a right to trial by jury is not for our consideration since it is not the function of an administrative body to pass upon the constitutionality of a statute which the law-making body has committed to it for administration." *Jebavy-Sorenson Orchard Co. v. Lynn Foods Corp.*, 32 Agric. Dec. 529, 531 (1973). To the same effect is *Simon Siegal Co. v. Heaton*, 5 Agric. Dec. 915, 918-19 (1946), which cites *Panitz et al. v. District of Columbia*, 112 F.2d 39 (D.C. Cir. 1940), as well as several early Departmental cases.

24. CONTRACTS

See **BREACH OF CONTRACT** - this index.

a. ABSENCE OF CONTRACT OR BREACH OF CONTRACT

When the parties have failed to enter a contract, the receiver is liable for the reasonable value of the produce. *S. Pavich & Sons v. Mut. Produce*, 31 Agric. Dec. 1296, 1299 (1972).

Where an intermediary, Mr. Chaseley, was an employee of both parties to a series of produce transactions, something happened that caused him to begin embezzling funds and misdirecting checks that were entrusted to him. This was not discovered until the end of the series of transactions. As part of this behavior pattern, he failed to disclose to either of the parties to the proceeding that he was employed by the other. It was stated:

> Such employment, of course, hopelessly compromised his loyalty to both employers as far as transactions between the two firms. Since the negotiations in regard to this transaction were all carried on through Mr. Chaseley, such negotiations cannot be viewed to have been in good faith, and are tainted by fraud. Due to the ignorance of both Complainant and Respondent as to Mr. Chaseley's unethical conduct, they cannot be deemed to be tainted by Mr. Chaseley's fraud, but, nevertheless, the transactions themselves are so tainted that it would be improper to find that a contract resulted from negotiations so compromised, unless the parties themselves, independent of Mr. Chaseley, clearly acquiesced in the contract or a modification thereof. Such is not the case with this transaction, and we concluded that Respondent is liable to Complainant only for

the reasonable value of the grapes. *A.P.S. Mktg. v. R.S. Hanline & Co.*, 59 Agric. Dec. 407, 412-13 (2000).

Where a purchase and sale contract called for numerous bulk loads to contain a specific number of pumpkins and for payment to be made on the basis of a per pound price for the total weight of the loads but limited to the total poundage assuming a 15 pound per pumpkin average, the delivery of loads containing pumpkins which average more than 15 pounds was not a breach of contract, and no notice of breach was required. The inventory count performed by the receiving retail stores was accepted as adequate evidence of the number of pumpkins delivered where such count was adequately documented, and no federal inspection was necessary to prove the count received. *PSM Produce, Inc. v. Boyer Produce, Inc.*, 60 Agric. Dec. 809, 826 (2001).

b. AGENT

When determining the contractual relationship between principals and their agents, the principles of apparent agency do not apply. *Pearl Ranch Produce, LLC v. Desert Springs Produce LLC,* 67 Agric. Dec. 1465, 1474 (2008).

c. ASSIGNMENTS

Respondent could have effectively assigned his right to receive the shipment of potatoes to an assignee. Respondent could also assign the duty to pay for the potatoes to the assignee, and if tender of payment were made, complainant was bound to accept. If however, the assignee failed to make payment as required by the contract, complainant remained liable for the contract price of the potatoes." *Washburn Potato Co. v. Elsesser*, 36 Agric. Dec. 927, 929-30 (1977).

d. CONDITION PRECEDENT

Words "Subject to being approved by USDA, we have berries available at 32 cents" interpreted as constituting a condition precedent to formation of a contract. *Brady Farms v. New Era Mktg*., 37 Agric. Dec. 1962, 1966 (1978).

e. CONTRARY TO PUBLIC POLICY

Contract terms requiring indemnification for PACA fines are void as against public policy. Misbranding violations under the PACA are satisfied under a graduated regulatory scheme, starting with notice, then fines are levied that increase with the number of violations, and finally formal disciplinary action is taken if the violations are repeated and/or flagrant. Innocence of mind is not a factor in finding a violation because a showing of intent is not required. The violation and attendant fines attach to the violator and cannot be passed back to the prior seller. Contract terms cannot be used to defeat the purpose of the PACA. *Mountain Valley, Inc. v. C.H. Robinson Co.*, 53 Agric. Dec. 1879, 1883-89 (1994).

Where contract for chipping potatoes agreed that the buyer's duty to accept was expressly conditioned on its satisfaction that the potatoes were of good chipping quality, the buyer cannot use arbitrary or unreasonable standards in determining whether the potatoes met contract terms, since this would be unconscionable and against public policy. *W.T. Holland & Son. v. C.K. Sensenig Potatoes*, 52 Agric. Dec. 1705, 1709 (1993).

f. DIVISIBLE OR ENTIRE

Substantial breach of entire contract by non-conformity of two installments. Discussion. *See Subercaseaux v. Murlas Bros. Co.*, 24 Agric. Dec. 509, 517 (1965).

g. EXCUSED PERFORMANCE - DURATION OF EXCUSE

Contract calling for shipment of two loads of seed potatoes provided, "TIME OF MAKING SHIPMENT - Feb. shipment 1978, buyer's option, trucks available, weather permitting." Trucks were not available excusing one shipment in February. Thereafter, seller sought damages for buyer's failure to take delivery of load in March. Held: no contract existed calling for buyer to accept shipment in March. *L.S. Taube & Co. v. Palmer*, 38 Agric. Dec. 731, 733-34 (1979).

h. FAILURE TO ENFORCE TERMS

We found that the payment and interest charge provisions in Complainant's invoices were incorporated into the parties' sales contracts. In addition, we found that Respondent's late payments over many years and Complainant's failure to charge interest during those years did not modify the parties' contracts, but that Complainant had waived its right to recover interest charges for late payments that it accepted prior to giving Respondent reasonable notice that the service charge provision in the parties' contracts would be enforced. *Johnston v. Ag Grower Sales LLC*, 69 Agric. Dec. 1569, 1587 (2010).

i. FORUM SELECTION CLAUSES

Good discussion. *See Hernandez v. R. & L. Produce Co.*, 37 Agric. Dec. 1975, 1981 (1978).

In *Orix Credit Alliance, Inc. v. Robert A. Brown, d/b/a Process One, Process One of Little Rock, a/k/a Process One of Memphis and Nancy A. Brown*, 1994 WL 392240 (U.S. Dist. Ct. for S.D.N.Y. 1994), the court gave the following summary statement of the law:

> Federal law is well settled that parties may contract to submit to jurisdiction in a given forum, and that forum selection clauses will be enforced. *See Jones v. Weibrecht*, 901 F.2d 17, 18 (2d Cir. 1990) (recognizing that a contractual forum selection clause should be enforced "unless it is clearly shown that enforcement would be unreasonable and unjust or that the clause was obtained through fraud or overreaching."); *Bense v. Interstate Battery Sys. of Am., Inc.*, 683 F.2d 718, 721 (2d Cir. 1982) (any "'general hostility' towards forum-selection clauses is today simply a vestigial remainder of an outmoded doctrine"); *Ultracashmere House Ltd. v. Madison's of Columbus, Inc.*, 534 F.Supp. 542, 545 (S.D.N.Y. 1982) ("forum selection clause alone . . . constitute[s] consent to personal jurisdiction"). New York courts also recognize that forum selection clauses are prima facie valid, and that, absent some compelling reason, should be honored by the parties and enforced by the courts. *See*, e.g., *Leasing Serv. Corp. v. Scott Crane Co.*, 83 Civ. 9379, 1984 WL 1004, at *2 (S.D.N.Y. Oct. 11, 1984) (noting that New York law permits parties to a contract to agree in advance to jurisdiction in a given court); *British West Indies Guar. Trust Co., Ltd. v. Banque Internationale A. Luxembourg*, 172 A.D. 2d. 234, 567 N.Y.S. 2d 731, 732 (1st Dep't 1991) (holding that a forum selection clause can only be set aside where enforcement would be

"so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court.").

See M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 92 S. Ct. 1907, 32 L.Ed.2d 513 (1972), which is the leading case.

j. FRAUD - EFFECT ON CONTRACT

On appeal from the Secretary's decision and order, where produce was sold "f.o.b. shipping point acceptance final" (*see* 7 C.F.R. § 46.43(m) which states that under this term, the buyer accepts at shipping point, has no right of rejection, and only has recourse for a material breach provided shipment is not rejected) and, before discovered fraudulent misrepresentation of produce buyer rejected, it was stated that under either the Common Law or the Uniform Sales Act, a purchaser who had been induced to enter into a contract by fraud has the right to avoid the contract. The buyer was stated to have done so by the rejection. If the buyer has a right of rejection because of fraud, it does not lose that right because of rejection before it discovered fraud. "This is for the reason that fraud in the inception of a contract, although it does not render the contract void, renders it voidable at the election of the person defrauded, with the result that if the defrauded party to a contract breaks it before he discovers the fraud, he may nevertheless assert the fraud as a defense as soon as he discovers it, and demands rescission on that account when sued for breach of contract." *Joseph Martinelli & Co. v. Simon Siegel Co.*, 176 F.2d. 98, 13 A.L.R.2d 1243 (1st Cir. 1949).

k. IMPOSSIBILITY OF PERFORMANCE

See UCC §§ 2-613, 2-615, and 2-616.

Uniform Commercial Code terminology is "Excuse by Failure of Presupposed conditions." *See* UCC § 2-615.

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. *DiMare Fresh, Inc. v. Sun Pac. Mktg. Coop., Inc.*, PACA Docket R-07-054, decided August 22, 2008 (unpublished decision), *aff*'d, No. 12-17378 (Ninth Cir., E. Dist. of Cali. February 24, 2015).

In *G. & H. Sales Corp. v. C.J. Vitner Co.*, 50 Agric. Dec. 1892, 1897-99 (1991), the parties entered into a contract calling for the future shipment of potatoes f.o.b. Florida, and potato production in the state of Florida was affected in varying degrees by a freeze. It was found that the potatoes had not been shown to have been "identified goods" within the meaning of UCC § 2-613 at the time of the freeze, and that the potatoes were not contracted to be grown on designated land so as to come within the category of "excuse by failure of presupposed conditions" as contemplated by UCC § 2-615. In addition, it was held that effect could not be given to an "act of God" clause in the contract because, even if the clause were deemed to apply to the entire state, the seller did not show any rational way to implement its provisions. An alleged commitment by the buyer, following part performance under the contract to pay the entire contract price for potatoes received, was found not to have the meaning ascribed by the seller. Interpretation of a document requires that component parts of the document be read within the context of the whole document.

In *Bliss Produce Co. v. A.E. Albert & Sons*, 35 Agric. Dec. 742, 746 (1976), we stated, "[The text of UCC section 2-615] must be jointly read with comment No. 9 which states that 'a farmer who has contracted to sell crops to be grown on *designated* land (emphasis added)' is excused under this section when there is a failure of the specific crop. Most cases adhere to this principle. *Harrell Bros. Canning Co. v. Olen Price Farm Supply*, 31 A.D. 331, 334 (1972); *Thomas J. Holt Co. v. Shipley Sales Serv.*, 25 Agric. Dec. 436, 438 (1966). The impossibility - act of God exemption should have its widest application to farmers, the berth narrowing as one moves in middlemen degrees towards the ultimate consumer. Hence, if designation of the land upon which crops will be grown is contractually mandatory before a farmer will fall within the UCC section 2-615 exemption, it is even more necessary that land designation apply to dealers before exemption be legally allowed."

It has been established that where a party to a contract is expressly excused from full performance if its production is reduced because of adverse weather conditions and such party fairly allocates production among its customers, such party is not in breach of contract upon the occurrence of the contingency stated in the contract. *Premium Elkton Potatoes, Inc. v. Process Supply Co.*, 40 Agric. Dec. 436, 440 (1981); *S.P. Lipoma Co. v. K & R, Inc.*, 27 Agric. Dec. 643, 649 (1968).

Where complainant was obligated under a requirements contract to ship five loads of bin lettuce per week to respondent for the period of one year, a claim that no supplies were available was insufficient to furnish an excuse not to ship under UCC § 2-615. Respondent's late payments also did not furnish an excuse not to ship under the contract, but were grounds for insecurity and a demand for assurance of respondent's ability to perform under the contract. Furthermore, under UCC § 2-609(3), complainant's right to demand assurance was not prejudiced by its delay in making the demand, and complainant was justified in withholding performance under the supply contract while it awaited a response to its demand for assurance and following respondent's failure to respond to its demand. Respondent was found to be entitled to make purchases to cover complainant's failure to ship under the contract for the period prior to the demand for assurance and was entitled to credit for cover as to purchases made under a substitute supply contract insofar as that contract was concluded prior to the demand for assurance, but not as to purchases made under a modification of that contract made after the demand for assurance. *R & R Produce, Inc. v. Fresh Unlimited, Inc*., 56 Agric. Dec. 997, 1108-09 (1997).

In *Harrell Bros. Canning Co. v. Olen Price Farm Supply*, 31 Agric. Dec. 331, 334 (1972), we found that where there was no "act of God" clause in a contract calling for the growing of one million pounds of squash, but testimony of witnesses at the hearing disclosed that the buyer knew that the seller had contracts for the growing of the squash with farmers in two specific Georgia counties, and the contract discussed planting acreage sufficient to yield one million pounds of squash, it was held that the contract dealt with the purchase of squash from a specific acreage.

See also Al Campisano Fruit Co. v. Shelton, 50 Agric. Dec. 1875, 1881-82 (1991).

In *Myco v. Boise Farmers Mkt., Inc.*, 48 Agric. Dec. 679, 681 (1989), the questions of impossibility through governmental intervention and of material breach by pesticide contamination were found not ripe for decision. The buyer of watermelons had accepted the melons and resold over a period of 19 days when further sale was embargoed by a governmental agency due to possible pesticide contamination. The melons were dumped three days later. It was found that the keeping period of watermelons was only two to three weeks, and that the buyer had not shown that the melons were in saleable condition at the time of the embargo. The buyer was liable for the purchase price.

Tomatoes to be provided under a supply contract were not goods "identified to the contract" because the contract did not refer to specified acreage. Therefore, when the distributor failed to deliver tomatoes as required by the contract, its default was not excused under U.C.C. 2-613 or 2-615, and the buyer was entitled to cover damages. *DiMare Fresh, Inc. v. Castro Produce LLC*, 72 Agric. Dec. 460, 473-74 (2013).

l. INSTALLMENT

See UCC, under subheading §§ 2-612, 2-609 - this index.

Parties entered into a written installment contract whereby respondent was to supply complainant with 22 loads of onions that were to have no more than 20% double hearts above one inch in diameter. Respondent cancelled the contract after complainant made late payments as to several loads. It was found that although the late payments were a violation of the contract, the Regulations and the Act, they did not furnish grounds for cancellation of the contract. Respondent, under § 2-609 of the UCC could have taken the late payments as reasonable grounds for insecurity, asked for adequate assurance of due performance, and suspended performance until receipt of such assurance, but cancellation prior to a failure to receive requested assurance was not an option. *Rich-SeaPak Corp. v. Pro-Ag, Inc.*, 56 Agric. Dec. 1958, 1965-67 (1997).

In an installment contract for potatoes from two distinct growing areas, where one portion of the contract failed to meet contract terms, this failure in no way rendered the total contract null and void. Complainant sold the remainder of the product and recovered damages from respondent's failure to give shipping instructions for the balance of the contract. *Gilbar Potato Sales v. Commodity Mktg. Co.*, 43 Agric. Dec. 1250, 1253 (1984). *See also* UCC § 2-612.

m. INTENT OF THE PARTIES

In all contractual interpretation, the intent of the parties where it can be reasonably discerned, should be paramount except in those rare instances where public policy is thereby contravened. *Primary Exp. Int'l v. Blue Anchor, Inc.*, 56 Agric. Dec. 969, 980 at n. 18 (1997).

"Protection of the justified expectations of the parties is the basic policy underlying the field of contracts." Quoting the comments to § 188 of the Restatement (Second) of Conflicts of Laws, in *A. Sam & Sons Produce Co. v. Sol Salins, Inc.*, 50 Agric. Dec. 1044, 1064 n. 39 (1991).

Where the parties to a contract covering tomatoes imported from Mexico agreed, following their arrival at destination, to the tomatoes being handled pursuant to the May 2, 1997, Clarification of the October 28, 1996 Suspension Agreement on Fresh Tomatoes from Mexico (termed the "Commerce Dept. Rules"), it was held that, although such rules used portions of the accustomed terminology of the Uniform Commercial Code, this Department's Regulations and decisions under the PACA in a way that is foreign to the usual meaning accorded those terms, the Secretary would seek to give effect to the intent of the parties as evidenced by their agreement to abide by such rules. Accordingly, the "Commerce Dept. Rules" were interpreted in a manner deemed to be consistent with the intended meaning of such rules rather than in accord with the meaning usually accorded to the terms used therein. *Ta-De Distrib. Co. v. R.S. Hanline & Co.*, 58 Agric. Dec. 658, 670-71 (1999).

n. JOINT VENTURE

Where parties to an agreement agreed to share profits, and committed time, effort, and money, to the growing of Napa cabbage, the agreement was held to be a joint venture.
L & M Farms, Inc. v. Y2S Trading, Inc., 69 Agric. Dec. 942, 955 (2010).

Where one party to an agreement only marketed the cabbage from a joint venture, and took on no risk or control over the venture, that party was held to not be a part of a joint venture. *L & M Farms, Inc. v. Y2S Trading, Inc*., 69 Agric. Dec. 942, 955 (2010).

Where the counterclaim submitted by Respondent concerned produce that was part of a joint venture, and one of the joint venture partners had not and could not be joined in the proceeding, determined that the counterclaim must be dismissed, as any amount due
Complainant or Respondent under the venture was dependent, at least in part, upon the contribution of and the proceeds due the third party, so an adequate judgment could not be rendered without the presence of the third party, (a necessary party to the action), to provide evidence and testimony in this regard. *Westberry Farms Ltd. v. Sungate Mktg. LLC*, 71 Agric. Dec. w, kk (USDA 2012), *published in* 72 Agric. Dec. w, kk (USDA 2013).

o. LACK OF AGREEMENT AS TO A MATERIAL TERM

Respondent-buyer offset misbranding fine against another payment to complainant-seller, claiming that printed terms on back of purchase order require indemnification of misbranding fines levied under the PACA. The contract terms were not enforceable because the form was sent to the seller after the shipment had arrived and been inspected. The prior course of dealings between the parties were not enough to show acceptance of the terms in this case. Each transaction must be viewed separately. *Mountain Valley, Inc. v. C.H. Robinson Co.*, 53 Agric. Dec. 1879, 1883-89 (1994).

p. LIMITATION OF REMEDIES

Where the written contract signed by the parties provided Complainant with a specific remedy for Respondent's failure to purchase the subject bulk bin lettuce, but it was not stated in the contract that this was to be Complainant's exclusive remedy (see U.C.C.
§ 2-719), Complainant was entitled to recover damages for Respondent's breach as provided in U.C.C. §§ 2-703 and 2-706. *Maverick Holdings Group, Inc. v. Community Fruitland, Inc.*, 66 Agric. Dec. 1452, 1463-65 (2007).

q. MEETING OF THE MINDS

"It is essential that there be a mutual manifestation of assent, sometimes referred to as a meeting of the minds, as to the material terms of the contract." *Griffin-Holder Co. v. Joseph Mercurio Produce Corp.*, 40 Agric. Dec. 1002, 1005 (1981); *Blasé v. Keegan, Inc.*, 36 Agric. Dec. 709, 713 (1977); *Indep. Grape Distrib. v. Barbera Packing Corp*., 25 Agric. Dec. 1144, 1146 (1966).

M. Offutt Co. v. Caruso Produce, Inc., 49 Agric. Dec. 596, 602 (1990).

When the President of Complainant grower signed and faxed back Respondent grower's agent's written marketing agreement authorizing Respondent to sell Complainant's peppers, this was deemed to reflect a meeting of the minds regarding the contract terms and the written marketing agreement was found to constitute the contract between the parties, rather than the conditions orally conveyed by Complainant's

President to Respondent's employee several days earlier. *Mayoli, Inc. v. Weis-Buy Services, Inc.*, 65 Agric. Dec. 648, 661-62 (2006).

r. MISREPRESENTATION AND MISTAKE

See major topic – **MISREPRESENTATION AND MISTAKE**.

s. MODIFICATION

See **BURDEN OF PROOF - CONTRACT MODIFICATION**. See also **CONSIGNMENTS - PERMISSION TO HANDLE**.

Misrepresentation causes modification to be a nullity. *McCabe v. Higgins Potato Co.,* 17 Agric. Dec. 1022, 1025 (1958). *See* **MISREPRESENTATION AND MISTAKE** for updating of law in this area.

A modification needs no consideration to be binding. *See* UCC § 2-209(1).

Where Complainant sought payment of the original contract price for mangoes sold to Respondent, but the record included evidence that Complainant agreed in writing to accept the lesser amounts of $30,000.00 (if payment was received by September 28, 2007), or $35,232.00 (if payment was received after September 28, 2007), it was found that there was a binding agreement to modify the original contract price of the mangoes to $35,232.00, with no time limitation on when payment was due. Respondent was ordered to pay Complainant $35,232.00. *New Mundo Exp. Fruits, Inc. v. San Diego Point Produce, Inc.*, 67 Agric. Dec. 888, 893 (2008).

Agreement to adjustment in price, though not in writing, was ratified by acceptance of reduced payment and lack of timely objection. *Heggeblade-Marguleas-Tenneco, Inc. v. Mim's Produce*, 33 Agric. Dec. 1333, 1336 (1974).

Modification of contract voided because of misrepresentation and mistake. *Dimare Homestead, Inc. v. Koam Produce, Inc.*, 59 Agric. Dec. 866, 876 (2000). See **MISREPRESENTATION AND MISTAKE** - this index.

Where complainant granted protection on the contract, it was held that since complainant was conscious when it granted protection that temperatures were important but chose to remain ignorant of such temperatures, the protection agreement could not be set aside. *Cal-Shred, Inc. v. Payton*, 46 Agric. Dec. 1125, 1127 (1987).

Where the parties renegotiated the price provision of a contract after arrival of produce, buyer cannot claim reimbursement from seller after it allows its customer a further price adjustment. *Finucane, Gilson & Foster, Inc. v. Deardorff-Jackson Co.*, 45 Agric. Dec. 1361-63 (1986).

t. NOVATION

For there to be a novation, it must be clear that it is the intent of both parties to substitute a new agreement for the old one. *E. Potato Dealers of Me., Inc. v. Commodity Mktg. Co.*, 36 Agric. Dec. 2017, 2021 (1977); *Morris v. Stutzman*, 1 Agric. Dec. 98, 100-01 (1942).

Where buyer accepted grapes which were non-conforming and insisted on a new price, and seller stated that it would rather take back the grapes, and did, it was held that there was no modification or rescission of the contract. *Shipley v. Peacock Sales Co.*, 46 Agric. Dec. 702, 705 (1987). *See also Cal-Mex Distrib., Inc. v. Jos. Notarianni & Co.*, 45 Agric. Dec. 2477, 2479-80 (1986), where complainant's employee agreed with the broker to have a shipment of damaged melons transshipped from the buyer to a third party so the latter could handle the load for the shipper's account.

Where respondent buyer was concluded to have accepted a load of tomatoes because it had failed to prove that it gave notice of rejection within the time required in the Regulations, but did convey its complaint about the load to complainant's seller, complainant's repossession of the load with respondent's permission did not constitute a novation of, or rescission of, the contract, and complainant was deemed to have acted as respondent's agent in reselling the tomatoes. *Thomas Produce Co. v. Lange Trading Co.*, 62 Agric. Dec. 331, 339 (2003).

For a thorough discussion of the elements of novation in an instance where the buyer assigned the right to receive and pay for a shipment of potatoes to a third party, *see Washburn Potato Co. v. Elsesser*, 36 Agric. Dec. 927, 929-30 (1977).

u. PRIVITY

Evidence showed that oranges were sold to a third party by complainant, and by the third party to respondent. The third party was not a party to the reparation action. Complaint was dismissed. *Phila. Fruit Exch., Inc. v. Garden State Farms, Inc*., 41 Agric. Dec. 1793, 1796 (1982). *See also Staples & Son Fruit Co. v. Monarque Brokerage Co.*, 38 Agric. Dec. 67, 70 (1979); *F.H. Hogue Produce Co. v. Senini Ariz.*, 32 Agric. Dec. 1206, 1209-10 (1973); *Magic Valley Produce, Inc. v. Nat'l Produce Distrib. Inc.*, 24 Agric. Dec. 1117, 1120-21 (1965), where the two respondents had the same president, complainant sold to National, and National sold to Eastern, and the complaint was dismissed against Eastern, and Eastern's counterclaim was also dismissed.

Where a reparation action was brought against a produce receiver involved in bribery of federal inspectors on the Hunts Point Market instead of against the firm that purchased the produce from complainant and negotiated an adjustment with complainant, it was held that there was no privity of contract between complainant and respondent, and no jurisdiction under the PACA. *Pac. Tomato Growers v. B.T. Produce Co.*, 60 Agric. Dec. 348 (2001).

See also Food Sales Co. v. Smeltzer Orchard Co., 18 Agric. Dec. 1209, 1211-12 (1959), and *Arid Zone Farms v. Chas. P. Tatt Fruit Co.*, 18 Agric. Dec. 1181, 1185 (1959), where the complainants were determined to have not been the party with whom respondents contracted. *See Lewis D. Goldstein Fruit & Produce Corp. v. E. Coast Distrib.*, 18 Agric. Dec. 493, 495 (1959), where the sale was found to have been by Indian River to East Coast, and by East Coast to complainant, and therefore no privity of contract existed between complainant and Indian River, and the complaint against Indian River was dismissed.

Where a load of cantaloupes was sold to Complainant Kellerman by Ritter & Post, but latter firm also had sold load to L. Gillarde and neglected to withdraw that firm's right to receive the load, Complainant was prevented from receiving the load. There was found to be no privity between Complainant and L. Gillarde. *Kellerman v. L. Gillarde Co.*, 8 Agric. Dec. 1347, 1351 (1949).

See **STANDING AND PRIVITY OF CONTRACT** - this index.

v. PROVISIONS - CONFORMITY WITH

Where a purchase and sale contract called for numerous bulk loads to contain a specific number of pumpkins and for payment to be made on the basis of a per pound price for the total weight of the loads but limited to the total poundage assuming a 15 pound per pumpkin average, the delivery of loads containing pumpkins which averaged more than 15 pounds was not a breach of contract, and no notice of breach was required. The inventory count performed by the receiving retail stores was accepted as adequate evidence of the number of pumpkins delivered where such count was adequately documented, and no federal inspection was necessary to prove the count received. *PSM Produce, Inc. v. Boyer Produce, Inc.*, 60 Agric. Dec. 809, 826 (2001).

w. PURCHASE BY SAMPLE

A contract to purchase by sample is entered upon receipt and acceptance of the sample. *Rudolph v. Spuds, Inc*., 28 Agric. Dec. 254, 257 (1969).

Where buyer, at seller's place of business, inquired about availability of green peppers for purchase, and seller dumped the contents of one carton of peppers in front of buyer, and the buyer agreed to buy 150 cartons, there was a sale by sample. "Under §2-313 of the Uniform Commercial Code, any sample or model which is made part of the basis of the bargain creates an express warranty [by the seller] that the whole of the goods shall conform to the sample or model." *E.L. Kempf & Son v. Certified Grocers*, 27 Agric. Dec. 799, 802 (1968).

x. REQUIREMENTS CONTRACT – DEFINITION

A requirements contract is a contract which calls for one party to furnish materials or goods to another party to the extent of the latter's requirements in business. A buyer's contract to obtain its requirements from a seller is enforceable when the seller agrees to provide the buyer with a quantity based on a stated estimate or based on the prior requirements of the buyer. In a requirements contract, it is the seller's duty to provide the requirements of the buyer and it is the buyer's duty to obtain those requirements in good faith and according to commercial standards of fair dealing in the trade. *G.W. Palmer & Co. v. Sun Valley Potato Growers, Inc.*, 65 Agric. Dec. 673, 680 (2006).

A stated minimum is not required to enforce a requirements contract, because U.C.C. § 2-306(1) allows a buyer to require a seller to provide a good faith quantity that is not unreasonably disproportionate to stated estimates. Reasonable elasticity in requirements contracts is permitted, even where a complete discontinuance may occur. *G.W. Palmer & Co. v. Sun Valley Potato Growers, Inc.*, 65 Agric. Dec. 673, 681 (2006).

y. RIGHT TO ADEQUATE ASSURANCE OF PERFORMANCE

Where complainant was obligated under a requirements contract to ship five loads of bin lettuce per week to respondent for the period of one year, respondent's late payments did not furnish an excuse not to ship under the contract, but were grounds for insecurity and a demand for assurance of respondent's ability to perform under the contract. Furthermore, under UCC § 2-609(3), complainant's right to demand assurance was not prejudiced by its delay in making the demand, and complainant was justified in withholding performance under the supply contract while it awaited a response to its demand for

assurance and following respondent's failure to respond to its demand. *R & R Produce, Inc. v. Fresh Unlimited, Inc.*, 56 Agric. Dec. 997, 1108-09 (1997).

z. SALE BY SAMPLE

Where complainant tendered six pallets of grapes to respondent's agent for examination and stated that they were from the lot of grapes subsequently shipped to respondent, the sale was by sample and amounted to an express warranty that the whole lot of grapes would conform to the sample. The condition or other characteristics disclosed by a sample are subject to subsequent proof in the normal manner. *Delano Farms Co. v. Suma Fruit Int'l*, 57 Agric. Dec. 749, 754 (1998).

aa. SEVERABILITY

Shriver v. Mkt. Pre-Pak, Inc., 39 Agric. Dec. 290, 304-05 (1980).

bb. TERMS - INTERPRETATION

When interpreting a disputed contract term, the plain language meaning of the term will be applied. When there is no clear plain-language meaning, extrinsic evidence may be used to give meaning to the term. Evidence as to negotiations between the contracting parties is extrinsic evidence that may enable meaning to be given to a disputed contract term. *DiMare Fresh, Inc. v. Sun Pac. Mktg. Coop., Inc.*, PACA Docket R-07-054, decided August 22, 2008 (unpublished decision), *aff*'d, No. 12-17378 (Ninth Cir., E. Dist. of Cali. February 24, 2015).

Where the terms used by the parties to describe a commodity are the same or similar to terms found in the U.S. Grade Standards for the commodity, it is assumed, unless specifically stated otherwise at the time of contracting, that the term has the same meaning as the meaning given to it in the applicable Standard. In the instant case, where Complainant sold navel oranges which it described as "fancy," without qualification, we found that the term referenced the "U.S. Fancy" grade set forth in the U.S. Standards for Grades of Oranges (California and Arizona). *Corona College Heights Orange & Lemon Ass'n v. Cal Zona Distrib., Inc.*, 68 Agric. Dec. 1236, 1241 (2008).

Where the parties, in various pleadings submitted during the course of the proceeding, described the transactions in question as sales, but the parties also stated that it was their intent at the formation of the contract that Respondent would sell the lemons on Complainant's behalf and remit the sales proceeds less commission to Complainant, it was found that Respondent was acting as Complainant's agent in selling the lemons. *Wildwood Produce Sales, Inc. v. Citrusource, Inc.*, 67 Agric. Dec. 704, 797 (2008).

#1 or #2 without qualification held to mean U.S. No.1 or 2. *S. Jersey Produce v. Rotella Produce*, 13 Agric. Dec. 566, 579 (1954).

"Typak # 1" held to mean U.S. No. 1. *Dimare Bros., Inc. of Cal. v. Phila. Produce Co.*, 38 Agric. Dec. 752, 755 (1979).

The term "super select" when applied to a contract for the sale of cucumbers held to have no meaning with regard to the size of the cucumbers. *Pope Packing & Sales, Inc. v. Santa Fe Vegetable Growers Coop. Ass'n*, 38 Agric. Dec. 101, 104 (1979).

"The term 'to be priced on next week's market' should be given its plain and simple meaning, that is, the average prices for the following week." *Bonita Packing Co. v. Pete Pappas & Sons*, 45 Agric. Dec. 2471, 2473 (1986).

The words, "f.o.b. as to price but delivered as to condition," fall under the term "f.o.b. inspection and acceptance arrival," defined in the Regulations at § 46.43(dd). *Villalobos v. Am. Banana Co.*, 56 Agric Dec. 1969, 1979 (1997); *Nick Delis Co. v. Schmucker*, 45 Agric. Dec. 1307, 1310-11 (1986).

Where the parties to a contract calling for the sale and shipment of onions destined for Japan reached an oral agreement that the terms were "U.S. No. 1 Dock Portland, $5.50 per bag," and it was also agreed by the parties that complainant was to be responsible for packing the containers and arranging for the trucks from complainant's plant to the container yard, and that respondent was to make the booking for the steamship, it was found that the manifest intent of the parties called for the onions to be delivered to the dock in Portland, with complainant's responsibility ending at that point. Contrary terms expressed in confirming memoranda were not effective under UCC § 2-207 since they materially altered the original accepted terms of the contract. *Or. Onions, Inc. v. JAC Trading Co.*, PACA Docket R-97-118, decided July 15, 1998 (unpublished decision).

Where the oral contract called for Respondent to sell "up to" one truckload of 60-count cartons of Idaho russet potatoes as Complainant required per week at a fixed price per-carton, such terms provide the basis of a requirements contract and were not too vague to be enforced. Because U.C.C. § 2-306(1) permits all quantities that are not unreasonably disproportionate to stated estimates, the lack of a stated minimum quantity in the estimate did not prevent enforcement of the good faith requirements of the buyer. *G.W. Palmer & Co. v. Sun Valley Potato Growers, Inc.*, 65 Agric. Dec. 673, 681 (2006).

See **SPECIFIC TERM -** this index.

cc. TIME - WHETHER OF THE ESSENCE

"It is well settled that a breach of contract as to time of delivery, where time is of the essence, is grounds for canceling such contract." *Higgins Potato Co. v. Holmes & Barnes Ltd.*, 20 Agric. Dec. 636, 640 (1961); *Anonymous*, 11 Agric. Dec. 455, 459 (1952).

25. CONVERSION

Where a trucker improperly diverted a load of produce from its intended destination to a destination of its choosing and had the receiver handle the produce for its account, the receiver was held liable to the shipper/owner for the reasonable value of the produce even though it had paid the trucker. Since respondent knew or should have known the produce did not belong to the trucker, it was a *bona fide* purchaser for value. *Pure Gold, Inc. v. B & G Produce, Inc.*, 47 Agric. Dec. 1741-42 (1988).

See **F.O.B. - CONVERSION** - this index.

26. COVER

a. EXPENSES SAVED IN CONSEQUENCE OF BREACH

Under U.C.C. § 2-712, when a buyer obtains cover for a seller's breach, the buyer may recover the difference between the cost of cover and the contract price together with any incidental or consequential

damages but less expenses saved in consequence of the breach. Where Complainant purchased potatoes at a delivered price to cover for Respondent's breach and the original contract was made at f.o.b. prices, Complainant's $2.75 per carton shipping cost for the f.o.b. contract was an expense Complainant saved in consequence of the breach. This expense was deducted from the cost of cover at the delivered price and the f.o.b. contract price. *G.W. Palmer & Co. v. Sun Valley Potato Growers, Inc.*, 65 Agric. Dec. 673, 682-84 (2006).

b. NO NEED TO GIVE NOTICE OF INTENT TO COVER

Seller contracted to supply buyer with specific quantity of peaches over period of time and about a week prior to time for shipments to begin told buyer that it would not be able to supply all the quantity called for in the contract. Buyer responded that it would have to seek supplies elsewhere, if necessary. After shipment had begun under the contract, buyer made cover purchases without informing seller until after such purchases were made. It was held that the Uniform Commercial Code does not require notice of intent to cover unless the aggrieved party has taken some positive action which in good faith requires such notification. *DNE Sales, Inc. v. Richfood, Inc.*, 50 Agric. Dec. 1037, 1041-42 (1991). *See also Associated Produce Distrib. v. Kurt Van Engel Comm'n Co.*, 45 Agric. Dec. 383, 386 (1986).

c. PURCHASES MUST BE TIMELY

Cover purchases must be made without unreasonable delay. *Fruit Belt Canning Co. v. Michibay Fruit, Inc.*, 48 Agric. Dec. 1116, 1120 (1989); *All Foods, Inc. v. Richard A. Shaw, Inc.*, 40 Agric. Dec. 1574, 1582 (1981).

d. WHEN BUYER HAS THE RIGHT TO DO SO

A buyer may cover and receive the differential in cost from the seller if the seller fails to deliver goods contracted to be sold. *See* UCC §§ 2-610, 2-712. *Rich-SeaPak Corp. v. Pro-Ag, Inc.*, 56 Agric. Dec. 1958, 1968 (1997); *G. & H. Sales Corp. v. C. J. Vitner Co.*, 50 Agric. Dec. 1892, 1897-99 (1991); *Al Campisano Fruit Co. v. Shelton*, 50 Agric. Dec. 1875, 1883 (1991); *Feldman Bros. Produce Co. v. A. Pellegrino & Sons*, 32 Agric. Dec. 1845, 1848-49 (1973).

Respondent was found to be entitled to make purchases to cover complainant's failure to ship under a supply contract for the period prior to the demand for assurance, and was also entitled to credit for cover as to purchases made under a substitute supply contract insofar as that contract was concluded prior to the demand for assurance, but not as to purchases made under a modification of that contract made after the demand for assurance. *R & R Produce, Inc. v. Fresh Unlimited*, Inc., 56 Agric. Dec. 997, 1009 (1997).

A buyer who has accepted non-conforming goods may still be entitled to damages for cover. In such a case, the buyer's damages will be measured as the difference between the cost of cover and the proceeds collected from the prompt resale of the accepted goods. *Sunridge Farms, Inc. v. Alphas 1 Co. (Order on Reconsideration)*, 68 Agric. Dec. 1302, 1305-06 (2009).

e. WHEN THERE HAS BEEN AN ACCEPTANCE

The concept of cover following acceptance is not frequently encountered. However, that such an avenue is open to an accepting buyer is explicitly stated in comment 1 to U.C.C. § 2-601, "A buyer accepting a

non-conforming tender is not penalized by the loss of any remedy otherwise open to him. This policy extends to cover . . ."

In addition, the text of § 2-607 on "Effect of Acceptance" states, in part, ". . . acceptance does not of itself impair any other remedy provided by this Article for non-conformity." The reference in § 2-714 on "Buyer's Damages for Breach in Regard to Accepted Goods" to the availability, in a proper case, of consequential damages under § 2-715 makes it clear that such is contemplated by the UCC. Cover in such circumstances might be more comfortably thought of under the heading of a buyer's duty to minimize damages. Consequential damages are available only if the buyer has a duty to promptly and properly resell the goods accepted. If he covers, his damages are the difference between the cost of cover and what was realized from the salvage sale. (All of the above quoted from *Pandol Bros., Inc. v. Prevor Mktg. Int'l, Inc.*, 49 Agric. Dec. 1193, 1203 (1990), note 11.)

The remedy of cover is not available to a buyer who has accepted the goods and has not revoked his acceptance. *Corona Fruit & Veggies, Inc. v. Produce Alliance LLC*, 70 Agric. Dec. A, R (USDA 2011), *published in* 72 Agric. Dec. A, R (USDA 2013).

27. CUSTOM AND USAGE

A trade practice may be established through proof of custom and usage. *See* UCC § 1-205. *See also Coast Mktg. Co. v. World Wide Produce Co.*, 30 Agric. Dec. 1742, 1747-48 (1971), confirmed on *Petition of Reconsideration*, 31 Agric. Dec. 669 (1972). (Decision deals with definition of terms "select" and "super select" as used in cucumber contracts.)

a. PROOF OF CUSTOM

Custom must be proved by numerous instances of actual practice, not by the opinion of a witness. *Cal. Fruit Exch. v. Spracale Fruit Co.*, 89 F. Supp. 580 (W.D. PA. 1950); *Lookout Mountain Tomato & Banana Co. v. Case Produce, Inc.*, 51 Agric. Dec. 1471, 1478-79 (1992); *Woods Co. v. PSL Food Mkt., Inc.*, 50 Agric. Dec. 976, 982-83 (1991); *Coast Mktg. Co. v. World Wide Produce Co.*, 30 Agric. Dec. 1742, 1747-48 (1971), confirmed on *Petition of Reconsideration*, 31 Agric. Dec. 669 (1972); *Michael Santelli & Sons, Inc. v. Rubenstein*, 21 Agric. Dec. 1053, 1056 (1962); *M.R. Davis & Bros. v. Flynn*, 20 Agric. Dec. 1069, 1072 (1961).

28. DAMAGES

Doctrine the damages must be calculable with mathematical accuracy rejected. *Shriver v. Mkt. Pre-Pak, Inc.*, 39 Agric. Dec. 290, 307 (1980).

Long-standing administrative practice favors the assessing of damages where possible. *James Macchiaroli Fruit Co. v. Ben Gatz Co.*, 38 Agric. Dec. 1477, 1484 (1979).

a. ACCOUNTINGS

Damages in the amount of the reasonable value of the produce are awarded when a party fails to account for produce. *L & M Farms, Inc. v. Y2S Trading, Inc.*, 69 Agric. Dec. 942, 973 (2010).

A failure to provide a proper accounting may preclude an award of damages to a receiver where no alternative method of assessing damages can be found. *J & J Produce Co. v. Weis-Buy Serv., Inc.*, 58 Agric. Dec. 1095, 1101 (1999).

Accountings that show only an average price are commonly not used to show the value of consigned goods or the value of damaged goods resold by a buyer. A buyer's accounting showing an average sale price for all the produce was deemed inadequate in *Supreme Berries, Inc. v. McEntire*, 49 Agric. Dec. 1210, 1217 (1990). However, where the accounting showed that the average price realized was the same as the current market price, and the amount of goods lost on repacking was less, as a percentage, than the condition defects shown on the arrival federal inspection, an exception was made, and the accounting was used to show the proper returns under a consignment contract. *Great Am. Farms, Inc. v. William P. Hearne Produce Co.*, 59 Agric. Dec. 466, 470 (2000). *See also DeSomma v. All World Farms, Inc.*, 61 Agric. Dec. 821, 835-36 (2002).

b. BUYER'S FOR NON-DELIVERY WHERE NO COVER MADE

UCC § 2-711 provides, in part, that:

(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance, then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (§ 2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid,

(a) "cover" and have damages under § 2-712 as to all the goods affected whether or not they have been identified to the contract; **OR**

(b) recover damages for non-delivery as provided in this chapter (§2-713). (emphasis supplied)

See H. Hall & Co. v. Action Produce, 45 Agric. Dec. 755, 758-59 (1986); and *Dennis Produce Sales, Inc. v. Green Valley Onion Co.*, 39 Agric. Dec. 1506, 1512-13 (1980).

Late delivery of potatoes caused shut down of buyer's processing plant and overtime operation when three loads arrived later, all at one time. Buyer was allowed to prove plant overhead costs resulting from shutdown, and overtime costs resulting from the delivery of three loads at one time. Both costs were awarded as consequential damages. *Process Supply Co. v. Perfect Potato Chips, Inc.*, 40 Agric. Dec. 800, 805 (1981).

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. *DiMare Fresh, Inc. v. Sun Pac. Mktg. Coop., Inc.*, PACA Docket R-07-054, decided August 22, 2008 (unpublished decision), *aff*'d, No. 12-17378 (Ninth Cir., E. Dist. of Cali. February 24, 2015).

c. ESTIMATION OF

Estimating damages is permissible as long as we do not move into speculation. Where determination of damages would be speculative (no objective benchmark can be found) they should not be awarded. Also, in arriving at an estimate, the uncertainty as to value must not be allowed to benefit the party who caused the uncertainty, or who had the burden of proving damages but failed to submit adequate evidence. *Grasso Foods, Inc. v. Americe, Inc.*, 69 Agric. Dec. 1547, 1563 (2010).

We have refused to use an estimate of commercial value made by a foreign surveyor where the record did not establish any expertise on the part of the surveyor to make such an estimate. *See Ont. Int'l, Inc. v. Nunes Co.*, 52 Agric. Dec. 1661, 1673 (1993).

When damages have not been shown the tribunal may, under certain circumstances, estimate damages in order to do equity. *Richard S. Brown, Inc. v. Houlehan, Inc.*, 47 Agric. Dec. 320 (1988); *Ark. Tomato Co. v. M-K & Sons Produce Co.*, 40 Agric. Dec. 1773, 1778 (1981); *C. & G. Onion Co. v. Bushman's, Inc.*, 40 Agric. Dec. 117, 120 (1981); *Brown & Hill v. U.S. Fruit Co.*, 20 Agric. Dec. 891, 895 (1961).

Damages need not be calculable with mathematical accuracy. *Shriver v. Mkt. Pre-Pak, Inc.*, 39 Agric. Dec. 290, 307 (1980).

Respondent buyer and complainant agreed after arrival of an f.o.b. shipment of tomatoes to respondent's handling them on a consignment basis. However, respondent failed to account. Held: "Respondent's failure to account necessitates our estimating the amount for which respondent is liable. In arriving at an equitable figure we take into consideration the lack of proof that the subject tomatoes were abnormally deteriorated together with the fact that the necessary uncertainty as to the value of the tomatoes must not be allowed to benefit respondent over complainant, since respondent's failure to account is the cause of the uncertainty." *Meyer v. Hardcastle Produce Co.*, 40 Agric. Dec. 1172, 1175 (1981).

Testimony of buyer allowed as basis of estimation of buyer's damages. *Farmers Sales v. Tomatoes, Inc.*, 32 Agric. Dec. 1889, 1892-93 (1973). *See also Anderson v. Big Stone Canning Co.*, 33 Agric. Dec. 961, 966-67 (1974).

Difference between high and low quotes in Market News reports used. *Oneonta Trading Corp. v. Walter Gailey & Sons, Inc.*, 41 Agric. Dec. 764, 768 (1982).

Where onions were sold U.S. No. 1 delivered and failed to grade on arrival, the difference between the mostly price for U.S. No. 1 and the price for fair condition, as shown by Market News reports was used. *I. Kallish & Sons v. Jarosz Produce Farms, Inc.*, 26 Agric. Dec. 1285, 1291-92 (1967).

Where potatoes failed to meet contract requirements and complainant authorized a consignment handling but respondent failed to make a prompt and proper resale, the market value of the potatoes was estimated by deducting the value of 150% of the damaged potatoes as found by the federal inspectors; i.e., one and one-half times the defects disclosed by the inspections from the contract price specified in the parties' original agreement. *E. Coast Potato Distrib., Inc. v. Spriridis*, 47 Agric. Dec. 947, 952-53 (1988). It is not stated whether relevant Market News prices were available, but if they were, the deduction should be applied to the average Market News price rather than the contract price.

d. FREIGHT

In *Horticulture Producers Federated Ass'n v. A. Sam & Sons Produce Co.*, 51 Agric. Dec. 1460, 1470 (1992), we stated:

> [w]hen resorting to the use of an alternative market under UCC § 2-723(2) we usually do not make an allowance for the cost of transporting the goods to such other market. Such an allowance would only be 'proper' where the prices in the alternative market could be deemed to be higher or lower due to such market's greater or lesser distance from the source of supply. In this proceeding the destination of Baxter Springs, Kansas contains no ready market for the resale of the cabbage, and transportation to another market was necessary in order to resell the cabbage. The additional freight costs should therefore be viewed as falling under the consequential damages provisions of UCC § 2-714(3), and not under the last phrase of UCC § 2-723(2).

The decision determined damages by the difference in price spread between the middle and low market price for similar produce in good condition.

e. INCIDENTAL AND CONSEQUENTIAL

Damages for lost profits were denied because of respondent's failure to show that such damages could not have been prevented by cover purchases. *Flanagan & Jones, Inc. v. World Wide Consultants, Inc.*, 53 Agric. Dec. 828, 857 (1994).

Late delivery of potatoes caused shut down of buyer's processing plant and overtime operation when three loads arrived later, all at one time. Buyer was allowed to prove plant overhead costs resulting from the shutdown and overtime costs resulting from the delivery of three loads at one time. Both costs were awarded as consequential damages. *Process Supply Co. v. Perfect Potato Chips, Inc.*, 40 Agric. Dec. 800, 805 (1981).

In *Stake Tomatoes v. World Wide Consultants*, 52 Agric. Dec. 770, 776 (1993), a load of tomatoes was sold to arrive showing light pink color, but actually arrived showing light red to red color. Damages for this breach were awarded based upon the difference between the contract price respondent had negotiated with its customer and the amount respondent actually received from its customer. This award of damages was treated as an exception to the normal method of awarding damages based on a percentage of defects, but seems to actually fall under the concept of consequential damages.

Storage fees can be awarded if agreed upon by the parties in a contract involving the sale of perishable agricultural commodities. *Grasso Foods, Inc. v. Americe, Inc.*, 69 Agric. Dec. 1547, 1564 (2010).

f. MATERIAL BREACH

Where Complainant materially breached the contract by shipping seeded watermelons, rather than the seedless watermelons called for in the contract of sale, but Respondent's damages resulting from the breach could not be measured using the normal method, i.e., the difference between the value of the watermelons as accepted and the value they would have had if they had been as warranted, because the account of sales prepared by Respondent's customer did not accurately account for the number of watermelons shipped, we found that the case presented special circumstances such that a more appropriate measure of Respondent's damages was the difference at the time of sale between the market value of the seedless watermelons called for in the contract of sale and the market value of the seeded watermelons actually shipped. *Diamond Fruit & Vegetable Distribs., Inc., v. Muller Trading Co.*, 66 Agric. Dec. 882, 889 (2007).

g. MITIGATION

When assessing damages for resold product, it is necessary that Complainant show that its resale was made in a "commercially reasonable manner." What is a "reasonable manner" depends upon the nature of the goods, the condition of the market and the other circumstances of the case. Where Complainant proved that the product to be resold was a "specialty item" with limited buyers, and that the product, once frozen, was not highly perishable, holding product in cold storage for several months until it could be resold was commercially reasonable. *Grasso Foods, Inc. v. Americe, Inc.*, 69 Agric. Dec. 1547, 1562 (2010).

Receiver of produce has a duty to mitigate its consequential damages. *See* UCC § 2-715(2) and comment 2.

Although goods meeting contract requirements were ultimately dumped, buyer failed to show that seller failed to mitigate damages as to goods accepted by buyer, and then wrongfully rejected. Seller promptly moved the goods to a third party to be disposed of, and it was said that, "[t]here is no allegation or evidence that [third party] was a firm unqualified to dispose of the disputed goods, or that the firm failed to properly do so. Therefore, it is found that complainant made reasonable efforts to mitigate its damages, but to no avail." *Dew-Gro, Inc. v. Mings Imp., Inc.*, 45 Agric. Dec. 739, 741 (1986).

Where shipper breached the contract by shipping potatoes that were not suitable for chipping, and the buyer received the potatoes, held that receiver's efforts to place the potatoes elsewhere and subsequent donation of the potatoes to charitable groups was justified after the seller failed to direct an alternative course. *Fisher v. Acton Co.*, 41 Agric. Dec. 524, 527 (1982).

Where a carload of lettuce sold f.o.b., without reference as to grade, was inspected on arrival in Chicago on October 27, and found to contain an average of *2%* damage by tipburn, *10%* damage by reddish brown discoloration following bruising affecting outer leaves and three to five head leaves, and *2%* decay respondent rejected. The lettuce was found to have made good delivery, and the rejection was found to be wrongful. Notice of rejection was given on October 27, and on the following day, the parties exchanged telegrams in an unsuccessful effort to reach an understanding. On October 29, the seller turned the load over to a third party to resell, and the third party diverted the load to New York where it arrived on November 3. The load was there determined to be in too deteriorated condition to bring freight charges and was abandoned to the carrier. The seller sought to recover the contract price, and the buyer contended that the seller failed to use due diligence in mitigating damages following rejection. We said:

> There is no evidence of any negligence, delay, or bad judgment in the attempted resale of this shipment. The diversion of the shipment to another market for resale is not shown to have been unreasonable. Complainant testified that it is often difficult or impossible to resell a shipment of lettuce on the same market where it has been rejected by the original buyer. We have previously held that if, in the seller's judgment, a resale can be made to a better advantage by diverting it to another market than that at which it was rejected, and there is no indication of bad faith or lack of diligence in so doing, the validity of the seller's action will be upheld. *S.A. Gerard Co. v. Metzler & Sons, Inc.*, 12 Agric. Dec. 781, 786 (1953). It is concluded that the diversion and attempted resale of this shipment was handled in a reasonable and diligent manner.

Navajo Mktg. Co. v. Kaiser, 19 Agric. Dec. 894, 898-99 (1960).

h. NOT PROVEN

Where Respondent sought damages for Complainant's material breach of contract, but failed to submit adequate evidence of its damages and no objective benchmark for determining damages could be found (e.g., percentage of condition defects, differential between USDA Market News price for product as warranted versus product as accepted), damages were not awarded and Respondent was liable for the full contract price less the cost of inspection. *Big Chuy Distribs. & Sons, Inc. v. Muller Trading Co.,* 66 Agric. Dec. 1445, 1451 (2007).

i. OPEN SALES AND CONSIGNMENTS

See **CONSIGNMENTS - SALE ON OPEN BASIS DISTINGUISHED FROM** - this index, and **OPEN** - this index.

j. *QUANTUM MERUIT* RECOVERY ALLOWED

Where there was no contract proved but goods were received and sold. *Pruette v. E. Vega & Sons Produce*, 41 Agric. Dec. 1196, 1200 (1981).

k. SELLER'S FOR NON-ACCEPTANCE OR REPUDIATION

UCC § 2-708 provides that:

> (1) Subject to subsection (2) and to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place of tender and the unpaid contract price together with any incidental damages provided in this Article (section 2-710), but less expenses saved in consequence of the buyer's breach.
>
> (2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this Article (Section 2-710), due allowances for costs reasonably incurred and due credit for payments or proceeds of resale.

Where buyer repudiated contract and refused to take delivery of frozen strawberries, seller could not recover difference between contract price and proceeds of a resale made seven and one-half months after the breach because such resale was not commercially reasonable as to time under UCC § 2-706. Seller was relegated to recovery of damages under UCC § 2-708 based upon difference between contract price and market price, but seller failed to submit evidence as to market price, and the data available to the Department showed that there was no difference between the two prices at the time for tender. The complaint was dismissed. *Valley Pride Sales, Inc. v. Dairy Rich Ice Cream Co.*, 53 Agric. Dec. 879, 886-87 (1994).

Where the buyer repudiates with respect to a part or the whole, the seller may resell the goods concerned, and if such resale is made in a commercially reasonable manner and in good faith, may recover the difference between the resale price and contract price plus any incidental damages incurred. *Washburn Potato Co. v. Rex E. Sparks Produce*, 42 Agric. Dec. 955, 958 (1983); *Ashley v. Cyr Bros. Meat Packing Co.*, 36 Agric. Dec. 401, 410 (1977).

Complainant failed to prove that it resold the commodities in a commercially reasonable manner. Damages awarded to Complainant based on the difference between prevailing market price and the original contract price (UCC § 2-708). *D.M. Rothman Corp., Inc. v. Good Luck Produce, Inc.*, 66 Agric. Dec. 1472, 1482-83 (2007).

l. SELLER'S FOR WRONGFUL REJECTION

UCC §§ 2-703, 2-706, 2-708.

Merit Packing Co. v. Garden State Farms, Inc., 41 Agric. Dec. 2260, 2263-64 (1982). *Yokoyama Bros. v. Cal-Veg Sales*, 41 Agric. Dec. 535, 538 (1982).

Following Complainant's wrongful rejection of several lots of corn, Respondent could not recover damages using the measure set forth in UCC § 2-706, i.e., the difference between the contract price and the resale price, because Respondent did not submit any evidence of the proceeds collected from the resale of the corn. Respondent was relegated to recovery of damages under UCC § 2-708, *i.e.*, the difference between the contract price and the market price. However, since relevant USDA Market News reports showed market prices for similar corn that were substantially greater than the f.o.b. contract price plus freight, Respondent failed to establish it was damaged according to the measure of damages set forth in UCC § 2-708(1). *Rosenthal Foods Corp. v. W-W Produce, Inc.*, 69 Agric. Dec. 917, 925-26 (2010).

Where buyer rejected two lots of onions and communicated such rejection to seller in timely fashion, rejections were effective and title was revested in seller. Seller took possession of onions and had them resold. Damages could not be awarded on the basis of the difference between resale price and contract price because complainant did not submit an accounting of the resale into evidence. Damages were awarded on the basis of the difference between market price and contract price. *McKay v. Lusk Onion, Inc.*, 54 Agric. Dec. 721, 725-26 (1995).

§ 2-706 is not available if seller's resale is defective, and seller is relegated to § 2-708. *Mut. Vegetable Sales v. Joseph Notarianni & Co.*, 29 Agric. Dec. 1049, 1053 (1970). *See Valley Pride Sales, Inc. v. Dairy Rich Ice Cream Co.*, 53 Agric. Dec. 879, 886-87 (1994).

Seller may recover expenses incidental to the resale of the wrongfully rejected product. *Pope Packing & Sales, Inc. v. Santa Fe Vegetable Growers Coop. Ass'n*, 38 Agric. Dec. 101, 105 (1979).

29. DEFERRED BILLING

This is a subcategory of "Open Price." See **CONSIGNMENTS - SALE DISTINGUISHED FROM** - this index. See also **OPEN PRICE** - this index.

In *Nw. Fruit Sales, Inc. v. Norinsberg Corp.*, 39 Agric. Dec. 1556, 1560 (1980), we stated, ". . . the term 'deferred billing' is not defined in the Department's regulations and has no fixed meaning within the

perishable industry . . . one of the meanings sometimes assigned to the term . . . conforms with . . . 'open billing basis, to be priced after sale . . ."

See Dennis Produce Sales, Inc. v. Caruso-Ciresi, Inc., 42 Agric. Dec. 178, 184 (1983), where we quoted the *Northwest Fruit Sales* case and said,

> [s]ince the record as a whole indicates that the term "deferred billing," however vague, did contemplate participation by complainant in the pricing of the produce after its sale, and since complainant was not satisfied with the price unilaterally set by respondent, it is apparent that the parties never agreed to a price under such terms.

Deferred billing has been stated to mean that the price will be established after the goods have arrived at their destination. *See Slayman Fruit Co. v. Wholesale Produce Supply, Inc.*, 30 Agric. Dec. 1751, 1755 (1971).

Where parties failed to agree on a price under deferred billing terms, the price was held to be a reasonable price, and prices shown by market reports from neighboring city, after deductions for freight and reasonable profit, were used to arrive at a reasonable price for the potatoes. *M.J. Duer & Co. v. J.F. Sanson & Sons Co.*, 49 Agric. Dec. 620, 625 (1990). *See also Corky Foods Corp. v. S & S Produce Co.*, 45 Agric. Dec. 844, 846-47 (1986), where the best evidence of the market price was found to be prices paid for similar transactions during the same time period rather than conflicting prices appearing on the Market News reports.

30. DELIVERED SALE

UCC terminology is "F.O.B. the place of destination," or "destination contract." *See* UCC § 2-318(1)(b). A "shipment" or "f.o.b." contract, in the absence of evidence as to the agreement, is presumed. *See* J. White & R. Summers, *Handbook of the Law Under the Uniform Commercial Code*, § 5-2, p. 143 (1972).

"'Delivered' or 'delivered sale' means that the produce is to be delivered by the seller on board car, or truck or on dock if delivered by boat, at the market in which the buyer is located, or at such other market as is agreed upon, free of any and all charges for transportation or protective service. The seller assumes all risks of loss and damage in transit not caused by the buyer . . ." 7 C.F.R. § 46.43(p).

a. BREACH OF DELIVERED CONTRACT

Under a delivered contract the goods are required to meet contract requirements at the time and place specified in the contract for delivery. The suitable shipping condition warranty has no relevance in a delivered sale (or where, as here, the contract was for fob price and U.S. #1 grade at destination) contract. *Sidney Newman & Co. v. Wallace Fruit & Vegetable Co.*, 21 Agric. Dec. 1048, 1050 (1962). However, something analogous to the suitable shipping condition concept may be utilized to ascertain whether goods met contract requirements at time of delivery. This occurs when inspection is delayed or goods may have been diverted from the original destination. The evidentiary standard to which a buyer should be held in these situations should be that a breach be proven by clear and convincing evidence. The diversion from the original destination, or the delay, is attributable to the buyer, and the contractual obligation extends only to the contract destination point and time. *Villalobos v. American Banana Co.*, 56 Agric. Dec. 1969, 1978-79 (1997).

Condition of produce at a time substantially later than time of delivery and at a different place from contract destination, may be used to show breach as to a delivered sale. Inspection showing *15%* sunken discolored areas, plus *4%* quality defects, four days after arrival, was held to show breach as to potatoes. Record contained expert testimony supporting conclusion, and it was also noted that "during the four day period the outside temperatures ranged from 30 to 34 degrees, no heat was applied to the potatoes, and the load was properly ventilated . . ." *Baltes Potato Co. v. I. Kallish & Sons*, 18 Agric. Dec. 1301, 1304 (1959).

Potatoes shipped on a delivered basis from Maine (where they graded U.S. No. 1 on May 30, 31, and June 2) to Brooklyn, New York, were then shipped on June 5, from New York to Puerto Rico where they were inspected on June 10th, and found to contain an average of *25%* fusarium tuber rot in advanced stages. It was stated that, "[i]n our view, this evidence of condition in Puerto Rico some 5 to 8 days after the potatoes were delivered to the Bull Line [in Brooklyn], is unacceptable to establish grade requirements at the time the potatoes were delivered to the pier in Brooklyn." *Aroostook Growers & Packers, Inc. v. Flores & Co.*, 18 Agric. Dec. 918, 920-21 (1959).

Where parties concluded a "no grade" contract for the sale of onions on a delivered basis, the *U.S. Grade Standards* for onions were the standard for determining a breach as to condition (as distinguished from quality). *Sharyland L.P. v. Caribe Food Corp.*, 56 Agric. Dec. 1011, 1014-15 (1997).

b. FREIGHT

"A delivered sale is the opposite of an f.o.b. sale; *i.e.*, it is one in which the seller is responsible for paying the freight and the seller has the risk of loss in transit." *In re Ben Gatz Co.*, 38 Agric. Dec. 1038-39 (1979).

c. RESPONSIBILITY FOR TRUCKER'S FAILURE TO TENDER.

Trucker's failure to effect delivery or "tender" is attributable to seller in a delivered sale. *L.J. Crawford v. Ralf & Cono Comunale Produce Corp.*, 51 Agric. Dec. 804, 810 (1992).

Truck driver, after being informed by receiver that he would not be unloaded until later that day, took the product away and disposed of it without authorization. Found that there was no acceptance or wrongful rejection. The carrier, acting as the shipper's agent in a delivered sale, failed to make an adequate tender of delivery and the subsequent wrongful conversion of the goods by the carrier falls on the shipper. *San Joaquin Valley Vegetable Co. v. Kallish*, 42 Agric. Dec. 645, 651 (1942).

d. TRANSIT CONDITIONS

In a delivered sale, the shipper is responsible for what occurs during transit. *Pandol Bros., Inc. v. D'Acquisto*, 43 Agric. Dec. 646, 648 (1984); *Wallace Fruit & Vegetable Co. v. Mercurio*, 18 Agric. Dec. 1327, 1330 (1959).

31. DIVERSION

Diversion en route is an act of acceptance. *See* 7 C.F.R. § 46.2(dd)(1). *See also Magic Valley Potato Shippers, Inc. v. C.B. Marchant & Co.*, 42 Agric. Dec. 1602, 1606-07 (1983); *Lindemann Farms, Inc. v. Food Fair Stores*, 36 Agric. Dec. 92, 95 (1977).

32. DUMPING

Dumping requires a dump certificate or other appropriate evidence of the act. 7 C.F.R. § 46.23. *La Mantia-Cullum-Collier & Co. v. Castille*, 34 Agric. Dec. 769 (1975).

In *Great Lakes Produce v. Johnnie's Produce & Popcorn Supply Co.*, 31 Agric. Dec. 1300, 1303 (1972), although there was no adequate certificate to cover dumping of 800 out of 820 sacks of potatoes, a federal inspection showed 20 to 53%, average 33% damage, including 24% serious damage by hollow heart, and it was held that there was adequate proof that the potatoes were not merchantable and damages were awarded. *See also Harmon v. Pac. Gamble Robinson Co.*, 45 Agric. Dec. 2072, 2074-75 (1986); *Salinas Lettuce Farmers Coop. v. Larry Ober Co.*, 39 Agric. Dec. 65, 71 (1980).

In *Jameson v. Valerio's Produce Co.*, 46 Agric. Dec. 653, 656-56 (1987), it was stated that there is a presumption against verbal waiver of the required evidence of dumping. The parties had modified an f.o.b. contract following arrival of strawberries to call for protection against loss with no need for the receiver to secure an inspection. The receiver dumped a large portion of the berries without securing evidence of dumping. It was held that the receiver's evidence was sufficient to overcome the presumption as well as the seller's sworn statement that he had not made such a waiver.

Where a buyer claimed damages from tomatoes having been dumped, statements from third parties were held not sufficient in identifying the tomatoes being dumped, and the buyer was held liable for the value of the tomatoes. *Kaplan's Fruit & Produce Co. v. Tooley & Sons, Inc.*, 38 Agric. Dec. 97, 100 (1979).

Where buyer rejected produce due to its failure to meet requirement of contract that it conform with the government pesticide tolerances of buyer's jurisdiction and undertook with seller's knowledge to secure return of produce to seller's jurisdiction where it could be legally resold and was informed by customs broker that return would likely not be possible, buyer's subsequent dumping of produce, under all circumstances of case, was found to fall within good faith requirement of § 2-603 of the UCC. *Steve Dart, Inc. v. Mecca Farms, Inc.*, 49 Agric. Dec. 638, 643-44 (1990).

A consignee in a consignment transaction has the duty to secure evidence of dumping for all produce dumped in excess of 5%, and any dumped produce in excess of 5% must be brought back into the accounting at the average price realized for the produce that was not dumped. *Alamo Produce v. Triton Imports*, PACA Docket No. R-96-056 decided 1997, (unpublished decision).

In an open sale transaction, dumping of any portion of the produce must be substantiated by a dump certificate or other appropriate evidence. In a consignment transaction, the regulations promulgated pursuant to the PACA require "proof as to the quantities of produce destroyed or dumped in excess of 5%." Here, the PACA investigator mischaracterized the contract as one of consignment rather than sale and erroneously granted a 5% dump discount. *Carmack v. Selvidge*, 51 Agric. Dec. 892, 901-02 (1992).

Where federal inspection on arrival showed an average of 7% decay in load of 1,090 cartons of cantaloupes, and buyer dumped 99 cartons (9%), we said that "we consider the dumpage on this load to be reasonable." *M. Offutt Co. v. Caruso Produce, Inc.*, 49 Agric. Dec. 596, 606 (1990).

Where a joint venturer accounted zero and negative returns for lots of cabbage, the accounting must also have included other adequate evidence to justify the zero and negative returns. Inspections or other adequate evidence are required to demonstrate that produce is without commercial value, and that documentation must be given to the joint account partner. Because the expenses were not separately accounted for,

presumption arose that zero and negative returns were a result of dumping. *L & M Farms, Inc. v. Y2S Trading, Inc.*, 69 Agric. Dec. 942, 965 (2010).

33. ELECTION OF REMEDIES

See **PRACTICE AND PROCEDURE – ELECTION OF REMEDIES** - this index.

7 U.S.C. § 499e(b):

> Such liability may be enforced either (1) by complaint to the Secretary as hereinafter provided, or (2) by suit in any court of competent jurisdiction; but this section shall not in any way abridge or alter the remedies[3] now existing at common law or by statute, and the provisions of this Act are in addition to such remedies.

THE LEADING CASES ARE:

Trans W. Fruit Co. v. Ameri-Cal Produce, Inc., 42 Agric. Dec. 1955, 1957 (1983).

M.S. Thigpen Produce Co. v. Park River Growers, Inc., 48 Agric. Dec. 695, 697 (1989).

Kurt Van Engel Comm'n Co., v. Schultz Sav-O Stores, Inc., 48 Agric. Dec. 731-33 (1989).

34. ESTOPPEL

a. DUTY TO SPEAK

A party must have a duty to speak to be stopped from denying it had agreed to pay invoices for which another party is obligated. *See* 28 Am. Jur. 2d 667-668. *See also Floriza Sales Co. v. Pamco Air Fresh, Inc.*, 47 Agric. Dec. 1328, 1339-40 (1988).

b. ESTOPPEL TO DENY AGENCY

Where Respondent remitted payment to a collection agent in settlement of its indebtedness to Complainant, but Respondent failed to establish that the agent was bestowed by Complainant with either actual or apparent authority to collect on
Complainant's behalf, held that Respondent's sole reliance on the representation of the agent that it was authorized to settle the indebtedness on Complainant's behalf was neither reasonable nor legally sufficient to absolve it of liability to Complainant. *New Generation Produce Corp. v. NY Supermarket, Inc.*, 68 Agric. Dec. 561, 586 (2009).

Estoppel to deny agency arises when the principal gave the agent indicia of authority on which another party relied to its detriment. *Bud Antle, Inc. v. Spruton, Inc.*, 47 Agric. Dec. 1619, 1622-23 (1988); *Sunny Sally, Inc. v. Ray Burke Farmer*, 23 Agric. Dec. 268 (1964) (not established); *Tri-State Sales Agency v. Palmetto Fruit & Produce Co.*, 14 Agric. Dec. 1140, 1143 (1955).

[3] The term "remedies" refers to procedural rights, not to substantive rights. *Rothenberg v. H. Rothstein & Sons*, 183 F.2d 524, 21 A.L.R.2d 832 (3rd Cir. 1950).

The necessary elements for the doctrine of estoppels to apply are: (1) the principal has given indicia of authority to the agent or has knowingly permitted or caused another to appear to be its agent; (2) there must be a representation of the agency by the principal; (3) there must be a reliance upon such representation by a third party; and (4) such representation must have been acted on in good faith to the injury of that third party. *Floriza Sales Co. v. Pamco Air Fresh, Inc.*, 47 Agric. Dec. 1328, 1339-40 (1988).

c. NECESSARY ELEMENTS

Where Complainant, who sold tomatoes on Respondent's behalf while acting in the capacity of a grower's agent, paid Respondent the net proceeds from its sales of the tomatoes but neglected to deduct the 8% commission that it was entitled to withhold as commission according to the contract, Respondent argued that Complainant should be estopped from recovering its commissions because it represented to Respondent that the settlement amounts already remitted to Respondent were final, which representation Respondent reasonably relied upon and paid its growers accordingly, so Respondent would suffer a loss if it were ordered to pay the commissions owed to Complainant. Held that in order for Respondent to defend the claim on the basis of estoppel, Respondent must establish both that its reliance upon the information provided to it by Complainant was reasonable, *and* that it relied upon the error made by Complainant to its detriment. The contract did not specify whether the commission would be deducted on the product liquidation or billed separately, so in the absence of any mention of the commission on the liquidation, Respondent should not have assumed that the commission had already been deducted. Moreover, Respondent failed to show that Complainant otherwise represented that the settlement amounts paid to Respondent were final, i.e., net after commission. Therefore, Respondent failed to establish that its reliance upon the information provided to it by Complainant was reasonable. Respondent also failed to establish that it relied upon the error made by Complainant to its detriment because it failed to show that it attempted to contact its grower to recoup the overpayment that it made as a result of its presumption that the funds received from Complainant were net after commission. Thus, Respondent failed to show that any losses incurred as a result of having to pay commission to Complainant were unavoidable. Because Respondent failed to establish the necessary elements of estoppel, Respondent was ordered to pay the commission owed to Complainant according to the terms of the contract. *Eurofresh, Inc. v. Tricar Sales, Inc.*, 68 Agric. 1224, 1235 (2008.)

35. EVIDENCE

See **BURDEN OF PROOF** - this index.

a. ALTER EGO

A newly-formed corporation was found to have been the alter ego of an established corporation because the established corporation: (1) accepted produce for both corporations, (2) provided warehouse space for both corporations, (3) comingled funds by delivering remittance checks from accounts it controlled, (4) shared an employee and owner, and (5) the employee in common to both corporations negotiated for both corporations. There was some evidence of separation, but the weight of the evidence showed that the two corporations were not acting as separate entities for the purposes of the joint venture. Because of these facts, the newly-formed corporation's interests were dominated by the established corporation to the extent that the newly-formed corporation was the alter-ego of the established corporation. *L & M Farms, Inc. v. Y2S Trading, Inc.*, 69 Agric. Dec. 942, 953-54 (2010).

Two corporations that were formed in different states, at different times, and the corporations had different owners and officers, separate employees, and accounting departments, were not alter-egos of one another. *L & M Farms, Inc. v. Y2S Trading, Inc.*, 69 Agric. Dec. 942, 954 (2010).

b. ATTORNEYS

In regard to relevant evidence offered by the parties under the documentary procedure, it was said that statements of fact sworn to by a party involved in relevant transactions could be accorded less weight when the statements were a part of legal argument obviously constructed by an attorney who was the first person to sign the statement. The situation was said to be analogous testimony elicited in response to leading questions. *Faris Farms v. Lassen Farms*, 59 Agric. Dec. 471, 480 (2000).

c. BROKERS

In the absence of the required statement on the broker's memorandum of sale as to who engaged the broker, a broker is presumed to have been engaged by the buyer. This fact should be weighed carefully in regard to the credibility of a broker's statements. In a case where the broker was found to have been engaged by the respondent, the broker's statements in respondent's favor were nevertheless given credence. *Charles Johnson Co. v. Hoversen*, 57 Agric. Dec. 756, 759-60 (1998).

d. CLEAR AND CONVINCING

Complainant shipped 44 loads of citrus to 2 buyers. All negotiations were through a broker, who was found to have purchased only one of the loads for the broker's own account. Complainant alleged that the broker made an oral agreement to guarantee the payment of the buyers. However, where the broker's memorandums of sale disclosed that the buyers were being accommodation invoiced by the broker, and such memorandums did not say that there was a guarantee by the broker, it was stated that a guarantee would have to be proven by the most forceful evidence. *Newbern Groves, Inc. v. C.H. Robinson Co.*, 53 Agric. Dec. 1766, 1790 (1994).

The use of f.o.b. acceptance final terms must be very clearly established due to the harshness of the terms and the rarity of its use in the trade. *Rose Valley Group, Inc. v. Misty Shores Trading, Inc.*, 53 Agric. Dec. 870, 874 (1994).

Fact of use of term f.o.b.a.f., if disputed, must be very clearly established, due to "the harshness of the conditions imposed . . . as well as . . . the rarity of its use in the trade . . ." *Morgan Prod. Corp. v. United Prod Co.*, 25 Agric. Dec. 1484, 1488-89 (1966).

e. CREDIBILITY

Various factors may be considered when assessing the credibility of a party's allegations. For instance, in *R.L. Burden Produce Serv. v. Taylor Produce*, 50 Agric. Dec. 1009, 1013 (1991), complainant alleged failure to pay for a series of four produce transactions. However, the evidence showed that complainant, during the informal stages of the proceeding, admitted to the Department that respondent had paid two of the items, but nevertheless included the two items in its formal complaint. On this basis, we said that although we would not normally have been disposed to credit respondent's assertion of payment due to the failure of respondent to correlate payments with transactions, we would give credit to respondent's representation of payment as to all four transactions due to complainant's lapse of memory as to two of the items.

f. EQUITY

Equity is not automatically available whenever plaintiff perceives a subjective unfairness in the legal outcome; equity grants relief when the law will not make plaintiff whole. Equity cannot be supported without adequate evidence of loss. *Pearl Ranch Produce LLC v. Desert Springs Produce LLC*, 67 Agric. Dec. 1465, 1475 (2008).

g. FAILURE TO OBJECT

Where Respondent failed to object to invoices sent by Complainant and received in the normal course of business, Respondent provided a credible explanation for its lack of objection and provided evidence that the sale did not take place, the failure of Respondent to object to the invoices did not create a sale between Complainant and Respondent. *Evans Sales, Inc. v. W. Coast Distrib., Inc.*, 67 Agric. Dec. 1441, 1461 (2008).

When documents such as mailgrams and invoices which contain terms of sale are not objected to in a timely manner, such documents are evidence of a contract containing the terms set forth therein. *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).

The failure of a party to object to an invoice received in the normal course of business does not create a sale which is otherwise non-existent. *Floriza Sales Co. v. Pamco Air Fresh, Inc.*, 47 Agric. Dec. 1328, 1340 (1988).

h. FOUNDATION

A verified signature on a questioned document is insufficient to show the authenticity of the document if there is no showing as to the knowledge of the person who signed it. *Great Am. Farms, Inc. v. William P. Hearne Produce Co.*, 59 Agric. Dec. 466, 469 (2000).

i. HEARSAY

Hearsay is admissible in administrative proceedings if it is the kind of evidence upon which responsible persons are accustomed to rely in serious affairs. *Cop Cotton Mills, Inc. v. Administrator*, 312 U.S. 126, 154-155 (1941). Under this rule, uncorroborated hearsay evidence where it did not appear that direct evidence was not conveniently available with respect to the facts alleged, was excluded. *In re Becker*, 16 Agric. Dec. 211, 214 (1957).

Moreau alleged that the sale to his agent Anderson was a sale by sample but was not present at the sale and did not submit a statement from Anderson. Held inadmissible hearsay. *Senter Bros., Inc. v. Moreau*, 18 Agric. Dec. 145, 147 (1959).

"While hearsay evidence is not necessarily inadmissible in these proceedings, if such evidence is admitted it is subject to careful scrutiny to determine the weight to which it is entitled." *G & S Farms v. Mendelson-Zeller Co.*, 20 Agric. Dec. 272, 277 (1961).

Account of sales received by complainant in regular course of business was properly admitted in evidence even though it was hearsay. *Mut. Vegetable Sales v. Joseph Notarianni & Co.*, 29 Agric. Dec. 1049, 1054 (1970).

j. INFERENCE DRAWN FROM FAILURE TO FOLLOW NORMAL PRACTICE AND REGULATIONS

Where the shipper claimed a sale and the receiver claimed the produce was received on consignment, the failure of the shipper to prepare an invoice showing a sale was found to be contrary to normal practice to contravene the Regulations, and to lend credence to the transaction having been one of consignment. *Procacci Bros. Sales Corp. v. B.T. Produce Co.*, 60 Agric. Dec. 341, 344 (2001).

k. INSPECTION BY INSPECTOR CONVICTED OF RECEIVING BRIBES

Four inspections were made of four lots of vine ripe tomatoes delivered to three of respondent's customers. Although all of the vine ripe tomatoes were the same brand and size and were shipped from the same packing house, one of the inspections showed two to four times the decayed and soft tomatoes as the other three inspections. Such inspection was performed by an inspector who had pled guilty to taking bribes, and the firm at which the inspection was performed was one of the firms whose personnel had been implicated in bribery of federal inspectors. Under the circumstances, for the purpose of determining whether there was a breach and the amount of damages resulting therefrom, the tomatoes that were the subject of the aberrant inspection were considered to have decayed and soft tomatoes equal to the average of the other tomatoes. *Oceanside Produce, Inc. v. JSG trading Corp.*, PACA Docket No. R-00-031 decided June 19, 2000, (unpublished decision).

Under the original f.o.b. contract the respondent who accepted the grapes had the burden of proving a breach on the part of complainant. Although under the PACA federal inspections are prima facie evidence of the truth of the statements recorded therein, it was held that such prima facie evidence is rebuttable, and that the credibility of the inspections was rebutted by the guilty pleas of the inspectors coupled with the implication of the buyer in the bribery of inspectors. It was found that the federal inspections were unconvincing, and that the respondent failed to prove a breach of contract. The complainant was awarded the original contract price. *Spencer Fruit Co. v. L & M Companies, Inc.*, 60 Agric. Dec. 799, 805 (2001).

l. INSPECTION NECESSARY TO PROVE BREACH

In the absence of an inspection by a neutral party at destination, the buyer fails to prove a breach. *Tantum v. Weller*, 41 Agric. Dec. 2456, 2457 (1982); *O.D. Huff, Jr., Inc. v. Pagano & Sons, Inc.*, 21 Agric. Dec. 385, 387 (1962).

For seller's failure to prove that effective rejection was wrongful due to seller's failure to secure inspection following rejection. *See Gilmeister Farms v. Schmieding Produce Co.*, 41 Agric. Dec. 2271, 2272 (1982).

Where a purchase and sale contract called for numerous bulk loads to contain a specific number of pumpkins and for payment to be made on the basis of a per pound price for the total weight of the loads but limited to the total poundage assuming a 15 pound per pumpkin average, the delivery of loads containing pumpkins which averaged more than 15 pounds was not a breach of contract, and no notice of breach was required. The inventory count performed by the receiving retail stores was accepted as

adequate evidence of the number of pumpkins delivered where such count was adequately documented, and no federal inspection was necessary to prove the count received. *PSM Produce, Inc. v. Boyer Produce, Inc.*, 60 Agric. Dec. 809, 826 (2001).

EXCEPTION: Chipping potatoes. *See Nicolls v. Fairmount Foods Co.,* 38 Agric. Dec. 469, 472-73 (1979); *Fairbrother v. Gulf Farms,* 28 Agric. Dec. 612, 615 (1969).

m. INVOICES NOT CONCLUSIVE EVIDENCE OF CONTRACT

Invoices, in and of themselves, are not conclusive evidence of existence of a contract or sale, particularly where Respondent has provided evidence that no sale existed, and Complainant has failed to rebut Respondent's evidence. *Evans Sales, Inc. v. W. Coast Distrib., Inc.*, 67 Agric. Dec. 1441, 1461 (2008).

Invoices are not conclusive evidence of the existence of a sale. *Cook Sales Co. v. Food City, Inc.*, 42 Agric. Dec. 1627, 1629 (1983).

The failure of a party to object to an invoice received in the normal course of business does not create a sale which is otherwise non-existent. *Floriza Sales Co. v. Pamco Air Fresh, Inc.* 47 Agric. Dec. 1328, 1340 (1988).

n. INVOICES ARE EVIDENCE OF CONTRACT TERMS

A failure to promptly complain as to the terms set forth in an invoice is considered strong evidence that such terms were correctly stated. *Pemberton Produce, Inc. v. Tom Lange Co.*, 42 Agric. Dec. 1630, 1636 (1983); *Casey Woodwyk, Inc. v. Albanese Farms,* 31 Agric. Dec. 311, 317 (1972); *George W. Haxton & Son v. Adler Egg Co.*, 19 Agric. Dec. 218, 224-25 (1960). (Such evidence is not conclusive and is merely one factor to be considered by the trier of the facts.)

Where, as to accepted goods, seller promptly issued invoices and respondent did not deny receiving same, and record disclosed no prompt objection thereto, buyer failed to meet its burden of proof in regard to alleged different price agreement than reflected by invoices. *Pac. Fruit, Inc. v. Bonafede*, 45 Agric. Dec. 371, 373 (1986).

Where buyer firm had changed hands and current ownership was unable to offer first hand testimony but called into question whether produce was purchased and received, the testimony of the seller's manager that he had personal knowledge of the sales, talked to the buyer's purchasing agent many times following receipt of the produce by buyer, and mailed invoices to the buyer, the inability of the buyer to show that a timely objection was made to the invoices was held to be sufficient proof that the produce was purchased, received and accepted. *C.H. Robinson Co. v. Tedesco's Wholesale Grocers, Inc.*, 50 Agric. Dec. 935, 937 (1991).

When Complainant sent Respondent invoices for each transaction showing the sales prices for the limes, and also sent Respondent weekly statements showing the sales prices for limes sold that week, to which Respondent did not object, and Respondent's former salesperson who was principally responsible for handling the contract with Complainant offered testimony that did not support Respondent, Complainant was found to have sustained its burden of proving that the lime prices were to be based on what Complainant elected to charge plus a packing fee, rather than Respondent's claim that the lime prices

were to be based on prices set forth in the Market News Service Reports. *Progreso Produce Ltd. 1 LP v. Fresh Group Ltd.*, 66 Agric. Dec. 1492, 1507 (2007).

o. NEGATIVE INFERENCES - TEMPERATURE TAPE

Failure to submit a temperature tape when asked to do so raises the negative inference that the tape would show abnormal transit. *Sharyland, L.P. v. Miller*, 57 Agric. Dec. 762, 767 (1998); *G.D.I.C., Inc. v. Misty Shores Trading, Inc.*, 51 Agric. Dec. 850, 863-64 (1992); *Monc's Consol. Produce Inc. v. A.J. Produce Corp.*, 43 Agric. Dec. 563, 566 (1984).

While acknowledging that a negative inference may be taken when a receiver neglects to retrieve a temperature recorder from the truck, held that such failure is nevertheless insufficient cause to conclude that the buyer failed to sustain its burden to prove normal transportation where there were no other factors present indicating that the transportation conditions were not normal. *Southern Specialties, Inc. v. Amerifresh, Inc.*, 66 Agric. Dec. 916, 921 (2007).

p. NEGATIVE INFERENCE RULE

Negative inferences may be taken when a party fails to provide obviously necessary documents or testimony. *In re: Mattes Livestock Co.*, 42 Agric. Dec. 81, 96 (1982); *In re: Speight*, 33 Agric. Dec. 280, 300-01 (1974); *Sec. & Exch. Comm'n v. Scott*, 565 F. Supp. 1513 (SD NY, 1983).

Buyer attempted to revoke acceptance of frozen potatoes after microbiological testing by buyer's lab. When seller requested retesting, buyer made two lots available for retesting and withheld two other lots. A negative inference was drawn against buyer for the lots it withheld, and its revocation of acceptance deemed unjustified. A negative inference was drawn against seller on the two available lots when it failed to show results of retesting, and buyer's revocation of acceptance was deemed justified as to those two lots. *Global Reliance, Inc. v. Pinnacle Food Groups LLC*, 73 Agric. Dec. 342, 358 (2014).

Where a grower's agent claimed to have allowed adjustments to purchasers and had issued invoices to the purchasers but did not submit in evidence copies of the invoices or other documents on which the adjustments were noted, a negative inference was drawn as to the existence of such documents and the alleged underlying adjustments. *Burnac Produce, Inc. v. Calavo Growers of Cal.*, 47 Agric. Dec. 1624, 1627 (1988). Citing *In re: Speight*, 33 Agric. Dec. 280, 300-01 (1974); *In re Mattes Livestock Co.*, 42 Agric. Dec. 81, 96 (1982); *In re DeJong*, 36 Agric. Dec. 1181, 1213 (1977), affirmed, 618 F.2d 1239, certiorari denied, 499 U.S. 1061; *Sec. & Exch. Comm'n v. Scott*, 565 F. Supp. 1513 (SD, NY 1983), affirmed per curiam, 734 F.2d 118 (2d cir. 1984); *Chase Manhattan Bank, N.A. v. Frenville*, 67 B.R. 858 (D, NJ 1986).

q. POLYGRAPH TESTS - ADMISSIBILITY

In excluding a polygraph report from consideration in a reparation proceeding, we said:

> We agree that the report should be excluded. In a leading federal case on the admissibility of polygraph tests the United States Court of Appeals for the 8th Circuit summarized the status of such tests as evidence in the following manner:
>
> > In applying the scientific acceptability standard to polygraph tests, all United States Courts of Appeals addressing the issue have

> excluded the results of unstipulated polygraph tests. These courts reasoned that the polygraph does not command scientific acceptability and that it is not generally believed to be scientifically reliable in ascertaining truth and deception to justify its utilization in the trial process. Consequently, they have held that the results of an unstipulated polygraph examination are either *per se* inadmissible or that the trial court did not abuse its discretion in refusing admission of the test results . . . *United States v. Alexander*, 526 F.2d 161 (8th Cir. 1975).

The above quotation is from *Martinous v. Keith Connell, Inc.*, 44 Agric. Dec. 1636, 1638-39 (1985).

r. PREPONDERANCE OF THE EVIDENCE

The party which has the burden of proof as to a fact must prove the fact by a preponderance of the evidence. *A.D. McGinnis Produce v. Pinder's Produce Co.*, 28 Agric. Dec. 249, 251-52 (1969).

". . . preponderance of the evidence, . . . is not necessarily controlled by the number of witnesses, but rather by their credibility." One witness was believed over two witnesses because of improbability of the two witness's testimony. *Am. Foods v. Corey Bros.*, 34 Agric. Dec. 401, 405 (1975).

s. PROOF OF MAILING

Proof that item was placed in the mail results in presumption that the item was received. *Abatti Produce, Inc. v. H.R. Bushman & Son*, 30 Agric. Dec. 558, 561-62 (1971).

Proof of proper mailing resulting in a presumption of its receipt can be established through proof of ordinary business practice. *George W. Haxton & Son v. Adler Egg Co.*, 19 Agric. Dec. 218, 224 (1960); *Meckel v. Cont'l Res. Co.*, 758 F.2d 811 (2d Cir., 1985); *Wells Fargo Bus. v. Ben Kozloff, Inc.*, 695 F2d 940 (5th Cir., 1983), rehearing denied 699 F 2d 1163, *cert. denied* 104 S. Ct. 77.

Where there was no evidence tending to confirm that invoices were received and opposing party positively swore that invoices were not received, strict proof of the mailing of the invoices was required. Such evidence would consist of a declaration by the person responsible for the mailing that the invoices were, in fact, properly addressed and placed in the mail. *Pismo-Oceano Vegetable Exch. v. A & S Produce, Inc.*, 56 Agric. Dec. 966, 968-69 (1997).

Proof required is testimony or sworn statement by person who mailed items, that of his or her personal knowledge, such items were properly addressed, and were placed in mail with proper postage. *Me. Potato Growers v. Orrell Produce Co.*, 14 Agric. Dec. 399, 403 (1955); *Butler v. S.D. Monash Produce Co.*, 11 Agric. Dec. 472, 476-77 (1952); *Postel v. Phil Peck Co.*, 10 Agric. Dec. 82, 87 (1951); *Goldsby-Evans Produce Co. v. Ernest E. Fadler Co.*, 9 Agric. Dec. 228, 235 (1950) (Testimony established that invoices were mailed, "and there is a presumption that they were received.")

t. REPORT OF INVESTIGATION

"The report contains both factual findings . . . and advisory opinions . . . and is included as evidence in the proceeding to be considered by the Presiding Officer. The report itself is neither binding on the Presiding Officer nor determinative of the Presiding Officer's final legal judgment. Each party is given

the opportunity to rebut the investigator's findings in the same manner as each is allowed to submit other evidence. When the record is presented to the Presiding Officer for preparation of a decision, the Presiding Officer examines all evidence: the Report of Investigation, the pleadings submitted by the parties, and any other evidence contained in the record. The Presiding Officer considers each piece of evidence and renders a decision based on the totality of the evidence contained in the record . . . " Investigator's mistaken characterization of a sale contract as consignment was found not to defeat the empirical findings of his audit. *Carmack v. Selvidge*, 51 Agric. Dec. 892, 902 (1992).

Unsworn evidence may be treated as evidentiary pursuant to 7 CFR § 47.7 if contained within the Department's Report of Investigation. *Tanita Farms, Inc. v. City Wide Distrib., Inc.*, 44 Agric. Dec. 1738-39 (1985) (Decision on Reconsideration).

u. SELF-EVIDENT AND CERTAIN

Parties concluded an f.o.b. contract that called for shipment of a load of cantaloupes to Houston, Texas, as the contract destination, but trucker disclosed to seller prior to loading that load was destined for Los Angeles. Seller then informed buyer through the broker that diversion to any other destination than Houston would result in contract terms being changed to "Acceptance Final, No Recourse." Buyer agreed, but shipped the load to Los Angeles where a federal inspection showed substantial condition defects. Buyer's defense that the load was en route to Houston through Los Angeles was found to lack credibility. It was stated that the acceptance final terms of the contract abrogated the warranty of suitable shipping condition, but left the seller liable for any material breach of the contract. A material breach, as the term is used in the Regulations, refers to all substantial breaches of contract other than a breach of the warranty of suitable shipping condition. The inspection in Los Angeles could be used to show a breach of the warranty of merchantability, applicable at shipping point, but would have to show condition defects so severe as to render it self-evident and certain that the commodity was non-conforming at shipping point. The certainty required was, however, stated to be reasonable certainty, not certainty that excludes all fanciful doubt. It was found that although the results of the inspection rendered it improbable that the cantaloupes were conforming at shipping point, it was not reasonably certain that they were non-conforming. *Martori v. Hous. Fruitland, Inc.*, 55 Agric. Dec. 1331, 1339 (1996).

By analogy to the judicial exception to the requirement that transportation be normal in order for the warranty of suitable shipping condition to apply, it was found that Canadian inspections could be used to attempt proof that the corn was not in suitable shipping condition. This proof would relate to the condition of the corn that would have been shown by a timely inspection following a timely arrival at the contract destination in Bainbridge, Georgia, and would have to demonstrate the breach of the warranty at that point with reasonable certainty. It was found that, although the condition factors shown by the Canadian inspections were extensive, the standard of reasonable certainty had not been met. *Alger Farms, Inc. v. Foster*, 57 Agric. Dec. 1655, 1668-69 (1998).

v. SELF-SERVING DOCUMENTS

A broker inspected the general run of lettuce on behalf of respondent buyer and following sale and shipment, issued a confirmation that disclosed no grade for the lettuce. On arrival, a federal inspection disclosed that the lettuce failed to grade U.S. No. 1, and the buyer rejected. After notice of rejection, the broker issued a second confirmation showing a sale of U.S. No. 1 lettuce. It was held that the second confirmation was a self-serving document and should be discounted. *Navajo Mktg. Co. v. Kaiser*, 19 Agric. Dec. 894, 898 (1960).

"As a general rule, anything in writing at time of transaction given more weight than subsequent statements by interested parties." *Chalona Bros. v. Associated Fruit Distrib., Inc.*, 10 Agric. Dec. 1430, 1432 (1951).

w. STATEMENTS BY PARTY WITHOUT PERSONAL KNOWLEDGE

Pleadings or statements under the documentary procedure signed by an attorney lack evidentiary value. *Royal Valley Fruit Grower's Ass'n v. Hamady Bros. Food Mkts., Inc.*, 37 Agric. Dec. 1925, 1927 (1978).

7 C.F.R. § 47.20(a)

x. STATEMENTS BY PERSON NOT UNDER OATH

". . . While Touchstone, in his letter of September 4, 1969, to the Department, has been very explicit regarding the making of the alleged contract, the fact remains that this was a statement not made under oath, by a witness who was not subject to cross-examination. John Findley, on the other hand, in denying Touchstone's statement, was under oath and was subject to cross-examination . . . Under these circumstances, we must give greater weight to the testimony of John Findley than to that of Touchstone." *Southland Produce Co. v. Findley Bros.*, 29 Agric. Dec. 1284, 1287-88 (1970).

Statements submitted by complainant were from a person with personal knowledge of the facts, but were unverified, hence they could not be given equal weight as verified statements from respondent's witness. *Cambridge Farms, Inc. v. H.R. Bushman & Sons*, 46 Agric. Dec. 1526, 1528 (1987).

An unsworn statement that is in evidence under the documentary procedure ". . . may be considered by the trier of the facts. (footnote omitted) The credence to be given to it is dependent upon the plausibility of the statement in the light of the surrounding circumstances." *Woods v. Conogra, Inc.*, 50 Agric. Dec. 1018, 1022-23 (1991).

"The allegations and testimony of respondent, under oath, to the effect that the $328.96 payment was made and accepted as full settlement are entitled to greater weight than the unsworn statement . . . contained in the report of investigation, that the amount was in part payment." *Anonymous*, 8 Agric. Dec. 598, 601 (1949).

". . . the statements of J. V. Cedergreen (in letters in the Report of Investigation) are not under oath and, therefore, they cannot be given as much weight as the statements of Bredenkamp which are in affidavit form." *Empire Foods, Inc. v. Fir Grove Farm*, 16 Agric. Dec. 202, 206 (1957).

y. TAPED PHONE CONVERSATIONS – ADMISSIBILITY

Federal statute making it illegal to intercept phone calls, and making intercepted messages inadmissible in evidence, has an exception for conversations taped by a party to the conversation. It was not proven that the law of Florida made such recordings illegal, or that, if it did, it was applicable to the facts of the case, or should take precedence over federal law as to admissibility. *Big Apple Pineapple Corp. v. Fashion Fruit Co.*, 58 Agric. Dec. 1106, 1108-09 (1999).

z. TESTIMONIAL EVIDENCE AS TO CONDITION DISCOUNTED

"We have often discounted testimonial evidence concerning the condition of perishable commodities, and stated the necessity of obtaining a neutral inspection showing the exact extent of damage." *Chiquita Brands, Inc. v. Joseph Williams, Jr. Co.*, 45 Agric. Dec. 374, 376 (1986).

aa. UNCONTROVERTED STATEMENTS

A sworn statement which has not been controverted must be taken as true in the absence of other persuasive evidence. *Sun World Int'l v. Bruno Dispoto Co.*, 42 Agric. Dec. 1675, 1678 (1983); *see also Apple Jack Orchards v. M. Offutt Brokerage Co.*, 41 Agric. Dec. 2265, 2267 (1982).

bb. UNVERIFIED PLEADINGS

Unverified pleadings cannot be given evidentiary value. *C.H. Robinson Co. v. ARC Fresh Food System, Inc.*, 50 Agric. Dec. 950, 952 (1991); *see also Prillwitz v. Sheehan Produce*, 19 Agric. Dec. 1213, 1215 (1960).

cc. WEIGHT GIVEN TO DOCUMENTS CONTEMPORARY WITH TRANSACTION

Documents issued at or near the time of the contract or transaction may be very material. In *Anonymous*, 8 Agric. Dec. 841, 845 (1949), we stated:

> We believe the telegrams to be very material. The telegrams were written shortly after the transactions and so represent [complainant's] understanding of the terms when fresh in mind. This was, of course, before the controversy herein arose and before there would be any reason for fabrication.

36. EXPRESS WARRANTY

See UCC § 2-313.

Parties entered into installment contract calling for the future delivery of potatoes which seller expressly warranted to chip on arrival without specifying any color criteria or other perimeters of quality. It was stated that while under such terms, the receiver has the sole right to decide whether potatoes would chip, receiver could not arbitrarily apply its standards so as to accept and reject potatoes of same characteristics. *Markel v. E. K. Bare & Sons*, 49 Agric. Dec. 631, 635 (1990).

Complainant created an express warranty that product would continue in useable condition by promising to place date codes on product and by the placing of such codes on the product. *Silver Star Processors, Inc. v. Costa Fruit & Produce Co.*, 53 Agric. Dec. 897, 906-08 (1994).

An express warranty may be any promise or guarantee by a seller which entices a buyer or consignee to accept goods. Complainant made an express warranty by promising that the cantaloupes would be "not green." *Stamoules, Inc. v. Sid Goodman & Co.*, 45 Agric. Dec. 2069-71 (1986).

Where complainant tendered six pallets of grapes to respondent's agent for examination and stated that they were from the lot of grapes subsequently shipped to respondent, the sale was by sample and amounted to an express warranty that the whole lot of grapes would conform to the sample. The condition or other

characteristics disclosed by a sample are subject to subsequent proof in the normal manner. *Delano Farms Co. v. Suma Fruit Int'l*, 57 Agric. Dec. 749, 754 (1998).

Note that potatoes may be viewed as guaranteed to chip by reason of an implied warranty of fitness for a particular purpose. *See* UCC § 2-315.

37. FEES AND EXPENSES

Where there is no oral hearing, the contract for the exchange of the produce may nevertheless provide for the payment of attorney fees. Where complainant placed words in its memorandum of sale requiring payment of attorney fees in connection with collection costs, it was held that the words used did not contemplate the payment of attorney fees in connection with the litigation of a good faith dispute. *Lionheart Group, Inc. v. Sy Katz Produce, Inc.*, 59 Agric. Dec. 449, 460 (2000).

Fees and expenses in hearing cases will be awarded to the extent they are reasonable. *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707 (1989); Pinto Bros. v. F. J. Bolestrieri Co., *38 Agric. Dec. 269 (1979); Nathan's Famous, Inc. v. Merberg*, 36 Agric. Dec. 243, 251-52 (1977).

Only expenses incurred in connection with the oral hearing will be awarded. *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707, 714-16 (1989).

a. ALLOCATION WHERE TWO OR MORE HEARINGS HELD AT SAME TIME

Coachella-Imperial Distrib. v. Franklin Produce Co., 37 Agric. Dec. 1257, 1263 (1978); *Coachella-Imperial Distrib. v. G. Mercurio Fruit & Prod. Co.*, 37 Agric. Dec. 1264, 1271 (1978); *Coachella-Imperial Distrib. v. United Fruit & Produce Co.*, 37 Agric. Dec. 1081, 1086-87 (1987).

b. AMOUNT

$100.00 per hour not excessive for competent counsel in the New York area. *Deardorf-Jackson Co. v. N.Y. Fruit Auction Corp.*, 37 Agric. Dec. 1577, 1582 (1978).

$125.00 per hour reasonable in view of complexities of proceeding. (1975 hearing in New York City) *Nathan's Famous, Inc. v. Merberg*, 36 Agric. Dec. 243, 247-50 (1977).

Issues were said not to warrant claim of $2,240.00 (32 hours at $70.00 per hour). Reduced to $700.00. *Patterson Produce Co. v. John Love Produce Co.*, 39 Agric. Dec. 1006, 1009 (1980).

Amount requested found excessive "considering the length and complexity of this proceeding." Legal fees reduced and lesser amount awarded. *Zoller Distrib. v. Tom Lange Co.*, 36 Agric. Dec. 428, 436-37 (1977).

Where complainant claimed 64 hours for time spent at hearing and hearing lasted only nine hours, only nine hours were awarded. Complainant claimed 161 hours for preparation; 80 hours were allowed as reasonable. *Potato Sales, Inc. v. Perfection Produce*, 38 Agric. Dec. 273, 280-81 (1979).

Requested $120.00 per hour was thought not unreasonable in view of the complexities of the case and the length of the hearing; however, amount awarded was reduced to $100.00 per hour. Such amount

was found to be more reasonable in view of the amount of reparation awarded. *Shriver v. Mkt. Pre-Pak, Inc.*, 39 Agric. Dec. 747, 748-49 (1980).

Complainant's counsel awarded $200.00 per hour. *E. Produce, Inc. v. Seven Seas Trading Co.*, 59 Agric. Dec. 853, 864-65 (2000).

c. ATTORNEY FEES UNDER SECTION 6e

Where a Chilean complainant, who had posted the double bond required by section 6(e) of the Act, requested a voluntary dismissal of its complaint due to the refusal of two of its key witnesses to come from Chile to attend the hearing in the United States, a dismissal without prejudice was ordered, and respondent was, therefore, not the prevailing party under the fee-shifting provision of Section 6(e). *Zeus Service S.A. v. L.A. Wroten Co.*, 60 Agric. Dec. 806, 861-62 (2001); (Note: this case was appealed by Wroten to the *Middle Dist. of Fla., Tampa Div.*, on June 6, 2002; [Case No. 8:02-CV-1007-T-27 TBM]. By order dated February 11, 2003, the Department's decision was affirmed.)

d. CONNECTION WITH ORAL HEARING

Fees and expenses will only be awarded to the extent that they are incurred in connection with an oral hearing. That an oral hearing might have been "contemplated" from the time of commencement of a reparation case does not necessarily make *all* work performed on that reparation case, from its early informal stages to the oral hearing, work that is "in connection" with the oral hearing. The prevailing party must clearly identify any fees and expenses incurred in connection with an oral hearing. *Grasso Foods, Inc. v. Americe, Inc.*, 69 Agric. Dec. 1547, 1566-67 (2010).

Costs associated with depositions which are admitted in evidence at the hearing are allowable. *Potato Sales, Inc. v. Perfection Produce*, 38 Agric. Dec. 273, 281 (1979).

"[E]xpenses which would have been incurred in connection with the case if that case had been heard by documentary procedure may not be awarded under Section 7(a)." *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707, 714-16 (1989); *Nathan's Famous, Inc. v. Merberg*, 36 Agric. Dec. 243, 251-52 (1977).

Post-trial brief denied as not being in connection with oral hearing. (Fees and expenses provision has been interpreted from the beginning to exclude any fees or expenses which would have been incurred in any event under the documentary procedure. Legislative history is said to support this view.) *Pinto Bros., Inc. v. Frank J. Balestrieri Co.*, 38 Agric. Dec. 269, 272-73 (1979); *Nathan's Famous v. N. Merberg & Son*, 36 Agric. Dec. 243, 251-52 (1977); *Mahns v. A.M. Fruit Purveyors*, 34 Agric. Dec. 1950, 1953 (1975).

Respondent claimed 9.6 hours for "Misc. services related to case." Held: No way to determine whether related to oral hearing and therefore denied. *Pinto Bros., Inc. v. Frank J. Balestrieri Co.*, 38 Agric. Dec. 269, 272 (1979).

Amount claimed for preparation of counterclaim and associated research disallowed as not incurred in connection with oral hearing. *Cal-Swiss Foods v. San Antonio Spice Co.*, 37 Agric. Dec. 1475, 1481 (1978).

Claim for fees incurred in connection with the preparation of answer, response to cross-claim, preparation of brief, and proposed findings of fact disallowed. *E. Produce, Inc. v. Seven Seas Trading Co.*, 59 Agric. Dec. 853, 865 (2000).

e. NON-PREVAILING PARTY BANKRUPT

Respondent, as the prevailing party, is entitled to reasonable fees and expenses pursuant to 7 U.S.C. § 499g(a), however, the award of fees and expenses is stayed pursuant to the automatic stay provision of the Bankruptcy Code because Complainant filed a Chapter11 bankruptcy petition before the issuance of a Decision and Order. *Paganini Foods LLC v. Westlake Distributors, Inc.*, 69 Agric. Dec. 868, 905 (2010).

f. NOT AWARDED AGAINST GROWER

Where complainant is a grower and not licensed or subject to license under PACA, a prevailing respondent may not recover fees and expenses. *Blasé v. Keegan*, 36 Agric. Dec. 709, 714 (1977).

g. PREVAILING PARTY

Attorney's fees and expenses were not awarded because there was no prevailing party.
Each of the four parties to this litigation failed in aspects of their allegations. With the exception of one party, all of the other parties were required to pay damages. The single party that did not have to pay damages, however, made arguments contrary to the statements of its witnesses at the hearing, and charged excessive amounts to the joint venture that was the subject of the litigation. It did not substantially prevail on the arguments it made in its complaint or on the arguments that it made in its post-hearing briefs. *L & M Farms, Inc. v. Y2S Trading, Inc.*, 69 Agric. Dec. 942, 974 (2010).

It was formerly stated that the prevailing party is the party in whose favor a judgment is entered even if the party does not recover its entire claim. *Offutt v. Berry*, 37 Agric. Dec. 1218, 1225 (1978); *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707, 715-16 (1989). However, these two cases were overruled as to the point stated by *Newbern Groves, Inc. v. C.H. Robinson Co.*, 53 Agric. Dec. 1766, 1854 (1994), see below. *See also M. Offutt Co. v. Caruso Produce, Inc*., 49 Agric. Dec. 596, 607 (1990), where respondent successfully defended against $75,342.81 of complainant's $79,521.73 claim, and respondent was found to be the prevailing party, although there was a positive award in complainant's favor.

Although Complainant was awarded only a small percentage of the damages claimed, Complainant prevailed on the issues upon which most time was spent at the oral hearing and was found to be the prevailing party in whose favor fees and expenses were awarded. *Mayoli, Inc. v. Weis-Buy Services, Inc.*, 65 Agric. Dec. 648, 668 (2006).

In *Anthony Vineyards, Inc. v. Sun World Int'l, Inc.*, 62 Agric. Dec. 342, 357 (2003), respondent prevailed on two of the three issues presented at the hearing and limited complainant's recovery to *32%* of the amount actually litigated at the hearing. Respondent was determined to be the prevailing party and was awarded attorney's fees and expenses, reduced by *32%*.

In *Newbern Groves, Inc. v. C.H. Robinson Co.*, 53 Agric. Dec. 1766, 1854 (1994), petition for reconsideration denied (54 Agric. Dec. 1444 (1995)). Although complainant recovered approximately one-fourth of the amounts claimed, it was found not to be the prevailing party in regard to any of the

respondents. Case contains extensive discussion of point. There is further important discussion in the Order on Reconsideration.

In *James Macchiaroli Fruit Co. v. Ben Gatz Co.*, 38 Agric. Dec. 1477, 1484 (1979), complainant claimed reparation in the amount of $50,673.70, but was awarded $19,247.70. Complainant was held to be the prevailing party without discussion.

In *Mic Bruce, Inc. v. Chiquita Brands, Inc.*, 45 Agric. Dec. 1215, 1244 (1986), complainant claimed $57,411.25 from respondent and was awarded $10,652.53. Complainant was found to be the prevailing party without discussion.

In *Valenzuela Produce v. Teddy Bertuca Co.*, 45 Agric. Dec. 1333, 1341 (1986), complainant sought reparation in the amount of $26,178.19, and respondent counterclaimed for $6,321.39. Complainant was awarded $5,735.36, and the counterclaim was dismissed. Complainant was found to be the prevailing party.

In *V.V. Vogel & Sons Farms v. Cont'l Farms*, 44 Agric. Dec. 886, 896 (1985), complainant sought reparation in the amount of $14,255.00, and respondent counterclaimed for $26,000.00 and requested an oral hearing. Complainant was awarded $7,704.00, and the counterclaim was dismissed. Complainant was found to be the prevailing party.

In *M & C P Farms v. Lloyd Myers Co.*, 45 Agric. Dec. 2099, 2105 (1986), complainant sought reparation in the amount of $69,180.25, and respondent counterclaimed for $5,000.00 in connection with the same transactions. Complainant was awarded $52,386.96, and the counterclaim was dismissed. Complainant was held to be the prevailing party.

Where a respondent has tendered a lesser amount than claimed by complainant, and is found to only be liable for such lesser amount, respondent is the prevailing party. *Dixon Tom-A-Toe Produce v. Kaleck*, 37 Agric. Dec. 1794, 1798 (1979); *George Arakelian Farms, Inc. v. Haral Fruits & Produce*, 37 Agric. Dec. 655, 658 (1979).

In case with two respondents, complainant prevailed as to one respondent, and other respondent prevailed as to complainant. Fees and expenses awarded accordingly. *Dimare Bros., Inc. v. Wholesale Produce Supply, Inc.*, 39 Agric. Dec. 257, 260 (1980).

In a case that arose under the double bond provision of Section 6(e) of the PACA, a Chilean complainant, who had posted the double bond required by Section 6(e), requested a voluntary dismissal of its complaint due to the refusal of two of its key witnesses to come from Chile to attend the hearing in the United States. A dismissal without prejudice was ordered, and respondent was, therefore, not the prevailing party under the fee-shifting provision of Section 6(e). Discussion of the disposition of voluntary dismissals under the Federal Rules of Civil Procedure in relation to fee shifting provisions of federal statutes and application by analogy to reparation cases. *Zeus Service S.A. v. L.A. Wroten Co.*, 60 Agric. Dec. 806, 861-62 (2001).

h. PROCEDURAL REQUIREMENTS MUST BE FOLLOWED

Where a prevailing party failed to include in its claim an explanation of how each item of fees and expenses was computed, and claim was not accompanied by the required supporting affidavit, the full amount requested was not allowed. However, since the record showed that transportation cost and

subsistence in specific amounts were incurred, these amounts were awarded. Attorney fees were disallowed. *Coachella-Imperial Distrib. v. E. Armata, Inc.*, 32 Agric. Dec. 909, 915-16 (1973). To same effect is *Wileman Bros. & Elliott, Inc. v. E. Armata Auction Sales Corp.*, 32 Agric. Dec. 927, 933 (1973).

Although complainant was found to be the prevailing party, no fees and expenses could be awarded because complainant's claim was filed late, was not itemized, contained no explanation of separate items and was not accompanied by the required affidavit. *L.E. Jensen & Sons, Inc. v. Huston Produce, Inc.*, 51 Agric. Dec. 814, 837-39 (1992).

i. SECRETARY TO DETERMINE WHAT IS REASONABLE

In hearing cases, it is the province of the Secretary to determine what are reasonable fees and expenses. *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707, 715 (1989). In the *Mountain Tomatoes* case, it was held that the failure of the parties to enter into serious settlement negotiations after being urged by the presiding officer to do so could be taken into consideration in determining the reasonableness of fees and expenses. Extensive discussion and item-by-item review of claimed fees and expenses. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983).

j. SET-OFF AGAINST REPARATION DUE OTHER PARTY

Where complainant was found to be due only $4,178.92 on a claim of $79,521.73, respondent was held to be the prevailing party and entitled to fees and expenses in the amount of $13,368.27. However, complainant was in bankruptcy and Secretary was stayed from issuing an award in respondent's favor for its fees and expenses. It was held that "[s]ince fees and expenses are, under the Act awardable as additional reparation, not to a party's attorney, but to the party, we will set off the $13,368.27 against the $4,178.92" which would have otherwise been awarded to complainant. No award was made to either party. *M. Offutt Co. v. Caruso Produce, Inc.*, 49 Agric. Dec. 596, 607 (1990). *See also Weller v. George*, 41 Agric. Dec. 294, 296-97 (1982), where complainant admitted liability for the counterclaim, and the amount of the counterclaim was offset against the amount awarded to complainant in the original claim.

k. SPECIFIC ITEMS

Fees and expenses of an attorney who appeared voluntarily as a personal attorney of certain of Respondent's witnesses, and who served no real purpose at hearing other than to protect the personal interests of his clients, were not reasonable, and therefore disallowed. *Evans Sales, Inc. v. W. Coast Distrib., Inc.*, 67 Agric. Dec. 1441, 1464 (2008).

As Complainant failed to establish that two attorneys were necessary to be present and represent it at the hearing, Complainant was only awarded the fees and expenses attributed to its lead attorney. *Progreso Produce Ltd. 1 LP v. Fresh Group Ltd.*, 66 Agric. Dec. 1492, 1518 (2007).

Where Respondent's attorney made a claim for fees and expenses relating to time spent preparing a post-trial brief, fees for time spent in preparation of the brief were disallowed as they were not in connection with the oral hearing, and would have been incurred had the case been decided by documentary procedure. *Evans Sales, Inc. v. W. Coast Distrib., Inc.*, 67 Agric. Dec. 1441, 1463 (2008).

Complainant's claim for fees and expenses related to post-hearing expenses, including the preparation of its brief, were determined not to be in connection with the oral hearing and were denied. *Progreso Produce Ltd. 1 LP v. Fresh Group Ltd.*, 66 Agric. Dec. 1492, 1518 (2007).

In *Newbern Groves, Inc. v. C.H. Robinson Co.,* 53 Agric. Dec. 1766, 1768-69 (1994), employment of salaried in-house counsel did not preclude an award of attorney fees to such counsel at market rates.

Fees and expenses of Respondent's non-attorney representative who appeared as a voluntary witness at hearing were reasonable and allowed. *Evans Sales, Inc. v. W. Coast Distrib., Inc.*, 67 Agric. Dec. 1441, 1464 (2008).

Fee awarded to non-attorney representative. *O.P. Murphy Produce Co. v. Genbroker Corp.*, 37 Agric. Dec. 1780, 1785 (1978).

Rules of Practice do not provide for award of fees and expenses for *pro se* representation. *Crow v. Mr. Spud, Inc.*, 38 Agric. Dec. 705, 715 (1979).

Attorney fees for time spent in travel disallowed. *Golden Harvest Farms, Inc. v. Stanley Produce Co.*, 38 Agric. Dec. 727, 730 (1979); *E. Produce, Inc. v. Seven Seas Trading Co.*, 59 Agric. Dec. 853, 865 (2000).

Where Respondent's attorney made a claim for fees and expenses relating to travel to the hearing in California from New Jersey, the state where the attorney's office is located, and back, fees for time spent on travel were disallowed. *Evans Sales, Inc. v. W. Coast Distrib., Inc.*, 67 Agric. Dec. 1441, 1463 (2008).

Telephone calls which were not detailed as to necessity and as to who called whom – denied. *Byrd Foods v. A.E. Albert & Sons,* 38 Agric. Dec. 995, 998 (1979).

Depositions - travel expenses in connection with deposition taken by written questions denied. Also denied attorney fees in connection with deposition by written questions of complainant and stenographic expenses denied as excessive. *Byrd Foods v. A.E. Albert & Sons*, 38 Agric. Dec. 995, 998 (1979).

Where Respondent's attorney made a claim for fees and expenses relating to travel within the state of California during the hearing for the purpose of interviewing witnesses scheduled to testify at hearing the following day, fees for time spent on travel were disallowed. *Evans Sales, Inc. v. W. Coast Distrib., Inc.*, 67 Agric. Dec. 1441, 1463 (2008).

Eight complainants out of total often were represented by one attorney, and claims for total time spent at hearing were submitted for each of the eight complainants. Held fee must be split between the eight complainants, but attorney was allowed total time at hearing, not 8/10's as urged by respondent, since it was necessary that attorney be at a hearing for full-time. *Ashley v. Cyr Bros. Meat Packing Co.*, 36 Agric. Dec. 401, 420-21 (1977).

Subsistence only allowed when attendance required at a point so far removed from place of residence of party as to prohibit return thereto day-to-day. *Tenneco W., Inc. v. Gilbert Distrib. Co.*, 38 Agric. Dec. 488, 493-94 (1979). Applied to attorneys. *Patterson Produce Co. v. John Love Produce Co.*, 39 Agric. Dec. 1006, 1009 (1980).

Claim based on appearance of principal at depositions of witnesses disallowed. *Patterson Produce Co. v. John Love Produce Co.*, 39 Agric. Dec. 1006, 1010 (1980).

Claims for witnesses who were subpoenaed for appearance at the hearing but not called, disallowed. Since complainant had taken their deposition, it should have known that these witnesses would not be called. *Patterson Produce Co. v. John Love Produce Co.*, 39 Agric. Dec. 1006, 1010 (1980).

Fees for voluntary non-subpoenaed witness allowed. Analogy with federal court does not hold because of our statutory provision. *Watson Distrib. v. Fruit Unlimited, Inc.*, 42 Agric. Dec. 1613, 1618 (1983).

Expenses incurred in airline travel and for hotel, which were not documented, were allowed since other party did not object to these expenses. *E. Produce, Inc. v. Seven Seas Trading Co.*, 59 Agric. Dec. 853, 865 (2000).

l. TIMELY FILING NECESSARY

Where the claim of the prevailing party is not timely filed, it cannot be allowed. *Brown & Hill Tomato Shippers, Inc. v. Superior Shippers Assoc., Inc.*, 32 Agric. Dec. 503, 506-07 (1973).

38. F.O.B.

UCC terminology is "shipment contract." *See* UCC § 2-319, Comment 4.

The Regulations (7 C.F.R. § 46.43 (i)), in relevant part, define f.o.b. as meaning "that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition . . ., and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed." *Oshita Mktg., Inc. v. Tampa Bay Produce, Inc.*, 50 Agric. Dec. 968, 973-74 (1991).

The buyer has the risk of loss in transit in an f.o.b. sale. *In re Ben Gatz Co.*, 38 Agric. Dec. 1038-39 (1979).

"Where a tender or delivery of goods so fails to conform to the contract as to give a right of rejection the risk of their loss remains on the seller until cure or acceptance." UCC § 2-510(1).

In an f.o.b. "no grade" contract, it is the shipper's obligation to load subject produce at shipping point which conforms to the contract, and which is in suitable shipping condition. *Main St. Produce, Inc. v. W. Veg. Produce, Inc.* and *Main St. Produce, Inc. v. Florance Distributing Co.*, 74 Agric. Dec. 193, 220 (2015).

In an f.o.b. contract, where the parties agree upon a destination, it is the seller's obligation to ship produce that arrives at the destination in suitable shipping condition. *La Valenciana Avocados Corp. v. Tomato Specialties, LLC*, PACA Docket No. W-R-2013-403, decided July 22, 2015 (decision unpublished).

a. ACCEPTANCE TERMS

See 7 C.F.R. § 46.43(1)

Where goods on track at Nogales, Sonora, Mexico, were sold "f.o.b. Nogales, Arizona," basis "Nogales Government Inspection and Acceptance," and shipped by seller to buyer in North Carolina where they were federally inspected and subsequently rejected by buyer, the rejection was wrongful. It was held

that the terms fell under "f.o.b. acceptance" in the regulations, and that under such terms, "[t]he buyer must accept the produce in order to obtain any relief for breach of contract by the seller. *L. Gillarde v. Joseph Martinelli & Co.* (1st Cir. 1948) 168 F.[2d] 276, [amended] 169 F.2d 60 cert. den. 33[5] U.S. 885. Having rejected the shipment, respondent is liable to complainant for the loss sustained on resale of tomatoes and is barred from claiming a breach of warranty, including the warranty of suitable shipping condition, on the part of complainant." *Alpha Produce Co. v. Kelly & Weatherington, Inc.*, 18 Agric. Dec. 1488, 1493 (1959).

b. ACCEPTANCE FINAL TERMS

See 7 C.F.R. § 46.43(m).

Juice grapes were sold "f.o.b. acceptance final" on October 13th and warranted to have been shipped on that day from California and to be U.S. No. 1 on that day. Seller further undertook in the contract to divert railcar from Kansas City on the B & O Railroad, but delayed two days in issuing the diversion order and diverted via the Pennsylvania Railroad causing two-day delay in arrival at destination where grapes were accepted by buyer, who then sought reparation for breach of contract. It was held that inspection on October 11th at shipping point showing U.S. No. 1 was best evidence of condition at time of shipment on the 13th; that warranty of suitable shipping condition was not available under f.o.b. acceptance final terms, but that seller materially breached the contract by issuing untimely and improper diversion orders to the railroad. Buyer was entitled to the difference between the market value of goods meeting contract requirements on the date when such goods should have been delivered at contract destination and the value of such goods at that place on the date they were actually delivered. *L. Gillarde Sons Co. v. I. Meltzer & Sons, Inc.*, 23 Agric. Dec. 481, 486 (1964).

Fact of use of term, if disputed, must be very clearly established, due to "the harshness of the conditions imposed . . . as well as . . . the rarity of its use in the trade. . . ." *Morgan Products Corp. v. United Prod Co.*, 25 Agric. Dec. 1484, 1488-89 (1966).

Where contract terms were f.o.b. acceptance final, the supply of vine ripe tomatoes when the contract specified gas green tomatoes was a material breach. *DeSomma v. All World Farms, Inc.*, 61 Agric. Dec. 821, 833 (2002).

Where seller stated it wanted no complaints with respect to the lettuce and that condition was conveyed to respondent who, nevertheless took the goods, shipment was found to be f.o.b. acceptance final. Buyer could not, therefore, complain about condition or quality defects at destination. *Colendich Farms, Inc. v. Finest Fruits, Inc.*, 46 Agric. Dec. 986, 988-89 (1987).

Where lettuce, upon arrival, showed 6% quality defects, 4% tipburn, 8% discoloration of head leaves and 8% decay, respondent had no recourse since use of f.o.b.a.f. terms voids the warranty of suitable shipping condition. *Brady v. Ben B. Schwartz & Sons*, 36 Agric. Dec. 437, 440 (1977).

c. CONVERSION

In an f.o.b. sale, loss of goods through conversion by trucker falls upon buyer. *Salinas Mktg. Coop. v. Loving's Produce*, 22 Agric. Dec. 1155, 1158 (1963).

However, "[w]here a tender or delivery of goods so fails to conform to the contract as to give a right of rejection the risk of their loss remains on the seller until cure or acceptance." UCC § 2-510(1).

Also, under UCC § 2-722, the seller, if it had an insurable interest, would have a right of action against a third party who so dealt with the goods as to cause injury to a party to the contract. This section should probably be interpreted so as to allow an action by the seller against innocent, or non-innocent, purchasers for value from a trucker who converts goods even though the buyer in an f.o.b. sale would have the primary cause of action. The last part of paragraph (a) speaks of a cause of action consequent upon conversion, and there is no reason in such a case to limit the cause of action to a third party who first caused the injury. In such a case, subsequent good-faith purchasers for value from the party who converted the goods also cause a continuing injury to the seller and are third parties in relation to the seller. An f.o.b. seller would have an insurable interest (since there is always the possibility in an f.o.b. sale that the goods might be rejected on arrival).

Where the owner/shipper of a load of perishables sold the load f.o.b. to customers in Connecticut, and the trucking company converted the load and secured the services of a licensed firm, acting as a broker or dealer to dispose of the load, such firm was liable to the owner for the value of the perishables, though such firm acted in good faith without knowledge of the lack of title in the trucking company, and the goods had already been disposed of and the trucking company paid therefore, when the licensed firm discovered the owner's interest in the goods. "No right, title or interest may be acquired as the result of an unauthorized or wrongful sale, gift, exchange, pledge, mortgage, or other transfer of property by a bailee in possession, though to an innocent purchaser. The bailor is not divested of his title by such an unauthorized act and may recover the property or its value from the vendee or transferee in an appropriate action." The Secretary was found to have jurisdiction to award reparation as to a transaction involving stolen goods. It was also stated that even if the licensed firm that received the goods from the trucker was acting as a commission merchant, "the general and almost universally recognized rule at common law is that a factor or commission merchant who receives property from his principal, sells it under the latter's instructions, and pays him the proceeds of the sale, is guilty of a conversion if his principal had no title thereto or right to sell the property, and that the factor is liable to the true owner for the value of the property even though he acted in good faith and in ignorance of his principal's want of title." Section 2-722 of the UCC was not mentioned in the decision, but since the complainant seller, in view of the f.o.b. sale, would not have had title, such section is the only possible basis for complainant to have had standing. *Scott & Allen v. C.H. Robinson Co.*, 53 Agric. Dec. 1901, 1904 (1994). *See also Smith Potato, Inc. v. Wood Bros. Produce,* 45 Agric. Dec. 2091, 2094-95 (1986); *George Teifer, Inc. v. LaMantia Bros. Arrigo Co.*, 39 Agric. Dec. 1498, 1501-02 (1980).

Where, under an f.o.b. acceptance final sale, respondent was deemed to have accepted a shipment at shipping point and upon arrival of the shipment at the place of business of respondent's customer on December 30th, such customer refused to unload until an inspection could be obtained after the New Year's holiday, and complainant then ordered the truck to another place of business and unloaded it without respondent's consent, it was held that complainant had converted the produce. Complainant, after the holidays, resold a part of the load and requested and secured respondent's help in placing the remainder of the produce with another firm. The resultant net proceeds were substantially less than the original sale price, and it was held that respondent, having accepted the produce, was liable to complainant for the original contract price, that complainant was liable to respondent for the value of the produce at time of conversion and that such value was the original contract price, and that respondent only owed complainant the net proceeds of the resale of the portion of the load that respondent handled at complainant's request. It was stated that:

> "Conversion" is exercise of dominion over personal property to exclusion or in defiance of [the owner's] rights and it may be committed by acquiring possession

> of goods with an intent to assert right over them which is, in fact, adverse to that of the owner. (citing case)

It was further said that:

> A converter need intend nothing evil; so long as he intends to deal with the property in a way which is in fact inconsistent with the [owner's] right, he is a converter. (citing case)

Turbana Corp. v. Tom Lange Co., 49 Agric. Dec. 1221, 1225-26 (1990).

Where a close review of the evidence revealed that the shipper recovered ownership of the load from its customer but subsequently relinquished beneficial ownership to the carrier, held that the carrier had not converted the load and the customer could not be held liable to the shipper for the salvage value, having paid the proceeds to the carrier. *Christian Salvesen Packing & Mktg. Co. v. Waldo H. Lailer & Co.*, 49 Agric. Dec. 645, 650 (1990).

d. FREIGHT

"In an f.o.b. transaction, the buyer is responsible for paying freight . . ." *In re Ben Gatz Co.*, 38 Agric. Dec. 1038-40 (1979).

"In an f.o.b. sale, since the buyer is responsible for paying the freight, if the seller initially finds a trucker, pays the freight and invoices the buyer for the freight, the seller is, as a matter of law, the agent of the buyer, and the law of agency is applicable. Under the law of agency, such a seller is in a fiduciary capacity and cannot make a secret profit on the freight. The seller can, of course, charge the buyer whatever fee or service charge is agreed upon to compensate him for procuring the truck and paying the freight, but this must be disclosed to the buyer. In the absence of an agreement and disclosure, the buyer has a right to assume that the amount of freight shown on the invoice is the amount of freight paid by the seller on the buyer's behalf." *In re Ben Gatz Co.*, 38 Agric. Dec. 1038-40 (1979).

e. RISK OF DELAY DUE TO FAILURE TO MEET IMPORT REQUIREMENTS

Where a buyer has specified the method of transportation and the carrier to a foreign country, the buyer is in a better position to know the importation requirements of that country. Accordingly, in an f.o.b. contract, the buyer was responsible for delays caused by failure to affix labels required by that country when the contract terms did not require the seller to affix those labels. The warranty of suitable shipping condition warrants that the produce was in a condition when loaded such that under normal shipping conditions, it would arrive at contract destination without abnormal deterioration. What is abnormal deterioration, which would constitute a breach of the warranty, is determined by PACA standards and regulations, and abnormal deterioration is not determined by the laws and regulations of the foreign country which is the ultimate destination. *Good v. Europacific Fruit Exp., Inc.*, 66 Agric. Dec. 891, 910 (2007).

f. TERMS ASSUMED

". . . the existence of f.o.b. terms are [sic] assumed when the contract is silent as to terms of delivery, . . ." *Hunts Point Tomato Co. v. S & K Farms, Inc.*, 42 Agric. Dec. 1224-25 (1983). *See* UCC § 2-503,

Comment 5, and *Ocean Breeze Exp., Inc. v. Rialto Distrib., Inc.*, 60 Agric. Dec. 840, 899 (2001). *See also White & Summers, Handbook of the Law Under the U.C.C.*, § 5-2, p. 143 (1972).

39. FOREIGN COMMERCE

Although the literal words of the PACA would apply to a foreign resident buying or selling in the United States, the Secretary has never considered such a foreign resident under the Secretary's jurisdiction if no agent or representative (other than a broker) is in the country. Solicitor's Opinion 254; Jan. 31, 1945.

40. FREIGHT

Official notice taken of the fact that freight rates charged in the produce industry are commonly flat rates which are applicable whether or not a full load is shipped. *S. Fla. Growers Ass'n, Inc. v. Country Fresh Growers & Distrib., Inc.*, 52 Agric. Dec. 684, 700-01 (1993).

See sub-topic **FREIGHT** under **DAMAGES, DELIVERED SALE, and F.O.B.** See major topic **TRANSPORTATION**.

41. GOOD DELIVERY

Defined - 7 C.F.R. § 46.43 (j). **The term "good delivery" is used in the Regulations only in reference to iceberg lettuce which is the only commodity for which there are official good delivery standards.** However, the term is commonly used to refer to the definition of suitable shipping condition in reference to any perishable commodity. Reference to the good delivery standards for lettuce in the Regulations will show the general methodology for application of the concept to all perishables.

Remember, there are specific published good delivery standards for lettuce - 7 C.F.R. § 46.44. These do not apply to leaf lettuce. *Billingsley Farms, Inc. v. E.L. Kempf & Son*, 37 Agric. Dec. 721, 726 (1978).

See **SUITABLE SHIPPING CONDITION** - this index.

For Latent Defects see **MERCHANTABILITY - WARRANTY OF**, subheading - **WARRANTY'S APPLICABILITY TO LATENT DEFECTS** - this index.

a. AVERAGING LOTS TO DETERMINE

When one lot from a single load (sold under one contract) did not make good delivery and the other lot did, the two lots were averaged, and it was determined that the load as a whole did not make good delivery. *Idaho Fruit Sales, Inc. v. Milwaukee Produce Distrib. Co.*, 37 Agric. Dec. 737, 742 (1978).

In *Sin-Son Produce Co. v. Tom Lange Co.*, 44 Agric. Dec. 409, 411 (1985), we found that a truckload containing three sizes of tomatoes shipped under one contract was a "commercial unit," and the whole load was deemed accepted when the tomatoes were unloaded "because a receiver cannot accept a part of a truckload of perishable agricultural commodities while rejecting the rest." We found that the inspection results as to each size should be averaged together to arrive at a damage percentage for the whole load in order to determine whether the load as a whole made good delivery. *See also Jen Sales, Inc. v. S. Friedman & Sons, Inc.*, 53 Agric. Dec. 810, 815 (1994).

HOWEVER:

After analysis of the definition of "commercial unit" in the Regulations, and of prior cases holding that lots of similar produce on a load should be averaged to determine if the load as a whole made good delivery, it was held that there is no reasonable basis for continuing to require that a breach pertain to a load as a whole. It was stated that "[t]here is nothing to prohibit rejection of a shipment when the breach exists only as to a portion of the load, and there is no prohibition of finding a breach and damages as to only a portion of a load when the whole load is accepted." The portions of a load which will be considered as subject to a finding of a breach of contract were stated to be those which are distinguished in federal inspections. It was also stated that "[t]his should not be viewed as having any effect upon the line of cases dealing with those situations where only a portion of a homogenous load is inspected and found to be in poor condition." *Primary Exp. Int'l v. Blue Anchor, Inc.*, 56 Agric. Dec. 969, 985 at n. 31 (1997).

b. GRADE STANDARDS AS REFERENCE POINT FOR DETERMINING

See **SUITABLE SHIPPING CONDITION - RELATIONSHIP TO GRADE STANDARDS** - this index.

Grade standards were used as a reference point for determining good delivery for cucumbers sold without any specification as to grade. "Where U.S. grade tolerances of 1% or less (for decay) are allowed for a commodity we have held that, depending on the applicable circumstances, such commodity can make good delivery with double or sometimes more than double the 1% decay allowed under the U.S. Grade Standards." *Pope Packing & Sales, Inc. v. Santa Fe Vegetable Growers Coop. Ass'n*, 38 Agric. Dec. 101 (1979). **Exception:** *See Borton & Sons, Inc. v. Firman Pinkerton Co.*, 51 Agric. Dec. 905, 911 (1992).

"When the tolerances provided by a U.S. grade standard for a commodity are higher (than 1%) . . . the amount of defects in excess of the published tolerances which would be found to comport with good delivery would not be proportionally as great." *Denice & Felice Packing Co. v. Super Food Services, Inc.*, 38 Agric. Dec. 744, 747 (1979). (Approximately half again as much as the published tolerances is usually allowed for coast-to-coast shipments.)

c. COMMODITIES

Apples:

Discussion of the presence and extent of water core damage. *Apple Jack Orchards v. M. Offutt Brokerage Co.*, 41 Agric. Dec. 2265-2266 (1982).

Where 20% injury at destination on Extra Fancy apples held to represent a breach of the f.o.b. contract even though the shipping point inspection showed no damage. *Yakima Fruit & Cold Storage Co. v. Int'l A.G., Inc.*, 42 Agric. Dec. 275 (1983).

Asparagus:

Inspection showing 13% serious damage held to reveal a breach of the f.o.b. contract. *Oshita Mktg., Inc. v. Tampa Bay Produce, Inc.*, 50 Agric. Dec. 968, 974 (1991).

Beans, Snap:

Where inspection made three days after shipment revealed 12% watery soft rot, held that beans failed good delivery. *Cayuga Producers Coop., Inc. v. Krotzki Farm Produce*, 8 Agric. Dec. 287, 290-91 (1949).

Broccoli:

Where destination inspection revealed 4% decay after ten-day transit period, held that railcar load of broccoli made good arrival. *Martori v. Olympic Wholesale Produce & Foods, Inc.*, 53 Agric. Dec. 887, 891 (1994); *H.H. Mulhardt Packing Co. v. First Nat'l Stores, Inc.*, 34 Agric. Dec. 1133, 1135 (1975).

Cabbage:

Where destination inspection made on carload of cabbage revealed 12% damage by yellowing and 1% damage by discolored areas, held that cabbage made good arrival. *Cal-Zona, Inc. v. Charles P. Sweeney Co.*, 22 Agric. Dec. 579, 583-84 (1963).

Cantaloupes:

Inspection made 48 hours after arrival and showing 10% decay too remote in time to reflect the condition of the cantaloupes on arrival. *G & S Produce Co. v. Watton Distrib., Inc.*, 35 Agric. Dec. 1653, 1657-58 (1976).

Federal appeal inspection made seven days after shipment and showing 2% soft and 5% decay (ranging from 0 to 33%) held to support claim that product failed good arrival. *G & S Produce Co. v. Schnuck Distrib. Co.*, 34 Agric. Dec. 1604, 1608 (1975).

Inspection made on railcar load of cantaloupes sold "f.o.b. rolling car" six days after date of sale, and showing 1% fresh cracks, 2% damage by bruising and 5% decay, found to have met good arrival requirements. *G & S Produce Co. v. L.R. Morris Produce Exch.*, 31 Agric. Dec. 1167, 1170 (1972).

Inspection made on railcar load ten days after shipment and showing 4% damage by bruising, 1% damage by fresh cracks, 1% damage by large sunken areas and 4% decay. Load was found to have made good arrival. *Woods Co. v. Robert T. Cochran & Co.*, 22 Agric. Dec. 1295, 1298 (1963).

Inspection at destination after 11 days in transit showed an average of 10% decay. Held that evidence fails to establish that the cantaloupes were not in suitable shipping condition. *Anonymous*, 9 Agric. Dec. 244, 249 (1950).

Cherries:

Shipment of bing cherries showing 2% decay at destination held not abnormally deteriorated. *Staples & Son Fruit Co. v. Auster Co.*, 37 Agric. Dec. 475, 481 (1978).

Cucumbers:

Cucumbers containing 2% decay were found to meet the warranty of suitable shipping condition. *Pope Packing & Sales, Inc. v. Santa Fe Vegetable Growers Coop. Ass'n*, 38 Agric. Dec. 101, 104-05 (1979).

Where cucumbers sold f.o.b. arrived with 4% decay, the product was found not to meet suitable shipping warranty. *HM Distrib. v. Van Buren Cnty. Fruit Exch. of Fla., Inc.*, 44 Agric. Dec. 528, 531 (1985).

Grapes:

Shipment of grapes showing 3% wet and sticky and 4% decay found to fail good delivery. *Tamouzian Bros. v. Prevor-Mayrsohn Int'l*, 34 Agric. Dec. 892, 895-96 (1975).

Where recording thermometer reflected that proper temperatures were maintained on board truck and there was no transit delay, grapes which had average 8% serious damage and 6% decay were not in suitable shipping condition. *Granada Mktg., Inc. v. Nat'l Fresh Fruit & Vegetable Co.*, 45 Agric. Dec. 1610, 1616 (1986).

Lettuce:

Good delivery standards specified in the Regulations apply only to iceberg lettuce and do not apply to leaf lettuce. *Billingsley Farms, Inc. v. E.L. Kempf & Son*, 37 Agric. Dec. 721, 726 (1978).

Where the contract specifically excluded bruising and/or discoloration following bruising, an inspection showing 33% discoloration following bruising and no other defects conforms with the f.o.b. terms. *Garin Co. v. Nash-Decamp Co.*, 44 Agric. Dec. 1283, 1286 (1985).

Melons - Honeydew:

Where 9% serious damage to honeydew melons is considered excessive given normal transit conditions. *Half Moon Fruit & Produce Co. v. Dan Garcia Brokerage, Inc.*, 42 Agric. Dec. 2048, 2051 (1983).

Onions:

Onions containing 8% total defects, including 1% decay found to have made good arrival. *Sunfresh, Inc. v. Brown*, 49 Agric. Dec. 626, 630 (1990).

Held that for northern onions, an allowance of 8% total defects including up to 4% decay was appropriate for an f.o.b. shipment from Washington to East coast receivers. *Flanagan & Jones, Inc. v. World Wide Consultants, Inc.*, 53 Agric. Dec. 828, 852 (1994).

Where 3% decay at destination was found to show that the onions made good arrival. *Am. Potato Co. v. D.L. Piazza Co.*, 17 Agric. Dec. 187, 190 (1958).

Oranges:

Where two truckloads of oranges, each of which traveled two days to destination, were found to contain 14% and 12% damage by skin breakdown respectively, shipper was found to have breached the warranty of suitable shipping condition. *Marion Cnty. Citrus Co. v. Egan, Fickett & Co.*, 23 Agric. Dec. 1289, 1293 (1964).

Inspection made at destination after three days of transit showed 11% total defects including 3% decay. Found that oranges made good arrival. *Lake Fruit Co. v. Jackson*, 18 Agric. Dec. 140, 143 (1959).

Pears:

Where the shipment was handled under normal transportation service and conditions, and the federal inspection showed 3% decay and 4% overripe, this condition approximately one day after arrival at destination is not adequate proof that the shipment was in unsuitable shipping condition at the time of sale. *Auster Co. v. Wesco Foods Co.*, 11 Agric. Dec. 70, 75 (1952).

Peppers:

Where respondent failed to prove U.S. No. 1 contract terms, an inspection showing 7% damage by bruising and 3% decay did not establish a breach of contract on an f.o.b. contract. *Denice & Felice Packing Co. v. Super Food Services, Inc*., 38 Agric. Dec. 744, 746-47 (1979).

Prunes (Plums):

Prunes containing 3% decay at destination found to make good arrival. *Anonymous,* 8 Agric. Dec. 593, 598 (1949).

Potatoes:

Potatoes found to contain 3% slimy rot four to seven days after shipment did not represent a breach of suitable shipping condition. *Vecchio v. Battleground Farms*, 16 Agric. Dec. 1135, 1138-39 (1957); *Contra-Michael-Swanson & Brady Produce Co. v. Schwendiman,* 8 Agric. Dec. 1300 (1949).

Assuming normal transportation, potatoes could have 2% decay on arrival at destination and still be deemed to have made good delivery. *M.J. Duer & Co. v. J.F. Sanson & Sons Co.,* 49 Agric. Dec. 620, 624-25 (1990); *Harvest Fresh Produce, Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703, 709-110 (1980).

Where contract called for "good skin" and the inspection showed "mostly slightly skinned, some moderately skinned," rejection by the buyer was justified. *Bushman's, Inc. v. Sol Salins, Inc.*, 39 Agric. Dec. 1568, 1571-72 (1980).

Since mahogany rot primarily results from extended storage at cold temperatures and the potatoes were only two days in transit, the receiver met its burden of proving that the shipper breached the contract. *Katz Co. v. Kunkel Co.*, 45 Agric. Dec. 760-68 (1986).

Potatoes found to contain 2% and 4% decay respectively made good arrival. *Mendelson-Zeller Co. v. Murlas Bros. Co.*, 23 Agric. Dec. 224, 230 (1964).

Where contract for chipping potatoes agreed that the buyer's duty to accept was expressly conditioned on its satisfaction that the potatoes were of good chipping quality, the buyer cannot use arbitrary or unreasonable standards in determining whether the potatoes met contract terms since this would be unconscionable and against public policy. *W.T. Holland & Son. v. C.K. Sensenig Potatoes,* 52 Agric. Dec. 1705, 1709 (1993).

Strawberries:

The maximum allowance for f.o.b. no grade strawberries to make good delivery after five days in transit is 15% total damage, 8% serious damage and 3% decay. *Main St. Produce, Inc. v. W. Veg. Produce, Inc.* and *Main St. Produce, Inc. v. Florance Distributing Co*., 74 Agric. Dec. 193, 212 (2015).

Inspection showed 15% total defects, including 4% serious damage, including 1% decay. Decision found the berries to have made good arrival after four days in transit. *Norden Fruit Co. v. E D P, Inc.*, 50 Agric. Dec. 1865, 1870-71 (1991).

In a shipment of strawberries from California to Pennsylvania, an average of 3% gray mold rot and 2% missing capstems not abnormal. *Watsonville Berry Coop. v. Jos. Notarianni & Co.*, 37 Agric. Dec. 443, 446 (1978).

Strawberries showing 3 to 20%, average 9% damage, including 3% serious damage by large flattened areas and 3 to 9%, average 3% gray mold rot, found not abnormally deteriorated in an f.o.b. sale. *Dave Walsh Co. v. Golub Corp.*, 37 Agric. Dec. 824, 827 (1978).

Establishes 15% total damage, 8% serious damage and 3% decay as the maximum allowance on f.o.b. sales of strawberries. *Supreme Berries, Inc. v. McEntire*, 49 Agric. Dec. 1210, 1216 (1990).

Inspection revealing 3% bruised and leaking, 5% soft and 3% decay shows berries made good arrival. *Empire Distrib. Co. v. Wholesale Produce Supply*, 32 Agric. Dec. 1301, 1305 (1973).

Tangerines:

Decay in tangerines ranging from 2 to 6%, averaging 4%, is not sufficient deterioration to indicate a lack of suitable shipping condition in an f.o.b. shipping point transaction in view of the fact that a tolerance of 3% decay is allowed by the U.S. Standards for tangerines in delivered sales. Nor is 2 to 10%, averaging 6% soft and puffy fruit sufficient damage to warrant the conclusion that the tangerines were abnormally soft and puffy. *Haines City Growers Ass'n v. Robinson & Gentile*, 10 Agric. Dec. 968, 972 (1951).

Tomatoes:

85% U.S. No. 1 tomatoes have been held to make good delivery if they have no more than 25% condition defects at destination. *Produce Exch., Inc. v. Tom Lange Co.*, 42 Agric. Dec. 1588, 1592 (1983); *Stockton Tomato Co. v. Albee Tomato* Co., 28 Agric. Dec. 1051, 1054 (1969) (15% quality and 9% condition defects).

In shipment of tomatoes which failed to meet color requirements upon arrival, seller was held liable for buyer's expenses incurred to repack and ripen the tomatoes. *Botts Produce Co., Inc. v. Flamingo Distrib. Co.*, Agric. Dec. 724 (1934).

Inspection made three days after arrival showing 3% decay, 3% bruising and 30% damage by mottling held to establish breach by seller of the warranty of suitable shipping condition, as mottling becomes more evident as the fruit turns red. *Strano Farms v. Sanzone-Palmisano Co.*, 50 Agric. Dec. 938, 940 (1991).

In shipment of tomatoes which failed to meet color requirements upon arrival, seller was held liable for buyer's expenses incurred to repack and ripen the tomatoes. *B & L Produce, Inc. v. Procacci Bros. Sales Corp.*, 37 Agric. Dec. 1243, 1246 (1978).

Tomatoes shipped under normal conditions arrived showing 7% decay and 6% damage by sunken discolored areas does not represent a breach of contract. *Lookout Mountain Tomato & Banana Co. v. Consumer Produce Co. of Pittsburgh*, 50 Agric. Dec. 960, 964-68 (1991).

Tomatoes sold as "Pinks" are off-color where inspection shows 10% green or breakers and 70% light red to red. *Horwath & Co. v. Mim's Produce, Inc.*, 47 Agric. Dec. 332, 334 (1988).

An inspection made five days after arrival showing 70% green and breakers and 25% turning and pink was sufficient to show that complainant failed to deliver pink tomatoes, which the contract called for. *B & L Produce of Ariz. v. Mim's Produce, Inc.*, 37 Agric. Dec. 201, 205 (1978).

Inspection showing 6% decay insufficient to show breach of suitable shipping condition warranty, but inspection on another load showing 10% decay held to show breach. *Nat'l Growers, Inc. v. Pelican Tomato Co.*, 24 Agric. Dec. 405, 410 (1965).

Watermelons:

Ruled that an inspection obtained one day after arrival showing 4% decay was a breach of the warranty of suitable shipping condition. *Digioia v. Dino Produce, Inc.*, 37 Agric. Dec. 839, 843 (1978).

Two piggyback containers of watermelons arrived at destination showing 6% and 5% decay respectively. Held that good arrival was not made, breaching the suitable shipping condition warranty. *B.G. Anderson Co. v. Zeidenstein Bros.*, 29 Agric. Dec. 1443, 1446-47 (1970).

42. GUARANTEE OF PAYMENT BY A THIRD PARTY

If a third party guarantees payment, it may be held liable in the event of non-payment by the principal. *Top Pac Growers & Shippers, Inc. v. Dock Case Brokerage Co.*, 42 Agric. Dec. 1251, 1254 (1983); *Wolverine Fruit Co. v. Boehmer*, 27 Agric. Dec. 1153, 1158 (1968); *MacClaren v. M-T Fruit & Produce, Inc.*, 22 Agric. Dec. 1048, 1053 (1963); *Hollandale Mktg. Ass'n v. Lally*, 18 Agric. Dec. 730, 735 (1959).

All defenses available to buyer are available to buyer's guarantor. *William Rosenstein & Sons Co. v. Greene*, 29 Agric. Dec. 627, 632 (1970).

43. IMPLIED WARRANTY

See **MERCHANTABILITY - WARRANTY OF** - this index.

a. MERCHANTABILITY - EXCLUSION OF

Exclusionary language must mention merchantability. *See L.E. Jensen & Sons, Inc. v. Huston Produce, Inc.*, 51 Agric. Dec. 814, 829 (1992).

Where tomatoes were purchased by Respondent from Complainant pursuant to the December 4, 2002 Suspension Agreement on Fresh Tomatoes Imported from Mexico, Respondent's claim that the

tomatoes were not merchantable due primarily to the quality defects disclosed by a USDA inspection cannot be considered because the Suspension Agreement permits adjustments to the sales price for the condition defects listed in the Agreement and for *no other defects*. The language used in the Suspension Agreement is sufficiently explicit to bring the exclusion of warranties to the buyer's attention and make plain that there are no implied warranties. *Omega Produce Co. v. Boston Tomato & Packing LLC*, 64 Agric. Dec. 1156, 1164 (2005).

d. FITNESS FOR PARTICULAR PURPOSE - EXCLUSION OF

Parties have the right to contract for waiver of the suitable shipping condition warranty as it applies to specific defects. *See Garin Co. v. Nash-Decamp Co.*, 44 Agric. Dec. 1283, 1286 (1985). However, the waiving of specific defects does not encompass the warranty of merchantability. In order to have an effective waiver of the implied warranty of merchantability, the requirements of § 2-316 of the Uniform Commercial Code must be met. The implied warranty of merchantability will apply unless the parties expressly exclude or modify the warranty by the use of conspicuous language which mentions the word "merchantability." *River Valley Mktg. Inc. v. Tom Lange Co*., 53 Agric. Dec. 918, 921 (1994). However, *see Martori Bros. Distribs. v. Hous. Fruitland, Inc.*, 55 Agric. Dec. 1331, 1337-38 (1996) for a description of the conditions under which the warranty of merchantability would apply to condition defects found at destination.

Subsection 2 of UCC § 2-316 requires a conspicuous writing for the exclusion of any implied warranty of fitness created under UCC § 2-315. However, where oral evidence shows that a buyer never relied upon seller to furnish goods fit for a particular purpose an issue of fact may be raised as to whether a warranty of fitness for a particular purpose was ever created. *See Davis v. Goldman-Hayden Co*., 50 Agric. Dec. 1014, 1017 (1991).

44. INSPECTIONS

a. APPEAL INSPECTIONS

Relationship of appeal inspections to original inspections. *See Vukasovich v. Fieldman Bros. Produce Co.*, 37 Agric. Dec. 436, 441 (1978); *Cargill Produce v. Sobiech Irrigation Equip.*, 33 Agric. Dec. 1141, 1149 (1974).

Where a shipping point inspection and a destination restricted inspection were reversed by an appeal inspection two days after arrival, the questions raised as to the identity of the product covered by the inspections were deemed insubstantial, and the determination made by the appeal inspector that the product was the same as previously inspected was accorded weight in arriving at a conclusion. *Fed'n Produce Sales v. A. Sam & Sons Produce Co.*, 51 Agric. Dec. 1460, 1466 (1992).

Notice of inspection provided to the shipper on the date of inspection was considered untimely where provided after more than half of the shipment was resold, as the shipper was deprived of the opportunity for an appeal inspection. *Quail Valley Mktg., Inc. v. Cottle*, 60 Agric. Dec. 318, 337 (2000).

Where a shipment of 630 cartons of lettuce were shipped, and 620 cartons were inspected indicating that the product met the Good Delivery Standard for iceberg lettuce, the receiver called for and obtained an appeal inspection two hours later, covering only 420 cartons of the shipment. The appeal inspection, although it did not nullify the first inspection, was considered to represent the best evidence of the condition of the lettuce. In determining whether the appeal inspection revealed a breach of the Good

Delivery Standard, the missing 210 cartons were considered to have contained no defects. *Nunes Co. v. W. Coast Distrib., Inc.*, 64 Agric. Dec. 1166, 1175 (2005).

Where the seller made a timely request for an appeal inspection, but the buyer denied the product was available and the buyer subsequently issued account of sales or other evidence which established that the product was, in fact, available for the requested appeal inspection, the original inspection shall be disallowed. *New Era Produce LLC v. Circus Fruits Wholesale Corp*., 72 Agric. Dec. 878, 892 (2013).

e. BY INSPECTOR CONVICTED OF RECEIVING BRIBES

Four inspections were made of four lots of vine ripe tomatoes delivered to three of respondent's customers. Although all of the vine ripe tomatoes were the same brand and size and were shipped from the same packing house, one of the inspections showed two to four times the decayed and soft tomatoes as the other three inspections. Such inspection was performed by an inspector who had pled guilty to taking bribes, and the firm at which the inspection was performed was one of the firms whose personnel had been implicated in bribery of federal inspectors. Under the circumstances, for the purpose of determining whether there was a breach and the amount of damages resulting therefrom, the tomatoes that were the subject of the aberrant inspection were considered to have decayed and soft tomatoes equal to the average of the other tomatoes. *Oceanside Produce, Inc. v. JSG Trading Corp.,* PACA Docket No. R-00-031 decided June 19, 2000, (unpublished decision).

Where grapes were consigned to a firm whose employee subsequently pled guilty to paying bribes to federal inspectors to alter inspections, and where an inspector who pleaded guilty to receiving bribes to alter inspections issued an inspection certificate covering 500 cartons of grapes from the 1,280 carton consignment showing the 500 cartons were ready to be dumped, it was held that since the consignee could only profit from the resale and not the dumping of the grapes, the inspection certificate was presumed to be valid. *Procacci Bros. Sales Corp. v. B.T. Produce Co.*, 60 Agric. Dec. 341, 346 (2001).

Where two inspections of shipments of cantaloupes on the Hunts Point market were performed by inspectors who pleaded guilty to accepting bribes for the falsification of inspection certificates, but there was no evidence that the firms which received the produce on the Hunt's Point market were involved in the paying of bribes, it was held that complainant had not submitted sufficient evidence to raise credible doubts as to the integrity of the federal inspections, and the complaint was dismissed. *Spencer Fruit Co. v. Nw. Choice, Inc*., 60 Agric. Dec. 346-47 (2001).

Where an inspection of a shipment of tomatoes on the Hunts Point market was performed by an inspector who pleaded guilty to accepting bribes for the falsification of inspection certificates, and an employee of the purchasing firm was indicted for bribery of federal inspectors but acquitted, it was held that complainant had failed to prove by a preponderance of the evidence that the employee participated in the bribery, and it was presumed, in the absence of the motive of a bribe, that the inspector would have inspected the tomatoes in the normal fashion. *Pac. Tomato Growers v. Am. Banana Co.*, 60 Agric. Dec. 352, 372 (2001).

f. BY NON-EXPERT DISCOUNTED

"We have often discounted testimonial evidence concerning the condition of perishable commodities and stated the necessity of obtaining a neutral inspection showing the exact extent of damage." *Mut. Vegetable Sales v. Select Distrib., Inc.*, 38 Agric. Dec. 1359, 1362 (1979); *see also Tyre Farm, Inc. v. Dandrea Produce, Inc.*, 45 Agric. Dec. 796, 799 (1986); *G.J. Albert, Inc. v. Salvo,* 36 Agric. Dec. 240,

242 (1977); *Salt Lake Produce Co. v. Butte Produce Co.*, 32 Agric. Dec. 1732 (1973); *B.G. Anderson Co. v. Mountain Produce Co.*, 29 Agric. Dec. 513, 517 (1970).

See Jordan v. Tom Lange Co., 50 Agric. Dec. 1027, 1031-32 (1991), where testimony of disinterested witnesses was disallowed because it had not been shown that federal or commercial inspection or inspection by state or local health official could not be obtained, and additionally, because produce was viewed by disinterested witnesses two weeks after arrival.

Testimony of buyer/consignee's trucker and reports from buyer/consignee's customers do not prove condition defects; they are parties to the transactions, so their reports are not impartial. *Rogers Bros. Farms, Inc. v. Skyline Potato Co.*, 69 Agric. Dec. 1599, 1613-14 (2010).

g. BY NON-EXPERT ALLOWED

Where a purchase and sale contract called for numerous bulk loads to contain a specific number of pumpkins, the inventory count performed by the receiving retail stores was accepted as adequate evidence of the number of pumpkins delivered where such count was adequately documented, and no federal inspection was necessary to prove the count received. *PSM Produce, Inc. v. Boyer Produce, Inc.*, 60 Agric. Dec. 809, 826 (2001).

h. COST OF

The cost of inspections is allowed as consequential damages. *Strano Farms v. Sanzone-Palmisano Co.*, 50 Agric. Dec. 938, 941 (1991).

i. DESTINATION INSPECTION

Destination inspection takes precedence over shipping point inspection as to condition (but not as to grade). *Homestead Tomato Packing Co. v. Tray-Wrap, Inc.*, 46 Agric. Dec. 643, 646 (1987); *Harvest Fresh Produce, Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703, 707 (1980).

j. FOLLOWING UNLOADING - LOSS OF IDENTITY

Where fungible goods are unloaded prior to inspection there may be insufficient proof that the goods inspected are the same as those shipped. *See Better Taters v. Haddad & Sons Brokerage*, 34 Agric. Dec. 1943, 1945-46 (1975) (potatoes); *Victor Produce & Kraut Co. v. S & K Farms, Inc.*, 34 Agric. Dec. 1587, 1592 (1975) (cabbage); *Me. Packers, Inc. v. Monticello Potato Shippers, Inc.*, 34 Agric. Dec. 1394, 1397 (1975) (potatoes - although inspection identified unloaded potatoes as having come from truck in which potatoes sold were shipped, quality factors differed so substantially from factors noted by inspection at shipping point that it was held that buyer failed to prove that potatoes were the same as those shipped.); *Fruitcrest Corp. v. Westco Products*, 18 Agric. Dec. 386, 388-91 (1959) (frozen cherries); *Anonymous*, 8 Agric. Dec. 418, 422 (1949) (bananas).

k. INADEQUATE SAMPLING

Arrival inspection by Mexican government used inadequate sampling and therefore could not be used to show a breach of the suitable shipping condition warranty. *Borton & Sons, Inc. v. Firman Pinkerton Co.*, 51 Agric. Dec. 905, 910 (1992).

l. OF ONLY A PORTION OF THE LOAD

When determining whether there is a breach, homogeneous lots or loads must be considered as a whole. The inspection of only a portion of a homogeneous lot should not be taken to reflect the condition of the entire lot. (We are not here speaking of a "restricted inspection;" i.e., an inspection of what the inspector considers to be a representative portion of a larger load, but of an inspection of only a portion of a lot or load because the remainder of the lot or load is not present.) However, such an inspection may show sufficient condition problems to indicate a breach as to the entire lot. The uninspected part of the load should be assumed to have no condition defects and be averaged with the portion that does contain such defects. Assume the result to apply to the entire lot, and rule accordingly. Sample computation: 300 inspected, out of a load containing an original 450, have 11% decay. 300 x .11 = 33; 33 ÷ 450 = .07, or 7% for the load as a whole.

See M.J. Duer & Co. v. J.F. Sanson & Sons Co., 49 Agric. Dec. 620, 624-25 (1990), where defects disclosed by inspection of only one-half of load were averaged with remaining half with assumption being made that remaining half had no defects, and load as a whole was found to have made good delivery.

See also W. Vegetable Exch. v. Moyers & Sons Wholesale Produce, 50 Agric. Dec. 1001, 1004 (1991); *Kaplan's Fruit & Produce Co. v. Houlehan, Inc.*, 44 Agric. Dec. 370, 372 (1985); *Mut. Vegetable Sales v. Select Distrib., Inc.*, 38 Agric. Dec. 1359, 1363 (1979); *Saikhon v. Russell-Ward Co.*, 34 Agric. Dec 1940, 1942-43 (1975).

The principle also applies where only a small portion of a lot was absent at time of inspection. *See Lookout Mountain Tomato & Banana Co. v. Case Produce, Inc.*, 51 Agric. Dec. 1471, 1478 (1992).

Note: this is not the same as a restricted inspection. See subheading "**RESTRICTED INSPECTIONS**" - this topic.

m. OF SEVERAL LOADS LUMPED TOGETHER

A foreign survey that lumped together apples from three sea-land containers was utilized to determine whether apples arrived with abnormal deterioration even though this method of survey made it impossible to associate the apples surveyed with the transit conditions applicable to each container. This was permitted because the temperature history for the three containers was sufficiently similar and sufficiently within normal parameters, that transit conditions could safely be said not to void the suitable shipping condition warranty as to any of the containers. *Primary Exp. Int'l v. Blue Anchor, Inc.*, 56 Agric. Dec. 969, 981 (1997).

n. PERCENTAGE OF DEFECTS - FAILURE TO SPECIFY

A timely Swedish survey which noted and described poor condition of commodity without giving percentage of defects and then estimated the remaining commercial value of the load, was found to be inadequate as a record of the condition of the goods on arrival in Sweden and could not be used in assessing damages. *See Ont. Int'l, Inc. v. Nunes Co.*, 52 Agric. Dec. 1661, 1672-73 (1993).

In *Associated Citrus Packers, Inc. v. Socodis Bocchi Trading, Inc.*, 53 Agric. Dec. 1889, 1900 (1994), a foreign survey which reported the percentage of cartons discarded during repacking and which gave an

estimate of damage expressed in a monetary amount was held to be not adequate to show a breach of contract or damages. We quoted *Ontario Int'l, Inc.*, as follows:

> In order for such an estimate to be of any use in this proceeding, we would have to be assured that the inspector possessed the commercial experience and expertise necessary to arrive at such a judgment. It is obvious that an estimate of commercial value moves us a step beyond the scientific sampling of produce, and the careful tabulating of percentage of damage, into the realm of the vagaries of the market place. Different markets vary greatly as to the degree to which damaged produce will be accepted by consumers, and as to the discount which will be necessary to move goods which are defective. Moreover, much will depend upon the relative amount of undamaged goods of the same type which will be concurrently available when the defective goods are marketed. This will, of course, vary greatly from day to day on the same market.

However, in *Viva Tiger, Inc. v. Cornucopia Trading Co.*, 53 Agric. Dec. 817, 825-26 (1994), a foreign survey which did not specify percentage of defects nevertheless showed a breach because the surveyor used the term "most" in the description of the damaged cartons, and such term had to be taken as meaning more than 50% of the cartons. It was stated that while "many" and "large" cannot be equated to the meaning accorded such terms in the "General Market Inspection Instructions" given to federal inspectors, the term "'[m]ost' is a term whose universal import signifies a majority and places the extent of damage at above 50% of the cartons sampled."

o. PRIMA FACIE EVIDENCE

Federal inspections of produce are *prima facie* evidence of the accuracy of the information set forth in the inspection report. *See* 7 U.S.C. § 499n(a). *See also Fruit Distrib. Corp. v. Gary D. Harney Co.*, 44 Agric. Dec. 1331, 1333 (1985).

Although under the PACA federal inspections are prima facie evidence of the truth of the statements recorded therein, it was held that such prima facie evidence is rebuttable, and that the credibility of the inspections was rebutted by the guilty pleas of the inspectors to bribery coupled with the implication of the buyer in the bribery of inspectors. It was found that the federal inspections were unconvincing under the circumstances of the case; and it was also found that testimony from the buyer's employees was an insufficient basis on which to conclude that the seller breached the contract of sale. The seller was awarded the original contract price. *Dimare Homestead, Inc. v. Koam Produce, Inc.*, 59 Agric. Dec. 866, 877 (2000).

p. PRIVATE INSPECTIONS

Where a carload of grapes sold f.o.b. and shipped from California to Buffalo, New York, was subjected to a restricted (upper two layers of load) federal inspection at destination which found, ". . . less than ½ of 1 *percent* to 3 *percent*, in some none, in few as high as 15 percent decay, Grey Mold Rot. Decay averages approximately 2 percent," the buyer rejected, and the car was moved to Philadelphia by the seller. Two unrestricted private inspections (one by the Binney Inspection Service, and the other by the Railroad Perishable Inspection Service) done at Philadelphia two days after the federal inspection in Buffalo found "less than 1 *percent* decay." The buyer/respondent's rejection was found to be wrongful on the basis of the private inspections. We said, "It appears that respondent, perhaps in good faith,

placed too much reliance upon a restricted inspection, and that the entire carload was not as bad as was indicated by that inspection." *Cal. Fruit Exch. v. Rothenberg*, 7 Agric. Dec. 986, 989-90 (1948).

Greater weight is given to the findings of federal inspections at shipping point than to private inspections at destination, **BUT only as to grade (as opposed to condition) defects**. *Chi. Oxford Co. v. Tuchten-Altman Co.*, 41 Agric. Dec. 110, 120 (1982); *see also Commonwealth v. Idaho*, 32 Agric. Dec. 1734, 1738 (1973).

In *Dew-Gro, Inc. v. First Nat'l Supermarkets, Inc.*, 42 Agric. Dec. 2020, 2024 (1983), a private inspection done at destination on the same day as a federal inspection was found to elucidate the federal inspection. We stated, "It is obvious from the very carefully done R.P.I.A. inspection that the celery was loaded with approximately 3 feet of lengthwise void which resulted in the shifting of the load during transit. Such shifting was undoubtedly the cause of the crushed and broken celery scored as a condition defect in the Federal inspection made January 26. Accordingly, we find that complainant did breach the contract of sale by improper loading of the celery." Similarly, where a private inspection made at time of arrival was given credence since it was not contested and a federal inspection made four days later was confirmatory in that it showed further deterioration of the same defects noted on the private inspection. *Harden Farms of Cal. v. Michael J. Navilio, Inc.*, 37 Agric. Dec. 1694, 1697 (1978).

q. RESTRICTED INSPECTIONS

"While a restricted inspection is certainly not as desirable as an inspection of an entire lot, a restricted inspection is not the same as an inspection of only part of a load (as where, for instance, a portion of the load may have been selectively removed and sold prior to inspection), and is presumed to be representative of the load as a whole unless there is some reason to think otherwise." *Pandol Bros., Inc. v. Prevor Mktg. Int'l, Inc.*, 49 Agric. Dec. 1193, 1197 (1990). Followed in *Fresh W. Mktg., Inc. v. McDonnell & Blankfard, Inc.*, 53 Agric. Dec. 1869, 1876 (1994).

Where a first, unrestricted inspection showed onions with 16% condition defects and where the second, restricted inspection showed the onions as grading U.S. #1, it was concluded that the first inspection had evidentiary weight. *Griffin & Brand Sales Agency, Inc. v. Bialis Produce Co.*, 41 Agric. Dec. 1627, 1629 (1982).

See also Cal. Fruit Exch. v. Rothenberg, 7 Agric. Dec. 986, 989-90 (1948), where a restricted inspection was found not representative. The case is briefed under **PRIVATE INSPECTIONS** - this topic.

r. SHIPPING POINT - WEIGHT

Greater weight is given to the findings of federal inspections at shipping point than to private inspections at destination, **BUT only as to grade (as opposed to condition) defects**. *Chi. Oxford Co. v. Tuchten-Altman Co.*, 41 Agric. Dec. 110, 120 (1982); *see also Commonwealth v. Idaho*, 32 Agric. Dec. 1734, 1738 (1973).

s. TIMELINESS

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

arrival and inspection and still rely upon the inspection. *Main St. Produce, Inc. v. W. Veg. Produce, Inc.* and *Main St. Produce, Inc. v. Florance Distributing Co.*, 74 Agric. Dec. 193, 214-15 (2015).

An inspection performed 7 days after arrival at a destination agreed upon by the parties is too remote in time to be considered as evidence in assessing the condition of the produce and whether it was in suitable shipping condition at time of shipment or arrival. *La Valenciana Avocados Corp. v. Tomato Specialties, LLC*, PACA Docket No. W-R-2013-403, decided July 22, 2015 (decision unpublished).

Although the inspection performed on the onions five days after arrival was not performed in a timely manner, noted the onions remained on the conveyance under constant refrigeration at the transit temperature specified by Complainant from the time of arrival to the time of inspection and concluded on this basis that the extreme amount of decay disclosed by the untimely inspection was sufficient to establish with reasonable certainty that a more timely inspection would have also disclosed abnormal deterioration in the onions. *Four Rivers Packing Co. v. Sam Wang Produce, Inc.*, PACA Docket No. R-08-089, decided September 4, 2009 (decision unpublished).

Inspections a few days (two is usually okay, three is stretching it, and we almost never use an inspection made more than three days old) after arrival may show the condition of the goods on the day of arrival. *Bruce Newlon Co. v. Richardson Produce Co.*, 34 Agric. Dec. 897, 900 (1975); *D.L. Piazza Co. v. Stacy Distrib. Co.*, 18 Agric. Dec. 307, 310 (1959). An exception to this rule was made in *Midwest Mktg. Co., v. Ralph & Cono Communale Produce Co.*, 46 Agric. Dec. 179, 180 (1987), where inspections made on two truckloads of watermelons four days after arrival showing 31% and 23% decay, respectively, were held to show a breach of contract by the supplier.

As to foreign shipments, some extra time may be allowed, but the point at which condition is being assessed is still time of arrival. Whether extra time is appropriate depends on the degree of decay, the amount of time lapse, the relative caducity of the produce and the conditions under which it was maintained after arrival. *See Trans W. Fruit Co. v. Ameri-Cal Produce, Inc.*, 42 Agric. Dec. 1955, 2008 (1983).

Inspections are too late when they are too remote in time from time of arrival to reflect condition on delivery. *Villalobos v. Am. Banana Co.*, 56 Agric Dec. 1969, 1980 (1997) (five days after arrival of tomatoes in a delivered sale); *Borton & Sons, Inc. v. Firman Pinkerton Co.*, 51 Agric. Dec. 905, 910 (1992) (four days after arrival of pears); *Dodds v. Produce Products, Inc.*, 48 Agric. Dec. 682, 684 (1989) (eight days after arrival of potatoes, citing case where seven days held too long); *U.S.A. Fruit, Inc. v. Roxy Produce Wholesalers, Inc*., 48 Agric. Dec. 705-06 (1989) (four days after arrival of plums); *Dave Westendorf Produce Sales, Inc. v. John Livacich Produce, Inc.*, 46 Agric. Dec. 536, 538-39 (1987) (four days after arrival of tomatoes); *Bruce Newlon Co. v. Richardson Produce Co.*, 34 Agric. Dec. 897, 900 (1975) (six days after arrival of potatoes); *D.L. Piazza Co. v. Stacy Distrib. Co.*, 18 Agric. Dec. 307, 310 (1959) (four days after arrival of carrots); *Vaughn-Griffin Packing Co. v. Thomas Aeozzo & Son*, 17 Agric. Dec. 1035, 1037-38 (1958) (five to six days after arrival of oranges); *Likins v. Walter Holm & Co.*, 10 Agric. Dec. 593, 597 (1951) (extensive defects in tomatoes five days after arrival).

An inspection on 270 out of a total of 324 lugs of tomatoes showing 7% soft and 32% decay, made five days after arrival, was too remote to show the condition of the tomatoes on arrival, especially since the receiver failed to show the conditions under which the tomatoes were stored. *B & L Produce of Ariz. v. Mim's Produce, Inc.*, 37 Agric. Dec. 201, 205 (1978).

Where a first inspection did not cover a substantial portion of the load and showed 12% decay, a second inspection, made five days later and showing only 9% decay was considered representative in showing that the load made contract terms on arrival. *Santa Clara Produce, Inc. v. Roth Produce Co.*, 36 Agric. Dec. 1395, 1398 (1977).

Where two inspections are made within 24 hours of one another, the more comprehensive inspection is a more reliable indication of the condition of the load as a whole. *Garin Co. v. Nicholas J. Zerillo, Inc.*, 35 Agric. Dec. 1259, 1262-63 (1976).

Where a restricted and an unrestricted inspection were taken on the load, the unrestricted inspection taken one day after the first, restricted inspection was accorded more weight even though it covered only 600 out of 750 cartons, because the pattern of damage was much the same on both inspections. *Senini Ariz., Inc. v. Fisher Foods, Inc*., 39 Agric. Dec. 275, 277-78 (1980).

Respondent's federal inspection on pears secured over two weeks after arrival, intended to prove a breach of contract based on latent defects was not timely, and respondent was ordered to pay the full purchase price. *Welch Fruit Sales, Inc. v. Jos. Notarianni & Co.*, 38 Agric. Dec. 589, 591-92 (1979).

Where tomatoes arrived late Friday and were inspected Monday morning, showing 18% soft and watery and 8% decay, held that the inspection supported receiver's claim of a breach of contract. *Veg-A-Mix v. George DePaoli Distrib. Co.*, 42 Agric. Dec. 1619, 1621 (1983).

Where, as to frozen strawberries, notice of breach was given one month after arrival, and inspection was made almost two months after arrival, it was found that "complainant inspected the berries within a reasonable time after arrival, and informed respondent of the claimed defect within a reasonable time after its discovery." *Kan. City Steak Co. v. Otto W. Cuyler, Inc.*, 10 Agric. Dec. 394, 399 (1951); petition for reconsideration and rehearing dismissed, 11 Agric. Dec. 383 (1952).

However, as to frozen peaches, over two months was held to be too long. *Cortley Frosted Foods, Inc. v. Ecco Pack Co.*, 11 Agric. Dec. 76, 94 (1952).

As to foreign shipments, compare *Trans W. Fruit Co. v. Ameri-Cal Produce, Inc.*, 42 Agric. Dec. 1955, 2008 (1983), where, as to shipments of containers of citrus, approximately 5% as to decay was the amount allowed for good delivery, and containers were not surveyed until five days after arrival. The buyer was found not to have met its burden of proving abnormal deterioration as to containers showing 7.55% to 8.58% decay due to the length of time between arrival and inspection, but was found to have met such burden as to containers showing 12.42 to 16.26% decay even though the length of time between arrival and survey was the same. This applies a standard closely analogous to the exception to the requirement of normal transportation where condition on arrival is so bad in a load transported under abnormal conditions that we can be sure that the warranty would have been breached even if transportation had been normal. *See also SEL Int'l Corp. v. Brown*, 52 Agric. Dec. 740, 749 (1993). See **SUITABLE SHIPPING CONDITION - EXCEPTION TO THE RULE** - this index.

Where foreign inspection was conducted seven days after receipt by the customer and eleven days after arrival in Santos, Brazil, buyer was found to have failed to prove condition of grapes on arrival. The buyer showed by a preponderance of the evidence that this was the normal time for securing inspections in Brazil, but failed to show that the seller knew at time of entering the contract that a Brazilian survey would take such an extraordinary length of time to secure. *El Rancho Farms v. Im Ex Trading Co.*, 58 Agric. Dec. 638, 645 (1999).

45. INTEREST

Section 5(a) of the PACA requires that we award to the person or persons injured by a violation of section 2 of the PACA "the full amount of damages sustained in consequence of such violations." Such damages include interest. *L & N R.R. Co. v. Sloss Sheffield Co.*, 269 U.S. 217 (1925); *L & N R.R. Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award. *See Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335, 338 (1970); *Crokett v. Producers Mktg. Ass'n*, 22 Agric. Dec. 66-67 (1963).

Complainant requested prejudgment interest on the unpaid produce shipment listed in the Complaint at the rate of 24 percent per annum (2 percent per month) based on a statement appearing on its invoice providing for the payment of such interest. Applying U.C.C. § 2-207 to the circumstances of this case, held that in the absence of evidence that Respondent seasonably objected to the interest provision stated on Complainant's invoice, the interest provision was incorporated into the parties contract. Held further that by failing to file an Answer to the Complaint, Respondent waived its opportunity to argue that the 24 percent per annum interest rate set by the statement on Complainant's invoice is not within the range of normal practice in the produce trade. Absent evidence indicating otherwise, the 24 percent interest rate set by Complainant's invoice is presumably a bargained term of the contract which this forum will enforce. *Four Rivers Packing Co. v. Veracity Produce LLC,* PACA Docket No. S-R-2013-325, decided May 14, 2015 (unpublished decision).

Complainant requested pre-judgment interest on the unpaid produce shipments listed in the Complaint at the rate of 21% per annum (1.75% per month). Complainant's claim was based on its invoices issued to Respondent, which expressly state: "A FINANCE CHARGE of 1 3/4% PER MONTH 21% PER ANNUM will be charged on all past due accounts." There was nothing in the record to indicate that Respondent objected to the interest provision stated on Complainant's invoices. In the absence of a timely objection by Respondent, the interest provision stated on Complainant's invoices was incorporated into the sales contracts. *See Johnston v. AG Grower Sales LLC*, 69 Agric. Dec. 1569, 1583-86 (2010). Accordingly, pre-judgment interest was awarded to Complainant at the rate of 21% per annum (1.75% per month). *Coliman Pac. Corp. v. Sun Produce Specialties LLC*, 73 Agric. Dec. 639, 646-47 (2014).

Complainant sought interest in a specified amount on the past due debt at the rate stated on its invoices. Because Complainant sought a specified amount of prejudgment interest in its complaint, the award of prejudgment interest was limited to the dollar amount sought in the complaint. *M & M Packaging, Inc. v. Casa De Campo, Inc.*, 70 Agric. Dec. xx, xxxi (USDA 2011), *published in* 72 Agric. Dec. xx, xxxi (USDA 2013).

Where Respondent filed a Counterclaim, it was awarded the full amount of its Counterclaim less damages, which amount was offset against the amount awarded to Complainant. A Decision and Order was issued in favor of Complainant ordering Respondent to pay the offset amount plus prejudgment interest on that amount. *Classic Fruit Co. v. Ayco Farms, Inc.*, 72 Agric. Dec. 867, 876-77 (2013).

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

the distribution of the prejudgment interest, the prejudgment interest was applied to the amount due each party prior to the application of an offset. *Classic Fruit Co. v. Ayco Farms, Inc.*, 72 Agric. Dec. 899, 903-4 (2013).

Complainant sought interest in a specified amount on the past due debt at the rate stated on its invoices. Because Complainant sought a specified amount of prejudgment interest in its complaint, the award of prejudgment interest was limited to the dollar amount sought in the complaint. *M & M Packaging, Inc. v. Casa De Campo, Inc.*, 70 Agric. Dec. xx, xxxi (USDA 2011), *published in* 72 Agric. Dec. xx, xxxi (USDA 2013).

Where an agreement is reached to change the original contract price for goods purchased, the payment due date for the purpose of calculating interest is the original payment due date specified in the contract, not the modification date, unless otherwise agreed between the parties. *New Mundo Exp. Fruits, Inc. v. San Diego Point Produce, Inc.*, 67 Agric. Dec. 888, 895 (2008).

If parties' contract for the payment of interest at a rate which is different than that normally awarded in reparation proceedings, this forum will award the percent of interest for which the parties contracted. *Seaquist v. Gro-Pro, Inc.*, 43 Agric. Dec. 161, 164 (1984); *Swanee Bee Acres, Inc. v. Gro-Pro, Inc.*, 42 Agric. Dec. 637, 640-41 (1983); *Grange v. Mark Bernstein Co.*, 29 Agric. Dec. 978-79 (1970); *Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335, 338 (1970).

Where a party has tendered payment in the exact amount which we later find to have been due and such payment was rejected, no award of interest on the amount tendered will be made. *Turbana Corp. v. Tom Lange Co.*, 49 Agric. Dec. 1221, 1227 (1990); *Salinas Mktg. v. Leonard O'Day Co.*, 16 Agric. Dec. 719, 725 (1957). Since a PACA claimant is entitled to full payment under the civil law and under the Act, this rule does not apply to payment tenders of less than the amount due even if the amount tendered was very close to what was due.

Where respondent had tendered a greater amount than was eventually awarded, and complainant had returned the unrestricted check to respondent, complainant would not be awarded interest on its claim. *Strano Farms v. Shapiro & Cohen, Inc.*, 49 Agric. Dec. 1227-28 (1990).

Where respondent, at the time of the filing of its answer, paid complainant $19,617.25 of the original $25,601.50 purchase price of produce, complainant's claim for interest on the $19,617.25 covering the period between the original date on which it was due and the date on which it was paid, was granted. It was stated that the award of such interest is similar to the award of interest in connection with undisputed amount orders and is in accord with precedent which views the authority to award interest as incident to the statutory duty to award the injured party "the full amount of damages sustained in consequence of such violations." *Peak Vegetable Sales v. Nw. Choice, Inc.*, 58 Agric. Dec. 646, 657 (1999).

When parties contract for the payment of interest at a rate which is different than that normally awarded in reparation proceedings, the percent of interest for which the parties contracted will be awarded. Where invoices provided to Respondent, and undisputed by Respondent, stated that the terms of payment were net 30 days, and further stated that any balances unpaid after 30 days were subject to a 1.5% (18% per annum) finance charge or interest on the invoice amount, interest of 18% on those invoices was awarded. *Grasso Foods, Inc. v. Americe, Inc.*, 69 Agric. Dec. 1547, 1567-68 (2010).

Complainant alleges that it is entitled to recover interest on its invoices which expressly state that "Past Due Accounts will be assessed a late payment service charge at the rate of 1½% per month or 18% per annum from the date of invoice." Respondent, rather than objecting to the "FOB Prompt" payment and service charge terms in Complainant's invoices, simply chose to ignore them. Comment 6 to section 2-207 of the Uniform Commercial Code makes it clear that a merchant's decision to ignore additional terms in confirming forms constitutes acceptance of those terms. *Johnston v. Ag Grower Sales LLC*, 69 Agric. Dec. 1569, 1586 (2010).

46. INTERSTATE COMMERCE

Shipments are considered to have occurred in "interstate commerce" if: (i) the produce regularly moves in interstate commerce; and (ii) the shipper or receiver of the shipments was also routinely engaged in interstate commerce. It is not necessary to demonstrate that each shipment was actually intended to move out of the state in which it was grown. *In re: Produce Place*, 53 Agric. Dec. 1715 (1994), aff'd, *Produce Place v. USDA*, 91 F.3d 173 (D.C. Cir. 1996); see, also *Almquist v. Mountain High Potatoes & Onion, Inc.* 65 Agric. Dec. 1418 (2006). *A-W Produce Co. v. Berry*, 68 Agric. Dec. 1291, 1295-96 (2009).

A transaction is in interstate commerce for the purpose of a reparation case if the shipment involves a type of produce commonly shipped in interstate commerce, and the produce is shipped for resale by or to a dealer that does a substantial portion of its business in interstate commerce. *Magallon v. Pac. Sun Distrib., Inc.*, 69 Agric. Dec. 848, 856 (2010).

a. BURDEN OF PROOF

In a case where the complainant was the assignee of the claims of multiple firms, and complainant alleged that the firms received the produce from out of state, the respondent, in its answer, stated that it neither admitted nor denied the allegation. The allegation in the complaint was hearsay and also was not in evidence because the case was an oral hearing case. At the hearing, representatives of several of the firms testified, but failed to mention where the produce came from. It was held that, ". . . the jurisdiction of the Secretary under the act depends upon proof that the transactions were in interstate or foreign commerce, and such proof is lacking . . ." The complaint was dismissed. *S. Water Mkt. Credit Ass'n Inc. v. Treasure Island Foods, Inc.*, 28 Agric. Dec. 1186, 1189 (1969), *pet. recon. dismissed*, 28 Agric. Dec. 1553-55 (1969).

In *Aday v. Springer*, 25 Agric. Dec. 272, 274 (1966), complainant, under oath, asserted that the produce was shipped in contemplation of interstate commerce and respondent, under oath, asserted that there was no such contemplation. Because of small inconsistencies in other testimony by respondent, it was stated that ". . . we believe the complainant's testimony, and find that this transaction was made in contemplation of shipment in interstate commerce."

Where tomatoes were sold for processing within the state where grown, and complainant offered testimony which was unrebutted that the processed tomatoes were sold in interstate commerce, the Secretary had jurisdiction over the transactions. *Faris Farms v. Lassen Farms*, 59 Agric. Dec. 471, 478 (2000).

b. CONTEMPLATION OF

Proof necessary to show:

A railcar load of potatoes was sold by complainant, located in Fort Fairfield, Maine, and shipped from the same location to respondent, which was located in Presque Isle, Maine. The terms of sale were f.o.b. inspection and acceptance arrival Presque Isle, Maine. Three days after shipment, respondent diverted the shipment to a customer out of state. It was stated that, "[w]e conclude from the contract as a whole that complainant expected respondent to divert the shipment in interstate commerce to a destination unknown or uncertain at the time of the making of the contract. The actual destination turned out to be Camden, New Jersey, which we consider to have been within the contemplation of the parties." *L.E. Rand Co. v. Shur-Gain, Inc.*, 24 Agric. Dec. 499, 500-01 (1965).

Where a load of cucumbers was sold by a Florida complainant to a Florida respondent, and shipped to a customer of respondent in Florida with the contemplation that the cucumbers would be distributed to firms outside the state, and over two-thirds of the cucumbers were shown to have in fact been shipped out of the state of Florida, but less than one-third were shipped to other Florida firms, it was found that the load was sold in contemplation of interstate commerce, and that the Secretary had jurisdiction. *Lionheart Group, Inc. v. Sy Katz Produce, Inc.*, 59 Agric. Dec. 449, 455 (2000).

c. CURRENT OF COMMERCE

A load of chipping potatoes was purchased from a Pennsylvania complainant by respondent who was located in Pennsylvania. A substantial portion of respondent's chips were distributed by Valley Distributing Company, also located in Pennsylvania, but situated near the borders of three states. The Judicial Officer found that,

> [o]n the basis of evidence of record showing that Valley Distributing Company shipped respondent's potato chips into the state of Ohio and the evasive statements by respondent's president upon being questioned about where the products of respondent were sold, including his admission that it is possible respondent's potato chips are shipped into other states, we conclude that this was a transaction contemplating shipment in interstate commerce, and that the Secretary has jurisdiction in the matter.

Troyer v. Blue Star Potato, 27 Agric. Dec. 301, 304 (1968).

Where potatoes were shipped intrastate to a processing plant located near the Canadian border, that fact alone was insufficient to show that the resulting processed potatoes were then exported to Canada or that it was contemplated by the parties that they would be so exported, it was concluded that the transactions were not in interstate or foreign commerce within the meaning of the Act, and the complaint was dismissed. *Troyer v. Blue Star Potato* is explained and distinguished. *DeBacker Potato Farms, Inc. v. Pellerito Foods, Inc.*, 57 Agric. Dec. 770, 772-73 (1998).

Where tomatoes were sold for processing within the state where grown, and complainant offered testimony which was unrebutted that the processed tomatoes were sold in interstate commerce, the Secretary had jurisdiction over the transactions. *Faris Farms v. Lassen Farms*, 59 Agric. Dec. 471, 478 (2000).

Where Big "O" Foods, a Minnesota firm, sold and shipped ten loads of potatoes to Roland, another Minnesota firm, and the potatoes were subsequently sold at retail within the state of Minnesota, it was found that the Secretary had jurisdiction over the transactions because five of the loads were purchased

by Big "O" Foods in North Dakota, and a substantial portion of the potatoes in the remaining five loads were purchased in North Dakota, and mixed with the remaining potatoes in the remaining five loads which were grown in Minnesota. We stated, "It seems clear to us that complainant's normal business practice involved the bringing of potatoes into Minnesota from North Dakota and the subsequent shipping of such potatoes at least to other points in Minnesota. This involves a 'current of commerce' of which the Minnesota potatoes became a part." *Big "O" Foods, Inc. v. Roland Mktg., Inc.*, 44 Agric. Dec. 928, 933 (1985).

d. MOVEMENT

Goods shipped from a state through another state to a receiver in the state from which they were shipped are shipped in interstate commerce. *Clearview Farms v. Noha*, 21 Agric. Dec. 806, 808 (1962).

It was formerly held that a contract for the sale of produce made by a party located, at the time of contracting, in New York, to a party located in Michigan, was not in interstate commerce because there was no proof that the commodity moved, or was contemplated to move, interstate. *Wright Supply Corp. v. Carpenter Mktg.*, 38 Agric. Dec. 1641-42 (1979). *See also Wide World of Foods v. Trinity Valley Foods Co.*, 34 Agric. Dec. 423, 426-27 (1975), where the seller was located in Texas, the broker in California, and the buyer in New York, but the goods were transferred from the seller's ownership to the buyer's ownership by a transfer in storage in Oregon and never moved outside of that state. We said,

> [c]omplainant failed to offer any evidence that the terms of sale . . . involved any contemplation of movement of the peas in interstate commerce or any evidence that the peas were ever actually moved in interstate commerce. The fact that the buyer, Imperial Frozen Foods, is a New York company and the peas are in Oregon is of no significance without a showing of interstate commerce.

Iwata v. W. Fruit Growers, Inc., 90 F.2d 575 (1937).

However, in *Tulelake Potato Distrib., Inc. v. Giustino*, 52 Agric. Dec. 752, 760 (1993), we stated:

> In the present case, there is no evidence that the commodity involved ever crossed a state line. Nonetheless, we must conclude that the [sic] this transaction was in commerce. The parties involved were in different states, the buyer was in Washington state and the seller and receiver were in California. When the parties to a transaction are in different states, the purchase or sale transaction is in interstate commerce even if there is no evidence that the commodity physically crossed a state line. In this case, therefore, the fact that the parties to the transaction were in separate states supplies the necessary interstate commerce for a finding of jurisdiction.

See, however, *Cont'l Growers v. Fisher Procurement, Inc.*, 55 Agric. Dec. 1382, 1385-86 (1996), at **"MOVEMENT IN BOND,"** *supra.*

The following is excerpted from an April 29, 1987, memo from Kenneth H. Vail, Assistant General Counsel, Packers and Stockyards Division, to Jack D. Flanagan, Chief, PACA Division:

> The leading case regarding the jurisdiction of a federal agency over activities involving movement among the islands of Hawaii is *Island & Airlines, Inc. v.*

Civil Aeronautics Bd., 352 F.2d 735 (9th Cir. 1965). In that case, the C.A.B. sought to enjoin Island Airlines, Inc. from conducting inter-island flights on the ground that it had not obtained certification from the C.A.B. Island Airlines, Inc. argued that its activities all occurred within the territory of the State of Hawaii. The district court ruled in favor of the C.A.B., holding that the boundaries of Hawaii were the islands plus a three mile belt around each. *Civil Aeronautics Board v. Island Airlines, Inc.*, 235 F. Supp. 990 (D. Hawaii 1964). The Court of Appeals affirmed, stating that where Congress had failed to delineate boundaries with certainty, the court must define such limits. The court then extensively examined the legislative history of the Hawaiian Statehood Act (48 U.S.C. prec. Subsection 491), and concluded that Congress had not intended that the territorial waters of the individual islands be extended beyond the traditional three mile limit, *Island & Airlines, Inc. v. Civil Aeronautics Bd.*, supra at 740. The court also relied on *United Airlines, Inc. v. Public Utilities Comm'n of Cal.*,109 F. Supp. 13 (N.D. Cal 1952) rev. on other grounds 346 U.S. 402 (1953), which held that the C.A.B. has jurisdiction over airline flights from the California mainland to Santa Catalina Island, a part of California 30 miles from the mainland, because such flights were in air space over the high seas, and not within the State of California, after they passed three miles from the mainland until reaching three miles from the coast of Santa Catalina. *Island & Airlines, Inc. v. Civil Aeronautics Bd.*, supra at 744.

The principle that the area beyond three miles from the coastline of the United States constitutes international waters has been affirmed on many occasions. *U.S. v. Wright-Barker*, 784 F.2d 161, 166 (3rd Cir. 1986); *U.S. v. Romero-Galue*, 757 F.2d 1147, 1149 (11th Cir. 1985); *U.S. v. Warren*, 578 F.2d 1058, 1064-65 n.4 (5th Cir. 1978), cert. denied 446 U.S. 956 (1980).

Therefore the law is clear that when perishable agricultural commodities are shipped among the Hawaiian Islands, they move in interstate or foreign commerce once they travel beyond three miles from the coastline of an individual island. *(At sometime in the recent past, I think, the U.S. extended its territorial limits to 200 miles from the shoreline as to fishing rights, so as to exclude foreign fishing off our coasts. On what basis was this done, and does it have any bearing on the ruling in this memo?)*

Where both parties are located within a state, but shipment is outside the state, there is interstate commerce. *J & J Produce Co. v. Weis-Buy Serv., Inc.*, 58 Agric. Dec. 1095, 1098 (1999).

Where sale and delivery of perishables took place entirely within the District of Columbia and there was no record of where the produce originated, the transaction was found to be within interstate commerce because there was testimony that no fruits and vegetables are grown within the District, and because the term interstate or foreign commerce is defined in the Act to include commerce "within the District of Columbia." *Sol Salins, Inc. v. FJL, Inc.*, 51 Agric. Dec. 888, 891 (1992).

e. MOVEMENT IN BOND

Where commodities, which were the subject of a contract between parties in the same or separate states of the United States, never entered the commerce of the United States because the commodities moved

through the United States from one foreign country to another foreign country, in bond, it was held that there was no interstate or foreign commerce within the meaning of the PACA. *See Cont'l Growers v. Fisher Procurement, Inc.*, 55 Agric. Dec. 1382, 1385-86 (1996), which includes extensive discussion of the question of the necessity for interstate or foreign *movement* of the commodity. *Tulelake Potato Distrib., Inc. v. Giustino*, 52 Agric. Dec. 752, 760 (1993), was distinguished on the basis that the commodity which moved entirely intrastate was nevertheless found to have been a part of the current of interstate commerce usual in such commodity. We stated:

> There is no question that under the current concept of the constitutional meaning of interstate commerce Congress would have power to regulate the parties' contracting, whether viewed as between the two parties in California, or as between complainant in California and respondent Albert in Arizona. The question is whether Congress has sought to reach the contracting undertaken by these parties, divorced as it was from any movement, or contemplated movement, in interstate or foreign commerce, of a perishable agricultural commodity. We think that in view of the evident close tie that exists in the Act between the concept of commerce, and the movement, or contemplated movement, of commodities in, or to, or from one of the several states, the answer must be in the negative. The situation is legally no different from the hypothetical sale by a firm in California to a buyer in New York, of perishables, which remain at all times in a warehouse in Germany, or which transfer, due to the sale, from a warehouse in Germany to one in France. In this hypothetical there is an interstate sale and a foreign sale, but there is no interstate or foreign commerce as defined by the Act, because there is no movement, or contemplated movement, of a perishable commodity, into, or out of, one of the United States, and there is no current of commerce in such commodity into, or out of, one of the United States. We conclude that we lack jurisdiction over the subject matter of the complaint. (Footnote omitted.)

See **JURISDICTION - TRANSACTION NECESSARY -** this index.

47. JOINT ACCOUNT TRANSACTIONS

Partners in a joint account relationship owe each other the utmost good faith in their dealings with one another. If the joint venture sustains damages because a joint venturer breaches his duties, the breaching partner must bear the loss, although in matters of judgment the joint venturer will not be liable for a loss caused by honest mistake or error of judgment not amounting to wantonness or fraud. *L & M Farms, Inc. v. Y2S Trading, Inc., 69 Agric.* Dec. 942, 960-61 (2010).

The ordinary rule of a joint venture is that each party bears their individual expenses.
The basic principle is that general overhead expenses are excluded from the gross profit of the joint venture where the overhead represents an attempt to charge compensation for services in providing capital and in providing the organization to handle the transaction. Joint account partners may agree to share expenses differently, however, joint venturers do not ordinarily agree to share the expenses of turning on the lights, making telephone calls, buying uniforms, or paying the salaries of office staff. *L & M Farms, Inc. v. Y2S Trading, Inc., 69 Agric.* Dec. 942, 966 (2010).

A joint account transaction is in the nature of a partnership to which the rules of partnership ordinarily apply. *Fla. Lime & Avocado Growers, Inc. v. Kegar-Caribe of Fla., Inc.*, 20 Agric. Dec. 795, 798 (1961);

Bertolla & Sons v. Hyman Distrib. Co., 13 Agric. Dec. 961, 967-69 (1954); *L. Gillard Co. v. Ball*, 4 Agric. Dec. 588, 591 (1945).

". . . We have held that a joint account agreement is in the nature of a partnership in which the parties intend to share profits and losses equally. Since this is true each of the parties is entitled to full disclosure from the other of all material facts concerning the subject of their agreement. A partner in a joint account arrangement owes the utmost good faith to his co-partner and we have held it is the duty of a partner to his co-partner to transact the joint-account business with reasonable care, skill diligence, and economy; and if the co-partnership sustains injury by reason of his failure to do so, he must bear the losses, though in matters of judgment he will not be liable for a loss caused by honest mistake or error of judgment not amounting to wantonness or fraud." *D.L. Piazza Co. v. Harshfield Bros.*, 13 Agric. Dec. 521, 524 (1954) (citations omitted).

"If one joint account partner can prove that the other partner had knowledge of the abnormal condition of a commodity at the time of contracting and that such knowledge was not communicated to the first partner, the innocent partner cannot be held liable for joint losses incurred solely because of the condition of the commodity." *Senini Ariz., Inc. v. Gentile Bros., Inc.*, 37 Agric. Dec. 1759, 1762 (1978).

Where lettuce was shipped f.o.b. in a joint account transaction, the warranty of suitable shipping condition was held to apply. *Green Valley Produce Coop. v. Mut. Produce, Inc.*, 43 Agric. Dec. 659, 662 (1984).

In *Kunkel Co. v. Salisch Produce Co.*, 32 Agric. Dec. 1585, 1588 (1973), we quoted an early decision, *L. Gillard Co. v. Ball*, 4 Agric. Dec. 588, 591 (1945), as follows:

> In the joint venture, complainant has as much to gain or lose as did respondent. It is reasonable to assume, then, that complainant did not jeopardize its own interests . . . We fail to see wherein complainant could be said to have been negligent . . . a joint adventurer "contracts for good faith and integrity, but not that he will commit no errors; for negligence, fraud and dishonesty he is liable, but not for non-negligent mistakes.

A joint account transaction contemplates, unless otherwise stated, that profits and losses will be shared equally. *Patterson Produce Co. v. John Love Produce Co.*, 39 Agric. Dec. 1006, 1009 (1980); *Wilco Produce v. McDonnell & Blankfard*, 27 Agric. Dec. 305, 308 (1968). See example of how shared loss is computed in *Davis v. Lebo*, 18 Agric. Dec. 1499, 1502-03 (1959).

A joint venture is a form of partnership to which apply the rules of partnership, wherein each of the joint venturers has the power to bind the others and to subject them to liability to third persons in matters which are within the scope of the joint venture. *Willingham v. Patterson Produce Co.*, 39 Agric. Dec. 766, 770-71 (1980); *C.H. Robinson Co. v. Sierra Packing Co.*, 24 Agric. Dec. 712, 714 (1965).

Sales charges and commissions are not normally contemplated as a part of the expenses of a joint account agreement. *Wilco Produce v. McDonnell & Blankfard*, 27 Agric. Dec. 305, 308 (1968) and *Nat'l Produce Distrib., Inc. v. Lewis D. Goldstein Fruit & Produce Corp.*, 13 Agric. Dec. 69-75 (1954).

Freight, hauling, terminal charges, reconditioning (where evidence supports necessity), and inspection charges have been allowed as expenses, prior to the splitting of the net proceeds. *Nat'l Produce Distribs., Inc. v. Lewis D. Goldstein Fruit & Produce Corp.*, 13 Agric. Dec. 69-75 (1954).

A joint account transaction can involve produce as to which no joint cost is stated. The receiver resells and deducts expenses from the gross proceeds and instead of charging a commission as an expense, splits the net proceeds with the shipper. *Nat'l Produce Distribs., Inc. v. Lewis D. Goldstein Fruit & Produce Corp.*, 13 Agric. Dec. 69 (1954). Most joint account transactions involve produce which has a joint cost (the shipper has purchased the produce at such cost, and such cost is used as a base for computation of shared profit or loss). Frequently the contract calls for a particular grade and may include f.o.b. terms. The receiver resells, deducting expenses of the resale such as freight, and splits the profit above the sale price, or the loss below the sale price, with the shipper. In this situation, damages from any breach of the contract may be factored in. *See Frank Kenworthy Co. v. Belson Bros.*, 14 Agric. Dec. 502, 509 (1955).

The amount represented as joint cost must be the true joint cost. *See Sam Egalnick Co. v. Ben Cole Produce Co.*, 9 Agric. Dec. 1037, 1043-44 (1950), where the shipper was found to have violated the Act by reason of receipt of a secret rebate from the grower.

a. ADEQUACY OF ACCOUNTING

An accounting from a joint venturer showed the date of shipment, the lot number, the name of the purchaser, the amount of cabbage sold, the initial invoice price, the amount actually received, the bill of lading number, the trucking company who delivered the cabbage, and notes on the problems with each load was held to be an adequate accounting even though it lacked an itemized explanation of the shipping charges, the commissions taken, or costs incurred, and it referred to the date of shipment without regard to the date of sale. *L & M Farms, Inc. v. Y2S Trading, Inc.*, 69 Agric. Dec. 942, 963 (2010).

b. DAMAGES

Damages in the amount of the reasonable value of the produce are awarded when a party fails to account for produce. *L & M Farms, Inc. v. Y2S Trading, Inc.*, 69 Agric. Dec. 942, 973 (2010).

c. DUMPING

Where a joint venturer accounted zero and negative returns for lots of cabbage, the accounting must also have included other adequate evidence to justify the zero and negative returns. Inspections or other adequate evidence are required to demonstrate that produce is without commercial value, and that documentation must be given to the joint account partner. Because the expenses were not separately accounted for, presumption arose that zero and negative returns were a result of dumping. *L & M Farms, Inc. v. Y2S Trading, Inc.*, 69 Agric. Dec. 942, 965 (2010).

48. JURISDICTION

"The jurisdiction conferred by the Perishable Agricultural Commodities Act, 1930, *supra*, applies to transactions in interstate commerce and is not dependent upon the amount in controversy or diversity of citizenship." *Simon Siegal Co. v. Heaton*, 5 Agric. Dec. 915, 918 (1946), citing *Krueger v. Acme Fruit Co.*, 75 F.2d 67 (5th Cir. 1935).

Jurisdictional issues are raised by the Secretary *sua sponte*. *DeBacker Potato Farms, Inc. v. Pellerito Foods, Inc.*, 57 Agric. Dec. 770, 772 (1998); *Provincial Fruit Co. v. Brewster Heights Packing, Inc.*, 39 Agric. Dec. 1514-15 (1980).

"There are four basic jurisdictional requirements under the Act; they are: (1) the transaction must involved "perishable agricultural commodities" (7 U.S.C. § 499a(4)); (2) the transaction must involve "interstate or foreign commerce" (7 U.S.C. § 499a(8)); (3) the person complaining must petition the Secretary within nine months after the cause of action accrues (7 U.S.C. § 499f(a)); and (4) the respondent must be a licensee under the PACA or operating subject to the licensing requirements of the Act (7 U.S.C. § 499d(a))." *Jebavy-Sorenson Orchard Co. v. Lynn Foods Corp.*, 32 Agric. Dec. 529, 531 (1973).

a. COMPULSORY COUNTERCLAIM

See **ELECTION OF REMEDIES** - this index.

A party may bring an action in this forum and still file a compulsory counterclaim on the same subject matter in a court of competent jurisdiction without losing its cause of action in this forum. *Kurt Van Engel Comm'n Co. v. Schultz Sav-O Stores, Inc.*, 48 Agric. Dec. 731, 733 (1989); *Trans W. Fruit Co. v. Ameri-Cal Produce, Inc.*, 42 Agric. Dec. 1955, 1957 (1983).

Extensive discussion: A state court judgment based on the compulsory counterclaim is *res judicata* in this forum and may form the basis for an award of reparation. *M.S. Thigpen Produce Co. v. Park River Growers, Inc.*, 48 Agric. Dec. 695, 697 (1989).

b. CONSENT INJUNCTION – FAILURE TO NOTIFY

A Consent Injunction issued by a federal district court in a trust proceeding brought pursuant to section 5(c) of the PACA (7 U.S.C. 499e(c)) is given effect in reparation proceedings with proper notice to the Secretary. Where proper notice is given, reparation actions before the Secretary may be stayed. Where parties fail to provide the Secretary with proper notice of a Consent Injunction before the Secretary's reparation order becomes final, the Secretary lacks jurisdiction to consider a petition to reopen or request to vacate the order. *Banacol Mktg. Corp. v. Jard Mktg. Corp.*, 69 Agric. Dec. 828, 831 (2010).

c. CONTEMPLATION OF INTERSTATE COMMERCE

Where a load of cucumbers was sold by a Florida complainant to a Florida respondent, and shipped to a customer of respondent in Florida with the contemplation that the cucumbers would be distributed to firms outside the state, and over two-thirds of the cucumbers were shown to have in fact been shipped out of the state of Florida, but less than one-third were shipped to other Florida firms, it was found that the load was sold in contemplation of interstate commerce, and that the Secretary had jurisdiction. *Lionheart Group, Inc. v. Sy Katz Produce, Inc.*, 59 Agric. Dec. 449, 455 (2000).

d. COUNTERCLAIMS

Counterclaims are permitted under PACA Rules of Practice, whether or not arising from the transaction complained of, and even though they arise from extrinsic matters. *Schumman Co. v. Yeckes-Eichenbaum, Inc. of N.Y.*, 7 Agric. Dec. 1216, 1220-22 (1948).

Counterclaims involving the same transaction may be filed more than nine months after the transaction occurred. *Calagno Farms v. Spring Kist Sales*, 22 Agric. Dec. 406, 410 (1963); *C.F. Smith, Inc. v. Bushala*, 21 Agric. Dec. 1365, 1370 (1962); *Chapin Bros., Inc. v. Michael Bros.*, 15 Agric. Dec. 616, 619 (1956); *Vener Co. v. McCaffrey Bros. Co.*, 15 Agric. Dec. 405, 410 (1956).

Counterclaims arising out of different transactions than those covered by a timely complaint must be filed within nine months after the cause of action as to such counterclaims accrued. *F & J Produce Sales v. Hdrlicka Dairy Cattle Inc.*, 45 Agric. Dec. 1342, 1344-45 (1986); *Sanders & Drake v Gardner Bros.*, 31 Agric. Dec. 128, 131-32 (1972); *Calcagno Farms v. Spring Kist Sales*, 22 Agric. Dec. 406, 410 (1963).

A counterclaim involving different transactions from those in complaint filed by a foreign complainant and filed within nine months after the filing of the complaint, but not within nine months of accrual of cause of action, was untimely. *Bar-Well Foods Ltd. v. Valley Packing Serv. Int'l*, 39 Agric. Dec. 1200, 1204 (1980).

e. COVERED COMMODITIES

The PACA defines "perishable agricultural commodity" as fresh fruits and fresh vegetables of every kind and character, and the Regulations state that "fresh fruits and fresh vegetables" include all produce in fresh form generally considered as perishable fruits and vegetables. The popular conception of what is a fresh fruit and vegetable has always been the standard by which determinations have been made as to what commodities are covered by the PACA, and not the botanical definition. Chestnuts are considered nuts, and are not covered by the PACA. *Regal Mktg., Inc. v. All Am. Farms, Inc.*, 58 Agric. Dec. 1133, 1134-36 (1999). *See also J. Stein & Son v. Magnelli's Fruit & Produce*, 14 Agric. Dec. 782, 784-85 (1955); *Phila. Produce Credit & Collection Bureau v. Frushon*, 8 Agric. Dec. 1055, 1057 (1949).

Peanuts, pecans and coconuts were excluded early from the category "perishable agricultural commodity." *Mason v. D.O. Lucas & Son*, 18 Agric. Dec. 835, 837 (1959); *Kelso v. Creech*, 16 Agric. Dec. 773, 774 (1957); *Arnold Fruit Co. v. Holly Bros.*, 10 Agric. Dec. 885, 887 (1951).

Respondent questioned the Secretary's jurisdiction over hydrated dates and requested a hearing. Dates are berries that are the fruit of date palm trees. Hydration is used to soften the texture of some date cultivars and is part of the curing and ripening process. The PACA defines "perishable agricultural commodity" as fresh fruits and fresh vegetables of every kind and character. The Regulations (Other than Rules of Practice) (7 C.F.R. § 46.1 *et seq.*) provide that fresh fruits and fresh vegetables include all produce in fresh form generally considered as perishable fruits and vegetables, that have not been manufactured into a food product of a different kind or character. (7 C.F.R. § 46.2(u)). The Regulations further state that the effects of curing and ripening operations are not actions that change the character of a perishable agricultural commodity. *Id.* Dates, whether or not requiring hydration, are therefore perishable fruit subject to the PACA. Since the Secretary has jurisdiction over this proceeding and Respondent admits liability in the full amount of the claim (after deducting payment), there is no need for an oral hearing. Respondent's request for an oral hearing is therefore denied. *Datepac LLC v. Trans Mid East Shipping & Trading Agency, Inc.*, 72 Agric. Dec. A, E (U.S.D.A. 2013).

See § 46.2(u) of the Regulations (7 C.F.R. § 46.2(u)).

See also paragraph entitled **"LOSS OF CHARACTER AS PRODUCE,"** - this topic.

f. CROSS-CLAIMS

The Secretary does not have jurisdiction to hear a cross-claim by one respondent against another respondent where such claim was not filed within nine months after the cause of action relative to such

cross-claim accrued, even though the cross-claim arises out of the same cause of action as a timely complaint filed in the same proceeding. *Larry Merrill Produce Co. v. L & P Vegetable Corp., Inc.*, 51 Agric. Dec. 802-03 (1992).

A cross-claim arising out of the same nucleus of fact as that involved in the complaint, filed by one respondent against another respondent, was found to be outside the Secretary's jurisdiction because filed more than nine months after the causes of action relative to such claims accrued. *Newbern Groves, Inc. v. C.H. Robinson Co.*, 53 Agric. Dec. 1766, 1768-69 (1994).

However, in *U.S. for the Use of Bros. Builders Supply Co. v. Old World Artisans, Inc.; Ticor Constr. Co. & Cent. Nat'l Ins. Co. of Omaha*, 702 F.Supp. 1561 (N.D. GA 1988); it was stated that,

> [i]n determining whether a cross-claim may relate back to the date of the original complaint, the federal courts distinguish between those wherein the defendant seeks to reduce the amount a plaintiff can recover, such as by recoupment, contribution, or indemnity, and those wherein the defendant is seeking affirmative relief . . . The cross-claim, to the extent that it seeks indemnity or contribution for sums it may owe to Builders Supply, relates back to the date of the filing of the original complaint and is therefore timely filed under the Miller Act. That part of the cross-claim that seeks payment for other labor, materials or damages, independent of the material for which Builders Supply seeks payment, is an independent cause of action. That part of the cross- claim does not relate back to the date of original complaint, and because it was not filed within the one-year period of the Act, it is barred.

See **PRACTICE AND PROCEDURE - CROSS-CLAIMS FILED AGAINST CO-RESPONDENTS** - this index.

g. DEALERS - RETAIL EXEMPTION

The PACA (7 U.S.C. § 499a(6)(B)) provides that "no person buying any such commodity solely for sale at retail shall be considered as a 'dealer' until the invoice cost of his purchases of perishable agricultural commodities in any calendar year are in excess of $230,000." *See Gregory v. Lane*, 17 Agric. Dec. 60, 62-63 (1958); *Michael-Swanson-Brady of Moorhead, Inc. v. Backer's Potato Chip Co.*, 17 Agric. Dec. 651, 655-56 (1958), where, after finding that the potatoes involved had been sold at wholesale, the opinion was offered that section 1(6)(B) of the Act "appears to contemplate a resale of the original product as purchased, rather than the resale of the end product after being purchased."

h. DEFINITION OF DEALER AND TRANSACTION

Complainant, a farmer with acreage in Michigan, contracted with respondent, a canner of vegetables in Michigan, to produce green beans on 37 acres of land. The contract provided that title to the seed and the beans produced from the seed, would at all times remain in respondent. Respondent harvested the beans as required by the contract and then rejected them at the cannery due to the alleged presence of worms, but did not notify complainant of the rejection until after the beans were dumped. Complainant alleged that the rejection was improper, and sought to recover the value set by the contract for the beans. It was held that the transfer of the beans from complainant to respondent under the contract could fit within the meaning of the term "transaction" used in Section 2 of the Act, that respondent was a dealer under Section 1(b)(6) of the PACA because it purchased beans on the open market from time to time,

and because the canner exception of Section 1(b)(6)(C) was inapplicable due to respondent having elected to secure a license under the PACA. However, respondent did not fall within the definition of dealer in Section 1 vis-à-vis complainant, nor did respondent participate in a transaction covered by Section 2(4) because no sale of the beans took place between complainant and respondent. *Areklet v. Stokely USA, Inc.*, 55 Agric. Dec. 1387, 1390-91 (1996).

i. FOREIGN COMMERCE

Although the literal words of the PACA would apply to a foreign resident buying or selling in the United States, the Secretary has never considered such a foreign resident under the Secretary's jurisdiction if no agent or representative (other than a broker) is in the country. Solicitor's Opinion 254; Jan. 31, 1945.

j. HANDLING FEE

The failure to pay both the filing fee and the handling fee was noted as a problem in connection with the attempted filing of a counterclaim over which it was held the Department lacked jurisdiction. However, the decision could as readily rest on the failure to file a timely claim as upon the failure to file the statutory fees. *C.H. Robinson Co. v. Kay Gee Produce Co.*, 60 Agric. Dec. 314, 316 (2001).

k. INFORMAL COMPLAINT - WITHDRAWAL OF

Cause of action accrued March 24, 1966. Informal complaint was filed May 19, 1966, and respondent was notified of such. Complainant then withdrew informal complaint, and was informed by the Department on October 17, 1966, that the Department's file on the matter was being closed. We said:

> It is true that the informal complaint of May 19, 1966, was withdrawn. It also appears that the formal complaint was not filed until April 3, 1967. If these were all the facts, we would not have jurisdiction in this matter. However, the records of the Department, of which we take official notice, show that under date of November 17, 1966, complainant wrote to the Department requesting permission to reopen the proceeding. This letter, which was received by the Department on November 21, 1966, had the effect of reinstating the earlier informal complaint. It constituted, in fact, a new informal complaint. Since it was filed within the statutory nine-month period, the Secretary has jurisdiction in this proceeding.

Colace Bros. v. Thomas J. Holt Co., 27 Agric. Dec. 932, 935 (1968).

On reconsideration, it was held that although the letter of November 17, 1966, was not a part of the record, the Secretary's jurisdiction did not depend upon the record, but upon the fact of a timely filing. 27 Agric. Dec. 1301 (1968).

l. INTERSTATE COMMERCE

Physical movement of a commodity across a state border is not a prerequisite to jurisdiction under the PACA. *A-W Produce Co. v. Berry*, 68 Agric. Dec. 1291, 1295-96 (2009).

Jurisdiction cannot be found purely on basis of admission in answer where evidence indicated lack of interstate movement. *E.S. Harper Co. v. Osborne*, 8 Agric. Dec. 1027, 1031 (1949).

Respondent, a PACA licensee located in the state of California, purchased California grown broccoli crowns from Complainant, a PACA licensee also located in the state of California. In defense of its alleged failure to pay Complainant the unpaid balance of the agreed purchase price for the broccoli crowns, Respondent asserted that neither the commodity in question, nor any of the products purchased by Respondent, are ever shipped out of state, so the Secretary lacks jurisdiction over this transaction. It was found that since the shipment in question involves a type of produce commonly shipped in interstate commerce and was shipped by a produce dealer that does a substantial portion of its business in interstate commerce, the subject shipment is considered to be in interstate commerce under the PACA. Based on this analysis, the Department could properly exercise jurisdiction over this dispute. *Produce Supply, Inc. v. Guy E. Maggio, Inc.*, 69 Agric. Dec. 791, 795 (2008).

Where there is no indication that the commodities involved in the Complaint ever physically crossed state lines, the transaction is nevertheless considered as entering the current of interstate commerce where the commodities commonly move in interstate commerce and where the parties reasonably could be expected to regularly engage in interstate purchases and sales of produce based on the nature of their businesses. *San Joaquin Tomato Growers, Inc. v. Abdallah*, 67 Agric. Dec. 645, 651 (2008).

Where potatoes were shipped intrastate to a processing plant located near the Canadian border, that fact alone was insufficient to show that the resulting processed potatoes were then exported to Canada or that it was contemplated by the parties that they would be so exported. It was concluded that the transactions were not in interstate or foreign commerce within the meaning of the Act, and the complaint was dismissed. *DeBacker Potato Farms, Inc. v. Pellerito Foods, Inc.*, 57 Agric. Dec. 770, 772-73 (1998).

The sale of Florida-grown tomatoes by a Florida grower/shipper to a "pinhooker" who intended to sell the tomatoes to local buyers for use at farmers' markets and roadside stands is not in interstate commerce because the tomatoes in question are not eligible for shipment outside the state of Florida due to Marketing Order requirements and because the parties never intended or contemplated that these tomatoes would travel in interstate commerce. As a result, these tomatoes cannot be considered a commodity that commonly moves in interstate commerce. As there was no actual or contemplated movement in interstate commerce for the shipments in question, the Secretary is without jurisdiction to consider the dispute. *DiMare Homestead, Inc. v. Yzaguirre Farms LLC*, 70 Agric. Dec. W, CC (USDA 2011), *published in* 72 Agric. Dec. W, CC (USDA 2013).

See **INTERSTATE COMMERCE** - this index.

m. LOSS OF CHARACTER AS PRODUCE

Water or steam blanching does not affect the character, but partial cooking of produce in oil prior to freezing changes its character and excludes such produce from our jurisdiction. Dicta in *Bar-Well Foods Ltd. v. Valley Packing Serv. Int'l*, 39 Agric. Dec. 1200, 1206 (1980).

The addition of chemicals for the purpose of inhibiting the growth of microorganisms in chilled orange sections packed in juice fell within the category of "curing," and thus was not an operation which changed the product into a food of a different kind or character within the meaning of the applicable section of the Regulations. *Silver Star Processors, Inc. v. Costa Fruit & Produce Co.*, 53 Agric. Dec. 897, 905-06 (1994).

See Section 46.2(u) of the Regulations (7 C.F.R. § 46.2(u)).

n. LOSS OF, 30 DAYS AFTER THE ISSUANCE OF AN ORDER

Absent intervening action which would stay an order, the Secretary loses jurisdiction over the subject matter 30 days after the issuance of a final order. *Morgan of Wash., Inc. v. Bramson*, 48 Agric. Dec. 1121 (1989); *Southland Produce Co. v. Caamano Bros. Wholesale*, 39 Agric. Dec. 789, 797 (1980); *Yamada v. Natural Disaster Claims Comm'n*, 513 P.2d 1001 (1973).

The leading authority is *Lasky v. Comm'n of Internal Revenue*, 235 F.2d 97 (9th Cir. 1956), aff'd, per curiam without opinion, 352 U.S. 1027 (1957) (Douglas, J., dissenting). In *Lasky*, the United States Court of Appeals had jurisdiction by statute to review Tax Court action if the petition for review was filed within three months after the decision of the Tax Court was rendered. The Tax Court entered its decision on April 8, 1954. No petition was filed. "Some four months after the decision, on August 23, 1954, the petitioners moved the Tax court to vacate the decision of April 8, 1954, on the ground of excusable neglect, a power formerly in the federal court's equity jurisdiction (citing cases), and now contained in Rule 60(b), F.R.C.P., 28 U.S.C., which by Rule 1 is confined to the United States District Courts and not applicable to executive agencies." (*Lasky*, at p. 98). The Court of Appeals stated:

> Though not a court at all but merely an administrative agency [the Tax Court] assumed the power of a district court and in December, 1954, it granted petitioners' motion to vacate its decision of April 8, 1954, and for the taking of additional evidence. After additional evidence was taken, the Tax Court rendered a second decision reaching the same result as in the first. The petition for review of the second decision was filed well within three months of the date it was entered.
> . . .
>
> We hold that the Tax court was without jurisdiction to set aside its first decision and that this court has no jurisdiction to consider a petition for review of its second decision. The petition for review is ordered dismissed.

Lasky, at p. 98, 100. *See also Harbold v. Commissioner of Internal Revenue*, 51 F.3d 618 (6th Cir. 1995), and *Kelley v. Commissioner of Internal Revenue*, 45 F.3d 348 (9th Cir. 1995) where the Court of Appeals said: ". . . the Tax Court is a court of strictly limited jurisdiction and cannot assert equitable powers in any way that could be construed as extending its jurisdiction."

o. NECESSITY THAT PRODUCE BE INVOLVED

For a party to be liable, it must have a contractual relationship involving the purchase and sale of produce and that transportation, or the sale of bags, separate from the sale of produce is not such a relationship. *E.J. Harrison & Son v. A.E. Albert & Sons*, 24 Agric. Dec. 884, 885 (1965); *Reid & Joyce Packing Co. v. Touchstone*, 15 Agric. Dec. 884, 887 (1956); *Anonymous*, 4 Agric. Dec. 332-33 (1945).

Complainant's claim for bags, wire ties, and the cost of grading equipment used in connection with potatoes sold to respondent was allowed. Such items were "incidental and necessary to the merchandising of perishable agricultural commodities" and therefore they "come within the scope of the act." *Kowinsky v. Gardner Bros.*, 23 Agric. Dec. 717, 720 (1964). *See also Otoy v. Red Head Tomato Packing Co.*, 14 Agric. Dec. 331, 333 (1955); *Piper v. Main Estates*, 12 Agric. Dec. 1369 (1953).

In *Eady v. Eady & Assoc*., 37 Agric. Dec. 1589, 1592 (1978), complainant contracted to furnish farm equipment to respondent (for use in cultivation of produce crops) in exchange for respondent's promise to give complainant 10% of the net proceeds from the sale of the crop. The farm equipment was not a perishable commodity and (as between complainant and respondent) there was no exchange of a perishable commodity. We held that we had jurisdiction. Issue discussed at length.

Where A was alleged to have provided B with consulting services as to how to grow Oriental vegetables in exchange for a portion of the commission B was to paid by the grower of the vegetables, and the vegetables were grown, sold, and shipped, it was held that the jurisdictional requirement of transactions involving perishable agricultural commodities was met so as to give Secretary jurisdiction over a reparation complaint by A against B for the commissions. *E. Produce, Inc. v. Seven Seas Trading Co.*, 59 Agric. Dec. 853, 861 (2000).

See **"TRANSACTION NECESSARY"** - this topic.

p. NINE-MONTH STATUTE OF LIMITATIONS

See **CAUSE OF ACTION** - this index.

See **STATUE OF LIMITATIONS** - this index.

The statute is jurisdictional in nature. ". . . the time allowed for filing of claims is a limitation upon jurisdiction and, therefore, being of more consequence than a statute of limitations, cannot be altered by the parties." - citing *Louisville Cement Co. v. I.C.C.*, 246 U.S. 638 (1918). *Cadenasso v. Cal-Mex. Distrib. Co.*, 2 Agric. Dec. 751, 754 (1943).

In *Louisville Cement Co. v. Interstate Commerce Comm'n*, Justice Clark, writing for a unanimous court, stated:

> We agree with this conclusion of the Commission, that the two-year provision of the act is not a mere statute of limitation, but is jurisdictional, - is a limit set to the power of the Commission, as distinguished from a rule of law for the guidance of it in reaching its conclusions.

The statute in question read, "All complaints for the recovering of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after."

Good explanatory language in *H & M Banana Co. v. Rakovich Farm Produce*, 18 Agric. Dec. 504, 507 (1959). *See also B & K Produce Co. v. Shipper's Serv. Co.*, 33 Agric. Dec. 701, 706 (1974).

"Contrary to complainant's assertion that a cause of action does not accrue until the facts are known to a complainant, it is well settled that a cause of action accrues at the time that an event occurs and not at the time when a party discovers the facts or learns of his rights thereunder." (citing cases) *Calavo Growers of Cal. v. Int'l Food Mktg.*, Inc., 40 Agric. Dec. 972, 974 (1981).

A complaint, either informal or formal, must be filed within nine months of when the cause of action arose. 7 U.S.C. 499 f (a)(1*). Sanders & Drake v. Gardner Bros.*, 31 Agric. Dec. 128, 131-32 (1972); *Freshpict Foods, Inc. v. Consumers Produce,* 29 Agric. Dec. 163, 164 (1970); *Immokalee Vegetable*

Growers Coop. Ass'n v. Sidney Rosenthal Produce, Inc., 29 Agric. Dec. 483, 486 (1970); *Pelletier Fruit Co. v. Koutroulares,*19 Agric. Dec. 1232, 1237 (1960).

See **CAUSE OF ACTION** - this index.

Filing of informal complaint tolls statute. *Syracuse & Jenkins Produce Co. v. Anthony Gagliano & Co.*, 44 Agric. Dec. 1034, 1036 (1985); *E. Potato Dealers of Me., Inc. v. Commodity Mktg. Co.*, 36 Agric. Dec. 2017, 2021 (1977). *See* 10 N. Harl, Agricultural Law, § 72.10[2][c] at n. 41 (1983).

Where a complainant files an informal complaint and subsequently informs the Department that it wishes to close the file or dismiss the complaint, the file will be closed, and the Department will so notify the complainant. Once the complaint is dismissed, the statute of limitations is no longer tolled, and the time to file a complaint will expire in nine months after the accrual of the cause of action. *Bemel, Inc. v. U.S. Produce Brokers, Inc.*, 53 Agric. Dec. 1859, 1860 (1994).

Cause of action did not accrue until the time the accounting was rendered by the grower's agent. *Wuszke v. Fruit Pak, Inc.*, 42 Agric. Dec. 1207, 1211 (1983).

q. NON-PRODUCE COUNTERCLAIMS

For this forum to have jurisdiction over a counterclaim or set-off, the claim must involve a produce transaction. Respondent's off-set was based on the contention that complainant, without authorization, used respondent's bulk loader and damaged it. The Secretary had no jurisdiction over this claim. *Quincy Produce Co., v. Stewart Produce Co.*, 20 Agric. Dec. 681-82 (1961).

r. OFFSETS

An offset as to transactions extraneous to the complaint must be pleaded within nine months of when it occurred for there to be jurisdiction. *Produce Distrib., Inc. v. Michael Bros.*, 45 Agric. Dec. 814, 816-17 (1986); *Sanders & Drake v. Gardner Bros.*, 31 Agric. Dec. 128, 131-32 (1972).

s. OVER IMPLIED DUTY ARISING OUT OF UNDERTAKING

Complainant seller renounced ownership of produce in favor of trucking company, and trucking company subsequently refused to convey produce to out of state commission merchant as directed by seller and instead conveyed load to a local commission merchant. In action against local commission merchant by seller to recover proceeds of salvage sale it was held that the Secretary had jurisdiction to adjudicate issue of whether seller had beneficial ownership, and it was found that seller did not have such ownership. Citing section 2(4) of the PACA making it illegal ". . . 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 . . .," we stated:

> If, as alleged by complainant, the beneficial ownership of the produce belonged to complainant, and respondent, a licensee under the Act acting in the capacity of a commission merchant, was put on notice of that beneficial ownership, then respondent had at least an implied duty arising out of an undertaking in regard to a transaction involving perishables to pay the proceeds of the load to its beneficial owner.

Christian Salvesen Packing & Mktg. Co. v. Waldo H. Lailer & Co., 49 Agric. Dec. 645, 649 (1990).

t. PROMISES TO PAY OR NOTES

If a produce creditor accepts a note in lieu of timely payment, it is assumed that it was accepted merely as evidence of the indebtedness unless it is made clear by the parties that it is accepted in satisfaction of the indebtedness. If it is not accepted in satisfaction of the indebtedness and the debtor defaults on the note, the creditor may elect to sue on the note or on the original debt. If the creditor chooses to sue on the original debt in a reparation proceeding, the complaint must be filed within nine months of the date of the accrual of the PACA cause of action and, in addition, the creditor must surrender the original note to the Department, or satisfactorily account for its failure to do so. This protects the debtor from having the note negotiated for value to a bona fide purchaser by a creditor who also chooses to sue on the debt. It follows that in order for a PACA action to be filed following the taking of a note, the default must take place within such time as to allow filing of the complaint within nine months after the PACA cause of action accrued. If the note is taken after the filing of the jurisdictional complaint, such complaint should be returned to the complainant since it would have no PACA cause of action while the note is still executory. During the period when a note is executor, a creditor is not entitled to file a formal or informal complaint with the Department. See *Fed. Fruit & Produce Co. v. Sandy's Produce*, 24 Agric. Dec. 1121, 1123-24 (1965) and *Cadenasso v. Cali-Mex. Distrib. Co.*, 2 Agric. Dec. 751, 754 (1943). To the extent that *Or. Onions, Inc. v. Paiute Frozen Foods Corp.*, 48 Agric. Dec. 1122 (1989) appears contradictory, it should not be followed.

The foregoing was followed in *Turbana Fruit Co. v. Larry Merrill Produce Co.*, 50 Agric. Dec. 1872, 1874 (1991).

u. RESPONDENT NOT SUBJECT TO LICENSE

This forum lacks jurisdiction over a respondent who is neither licensed nor subject to license. *Jebavy-Sorenson Orchard Co. v. Lynn Foods Corp.*, 32 Agric. Dec. 529, 531 (1973); *Fairbrother v. Gulf Farms*, 28 Agric. Dec. 612, 616-17 (1969). Similarly, this forum lacks jurisdiction to issue a positive award against a complainant, the subject of a counterclaim, who is not licensed or subject to license under the Act. The amount found due may, however, be set off against any positive award to the complainant arising from the original claim. *Crawford v. Ralf & Cono Comunale Produce Corp.*, 51 Agric. Dec. 804, 810 (1992).

v. RESPONDENT UNLICENSED BUT OPERATING SUBJECT TO LICENSE

Where it was established from evidence regarding the transactions that are the subject of the reparation complaint, along with evidence regarding transactions that are not the subject of the complaint, that Respondent was operating subject to license during the time period of the transactions contained in the complaint, Respondent held liable for the reasonable value of tomatoes received and sold on behalf of Complainant. *Sol Fresh Produce, Inc. v. LA Repack, Inc.*, 65 Agric. Dec. 688, 692-93 (2006).

w. TRANSACTION NECESSARY

The word "transaction" in Sec. 2(4) of the PACA refers to a commodity that is "bought or sold, or contracted to be bought, sold, or consigned . . . or the purchase or sale" thereof "is negotiated by a broker." A contract for $0.05 per lug fee for storing, gassing, and for freight as to ten carloads of grapes was not a transaction subject to the PACA. *Anonymous*, 4 Agric. Dec. 934, 936-37 (1945). *See also*

Alkop Farms, Inc. v. Frupac Int'l Corp., 50 Agric. Dec. 1901, 1920-21 (1991); *E.J. Harrison & Son v. A.E. Albert & Sons*, 24 Agric. Dec. 884-885 (1965); *Reid & Joyce Packing Co. v. Touchstone*, 15 Agric. Dec. 884, 887 (1956).

"Although the word 'transaction' is not defined in the Act or the Regulations, it has been consistently construed to mean any of the types of contracts or understandings which are mentioned in the definitions in the Act for commission merchants, dealers, and brokers, that is, consignments, purchases and sales, and negotiating of sales and purchases on behalf of a seller or purchaser." *Reid & Joyce Packing Co. v. Touchstone*, 15 Agric. Dec. 884, 887 (1956).

A joint venture might be viewed as involving no "transaction" as between the joint venturers but where the joint venture is for the purpose of engaging in a perishable transaction, we have jurisdiction to adjudicate issues between the joint venturers. Thus, where complainant entered into a joint venture farming agreement with respondent which agreed to raise and market various perishable commodities with complainant furnishing the equipment necessary to the cultivation of the crops and receiving under the agreement 10% of net proceeds, it was held that "complainant does not merely seek recovery of a rental fee for farm equipment. This case rather partakes of the nature of a joint venture which was directly concerned with participation in the proceeds from the sale of perishable agricultural commodities." *Eady v. Eady & Assoc*., 37 Agric. Dec. 1589, 1591-93 (1978).

In *R.B. Todd Prod. Co. v. Frostreat Frozen Foods*, 22 Agric. Dec. 917, 920-21 (1963), there was an agreement between the parties that complainant would harvest and transport beans at a certain price per ton. Since there was no consignment, purchase or sale of beans, the complaint was dismissed for lack of jurisdiction. The contract was purely for harvesting and transportation.

Contracts for the rendering of a service such as harvesting are covered transactions if they involve the sale of a perishable commodity. *Faris Farms v. Lassen Farms*, 59 Agric. Dec. 471-73 (2000).

While the PACA reparation forum does not ordinarily have jurisdiction over cold storage fee claims, there is jurisdiction to adjudicate those claims when the cold storage fees are incident to the consignment of a perishable agricultural commodities. *Magallon v. Pac. Sun Distrib., Inc.*, 69 Agric. Dec. 848, 864-65 (2010).

x. TRANSPORTATION AS PART OF A PRODUCE CONTRACT

Secretary has jurisdiction when transportation is a part of a produce contract. *Pappas & Co., v. Papazian Distrib. Co.*, 46 Agric. Dec. 1882, 1886-87 (1987); *Shopwell, Inc. v. Royal Packing Co.*, 43 Agric. Dec. 902, 905 (1984); *Relias v. Frank Kenworthy Co.*, 16 Agric. Dec. 590, 600 (1957).

Where complainant sold a carload of tomatoes to respondent, f.o.b., and respondent was legally obligated, as between complainant and respondent to pay the freight but did not pay such freight to the railroad, and where complainant, under applicable tariffs had guaranteed payment of the freight to the railroad, and requested reparation for only the freight, it was stated that:

> [h]ere there can be no doubt that the sales transaction between the parties is within the purview of the act. Since respondent, under the sales transaction, became liable for the freight charges, the payment of such charges became an 'undertaking (by respondent) in connection with such transaction.' Where transportation charges are implicit in a transaction within the purview of the act,

> we have consistently held that in determining the rights of the parties under the transaction the Secretary is authorized to award reparation for such charges, or dismiss a claim therefor, dependent upon the facts and applicable legal principles of each case.

(Complaint was dismissed due a finding of accord and satisfaction.) *Relias v. Frank Kenworthy Co.*, 16 Agric. Dec. 590, 600 (1957).

y. TRANSPORTATION CONTRACT

This forum lacks jurisdiction over the subject matter when there is only a transportation contract in issue, and the contract is not related to a produce transaction which is in issue. *Me. Banana Corp. v. Walter D. Davis, Inc*., 32 Agric. Dec. 983, 986 (1973); *Reid & Joyce Packing Co. v. Touchstone*, 15 Agric. Dec. 884, 887 (1956).

In *Anonymous*, 4 Agric. Dec. 934, 936 (1945), it was held that where complainants and respondent entered into a contract whereby respondent was to ship carloads of grapes to complainants and the latter were to receive a commission for arranging for storage space, payment of the freight charges and gassing the grapes, and respondent failed to ship any grapes, the stipulated compensation was not for grapes bought or sold or contracted to be bought or sold or consigned, or the purchase and sale thereof negotiated by a broker, and, therefore respondent's failure to pay complainants for the kind of services that were to be rendered was not in violation of the Act.

However, where a dispute "is between two parties dealing in . . . a perishable agricultural commodity, and involves freight charges which were part of a necessary and usual contract or agreement relating to the handling of [perishables] . . . liability between the parties for said freight charges arises out of this transaction." *Frank Kenworthy Co. v. D.L. Piazza Co.*, 16 Agric. Dec. 844, 849 (1957). Decision cites *Relias v. Kenworthy*, 16 Agric. Dec. 590, 600 (1957); *Sawyer v. Rothstein & Sons*, 15 Agric. Dec. 693, 696 (1956).

In *Kingsbury Co. v. Metzler*, 52 Agric. Dec. 1724, 1727 (1993), respondent, a licensee under the Act, acted as a truck broker on behalf of complainant, and secured a truck to transport a load of chipping potatoes to a third party customer of complainant. The truck was delayed in transit and on arrival, the potatoes were rejected. Respondent attempted to contact an agent of the third party in the state where the potatoes were grown for instructions as to disposition of the load and was unsuccessful in making such contact. No instructions were received from complainant and after waiting several hours, respondent resold the load for an amount which netted substantially less than complainant would have realized from its contract with the third party. We stated:

> Respondent is licensed under the Act, and as a licensee would qualify, in a proper situation, as a commission merchant, dealer, or broker. However, respondent's sale of the chipping potatoes following their rejection was accomplished in his capacity as a truck broker for complainant, and did not arise out of a contract between complainant and respondent which concerned the sale or consignment of the potatoes as between complainant and respondent. Respondent did not receive the potatoes in interstate or foreign commerce as a commission merchant, or buy or sell or contract to buy or sell or take on consignment the potatoes as between complainant and itself, or negotiate as a broker the purchase or sale, as between complainant and any other party, of such potatoes. Thus, the dealings of

> respondent with complainant do not qualify as a "transaction" of the type delineated in the Act, and the Secretary does not have jurisdiction over an allegation by complainant based upon such malfeasance or negligence by respondent as may be shown by the record herein.

In *Christian Salvesen Packing & Mktg. Co. v. Waldo H. Lailer & Co.*, 49 Agric. Dec. 645, 649 (1990), where a seller-shipper agreed with buyer to take back a load of produce following arrival and discovery of freezing injury caused by trucker, subsequent communication with the trucking company by the seller-shipper stating that the seller was refusing the load, referring to the load as belonging to the trucking company and stating that the trucking company would be held for the original invoice price, showed a renunciation of ownership in favor of the trucking company. The trucking company subsequently refused to convey produce to out of state commission merchant as directed by seller and instead conveyed load to local commission merchant. In action against local commission merchant by seller-shipper to recover proceeds of salvage sale, it was held that the Secretary had jurisdiction to adjudicate issue of whether shipper had beneficial ownership, and it was found that shipper did not have such ownership. We stated:

> If, as alleged by complainant, the beneficial ownership of the produce belonged to complainant, and respondent, a licensee under the Act acting in the capacity of a commission merchant, was put on notice of that beneficial ownership, then respondent had at least an implied duty arising out of an undertaking in regard to a transaction involving perishables to pay the proceeds of the load to its beneficial owner.

"Since the produce transactions at issue in respondent's alleged freight offset are separate from the transactions at issue in the complaint, we cannot reach the question of whether the offset is proper and can be allowed. Therefore, respondent cannot be allowed to offset the freight costs that it allegedly incurred on complainant's behalf." *E. Produce, Inc. v. Seven Seas Trading Co.,* 59 Agric. Dec. 853, 858 (2000).

Respondent broker in negotiating for the consignment of complainant's cantaloupes to a third party undertook with complainant to secure vans for the transportation of the melons and then secured such vans through a distinct corporation which later billed the consignee for freight at a rate that was $600.00 per van in excess of prevailing freight rates. The consignee deducted such freight charges in its accounting to complainant. It was held that the Secretary had jurisdiction since complainant was not claiming on the basis of a transportation contract but on the basis of the broker's fiduciary duty. *Pappas & Co., v. Papazian Distrib. Co.*, 46 Agric. Dec. 1882, 1886-87 (1987).

z. TRUST

Where Complainant claimed that it was entitled to an order declaring that it is a PACA trust beneficiary of Respondent with valid PACA trust claims, such an order was not issued. Only the district courts have jurisdiction over actions by private parties seeking to enforce payment from trust, including actions seeking injunctive relief. It is the purview of the district courts to issue an order declaring that a Complainant is a PACA trust beneficiary of a Respondent with valid PACA trust claims. *Grasso Foods, Inc. v. Americe, Inc.*, 69 Agric. Dec. 1547, 1567 (2010).

49. MERCHANTABILITY - WARRANTY OF

a. APPLICABLE ONLY AT SHIPPING POINT UNDER COMMON LAW

The common law warranty of merchantability was applicable only at the shipping point. *N. Am. Produce Buyers v. Source Produce Distrib. Co.*, 48 Agric. Dec. 1101 (1989); *J.D. Bearden Produce Co. v. Pat's Produce Co.*, 12 Agric. Dec. 682, 692-93 (1953). *See also David M. Slaughter & Son v. Vegetable Juices, Inc.*, 37 Agric. Dec. 188, 194 (1978), where respondent's allegation that complainant breached the warranty of merchantability due to insect infestation and subsequent condemnation by authorities was denied because it could not be proven that the infestation occurred before leaving complainant's warehouse.

Where the parties agree to f.o.b. acceptance final terms, the buyer's only recourse is to prove a material breach of contract by the seller. For the buyer to establish a breach by the seller of the implied warranty of merchantability in such a case, the buyer must establish that the produce was not merchantable at the time of shipment. While the destination inspection of the romaine in question disclosed significant defects (73% average condition defects, including 42% average decay), the inspection was performed seven days from the date of shipment and was found, on that basis, to be too remote from the time of shipment to establish that the romaine was not merchantable when shipped. It was also noted that the tape from the temperature recorder placed on the truck was not submitted in evidence by Respondent to establish that the romaine was held at proper temperatures between the time of shipment and the time of inspection. Without proof of proper temperatures during transit, it is possible that the defects found upon inspection were caused by high transit temperatures and not unmerchantable at the time of shipment. *Fresh Kist Produce LLC v. Superior Sales, Inc.*, 67 Agric. Dec. 1477, 1484 (2008).

In a 1992 case, it was stated that if the warranty of suitable shipping condition were not applicable due to the use of f.o.b. acceptance final term, the warranty of merchantability would nevertheless be applicable. The case appears to stand for proposition that condition of goods may be so bad at destination after short shipment and good transportation that the warranty of merchantability can be shown to have been breached at shipping point. However, the subject goods were in fact found to have been sold f.o.b. Therefore, the suitable shipping condition rule was applicable though such was not stated. *Garren-teed Co., Inc. v. Mo-Bo Enter.*, 51 Agric. Dec. 811, 813 (1992). *See Lookout Mountain Tomato & Banana Co. v. Consumer Produce Co. of Pitts.*, 50 Agric. Dec. 960, 966-67 (1991).

In order to show a breach of the warranty of merchantability by a destination inspection, the inspection would have to show condition defects so severe as to render it **self-evident and certain** that the commodity was non-conforming at shipping point. The certainty required was, however, stated to be reasonable certainty, not certainty that excludes all **fanciful** doubt. It was found that although the results of the inspection rendered it improbable that cantaloupes were conforming at shipping point, it was not reasonably certain that they were non-conforming. *Martori v. Hous. Fruitland, Inc.*, 55 Agric. Dec. 1331, 1337-38 (1996). *See also Malito's Rolling Hills Orchards v. Fort Wayne Produce Co.*, 37 Agric. Dec. 211, 213 (1978), where an inspection made only 24 hours after shipment showed 76% yellowing and 8% decay. It was held to be reasonably certain that the warranty of merchantability was breached at shipping point.

b. QUALITY DEFECTS

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. *Martori v. Olympic Wholesale Produce & Foods, Inc.*, 53 Agric. Dec. 887, 891 (1994).

Where potatoes were sold as "off-grade" and contained 22% hollow heart, found to meet warranty of merchantability. *Anthony Farms, Inc. v. Bushman's, Inc.*, 45 Agric. Dec. 1640, 1643 (1986).

Where seller consigned lettuce for a minimum guaranteed price and the destination inspection showed 44% quality defects, consisting of poorly trimmed heads and broken midribs, held that the shipper breached the warranty of merchantability, and consignee was relieved of the guaranteed minimum price only owing net proceeds from consignment handling. *Wilco Produce Co. v. Wishnatzki & Nathel*, 27 Agric. Dec. 782, 784-85 (1968).

c. MEANING OF

A seller warrants that at the time of sale the goods are such as will pass without objection in the trade. Suitable shipping condition extends this warranty to the contract destination agreed upon by the parties if transportation service and conditions are normal. *Lookout Mountain Tomato & Banana Co. v. Consumer Produce Co. of Pitts.*, 50 Agric. Dec. 960, 963-65 (1991).

See UCC ¶ 2-314 for complete statement of the warranty.

"The term 'merchantable' has been defined as 'goods which are reasonably suited for the ordinary uses and purposes of goods of the general type described by the terms of the sale and which are capable of passing in the market under the name or description by which they are sold,' and though not descriptive of the best quality, neither does it imply goods of the poorest quality, but covers goods of a fair, average quality." *Hunt Oil Co. v. Kastner*, 45 Agric. Dec. 800, 805 (1986); *L. Gillarde Sons Co. v. Moritz*, 21 Agric. Dec. 590, 595 (1962); *Samuel P. Mandell Co. v. Cantanzaro*, 17 Agric. Dec. 21, 25-26 (1958).

d. WARRANTY'S APPLICABILITY TO LATENT DEFECTS

In *Hunts Point Tomato Co. v. Md. Fresh Tomato Co.*, 47 Agric. Dec. 773, 779 (1988), a purchaser of tomatoes who failed to give notice of an evident breach at time of arrival but who did give notice six days later following federal inspections of the tomatoes which showed progressive decay, asserted an analogy with the *Brown & Hill* (*Brown & Hill v. U.S. Fruit Co.*, 20 Agric. Dec. 891, 894 (1961)) case. In finding against the purchaser, we made the following comments:

> The Brown & Hill case presented a very unusual situation in that a federal inspection showed the tomatoes to have been apparently perfect on arrival. Thus, the suitable shipping condition warranty applicable in F.O.B. sales was apparently fully satisfied. However, we found that the peculiar type of decay present in the tomatoes made the tomatoes inherently defective at time of sale. The Brown & Hill case is based upon the case of *Bearden Produce Co. v. Pat's Prod. Co.*, 12 Agric. Dec. 682 (1953), where green tomatoes failed to properly ripen due to late blight rot. As that case makes clear, a breach was found on the basis of the implied warranty of merchantability applicable at shipping point, and a breach of such implied warranty was found due to the fact that tomatoes with the particular type of condition defect were incapable of ripening properly. We have been extremely cautious in applying the line of reasoning which underlies these two decisions due to the fact that practically all condition defects in produce can be attributed to diseases of field origin which are present in the produce when it is shipped, and due to the fact that probably most of the produce shipped in this

country has such disease spores present. The significant factor in these two cases is not the field origin of the problem, but rather the fact that the particular defect makes it inevitable that the produce will not ripen properly, together with the fact that the defect is undiscoverable until such time as the ripening process begins.

L.E. Jensen & Sons, Inc. v. Huston Produce, Inc., 51 Agric. Dec. 814, 826 (1992). *See also Lookout Mountain Tomato & Banana Co. v. Consumer Produce Co. of Pitts*., 50 Agric. Dec. 960, 966-67 (1991); *Hunts Point Tomato Co. v. Md. Fresh Tomato Co.*, 47 Agric. Dec. 773, 779 (1988); *Brown & Hill v. U.S. Fruit Co*., 20 Agric. Dec. 891, 894 (1961); *J.D. Bearden Produce Co. v. Pat's Produce Co*., 12 Agric. Dec. 682, 692-93 (1953).

See also Strano & Strano v. Sanzone-Palmisano Co., 50 Agric. Dec. 938, 940 (1991), where an inspection of tomatoes three days after arrival was held to show a breach due to the presence of an inherent defect. *Also see Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc*., 48 Agric. Dec. 707, 713(1989), where a follow-up inspection established extensive damage by numerous pitted, discolored and/or sunken areas. It was held that these defects are caused by poor handling in picking and packing which appear as tomatoes ripen. Breach of contract found on the basis of latent defects.

See **SUITABLE SHIPPING CONDITION - INHERENT DEFECT** - this index.

50. SUSPENSION AGREEMENT

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. *IPR Solutions LLC v. Star Produce US LP,* PACA Docket No. S-R-2015-131, decided February 4, 2016 (unpublished decision).

Where tomatoes were purchased by Respondent from Complainant pursuant to the December 4, 2002 *Suspension Agreement on Fresh Tomatoes Imported from Mexico,* Respondent's claim that the tomatoes were not merchantable due primarily to the quality defects disclosed by a USDA inspection cannot be considered because the Suspension Agreement permits adjustments to the sales price for the condition defects listed in the Agreement and for *no other defects*. The language used in the Suspension Agreement is sufficiently explicit to bring the exclusion of warranties to the buyer's attention and make plain that there are no implied warranties. *Omega Produce Co. v. Boston Tomato & Packing LLC*, 64 Agric. Dec. 1156, 1164 (2005).

Where the parties to a contract covering tomatoes imported from Mexico agreed, following their arrival at destination, to the tomatoes being handled pursuant to the May 2, 1997, Clarification of the October 28, 1996 *Suspension Agreement on Fresh Tomatoes from Mexico* (termed the "Commerce Dept. Rules"), it was held that, although such rules used portions of the accustomed terminology of the UCC, this Department's Regulations and decisions under the PACA in a way that is foreign to the usual meaning accorded those terms, the Secretary would seek to give effect to the intent of the parties as evidenced by their agreement to abide by such rules. Accordingly, the "Commerce Dept. Rules" were interpreted in a manner deemed to be consistent with the intended meaning of such rules rather than in accord with the meaning usually accorded to the terms used therein. *Ta-De Distrib. Co. v. R.S. Hanline & Co.*, 58 Agric. Dec. 658, 670-71 (1999).

Where the December 4, 2002, *Suspension Agreement for Fresh Tomatoes from Mexico* was found to be applicable to the sale by Complainant of one truckload of tomatoes to Respondent, and Respondent secured an inspection of the tomatoes at a destination in Canada, it was determined that Respondent is not entitled to an adjustment of the sales price of the tomatoes, because a USDA inspection certificate was not provided. *Cimino v. Natures Way Farms LLC*, 66 Agric. Dec. 1519, 1525 (2007).

Where the sale of Mexican grown tomatoes falls under the terms of the *Suspension Agreement for Fresh Tomatoes from Mexico*, 73 FR 4831 (2008). Appendix D of the Suspension Agreement provides specific procedures for adjusting the sale price following a breach of contract by the seller. Only tomatoes with specific condition defects, documented by a timely unrestricted USDA inspection, are considered defective tomatoes. The seller may reimburse the buyer for defective tomatoes and specific reasonable expenses. Uninspected portions of a lot of tomatoes are not eligible for an adjustment. *Wm. Consalo & Sons Farms, Inc. v. Abdallah*, 68 Agric. Dec. 1277, 1286 (2009).

Where the calculation of damages for a material breach involves tomatoes sold subject to the 2002 Suspension Agreement (Suspension of Antidumping Investigation: Fresh Tomatoes from Mexico), the Agreement provides that any adjustments made to the sales price, other than those allowed for certain changes in condition following shipment, must be factored into the determination of the price of the tomatoes accepted, and that price must not fall below the reference price. *Del Campo Supreme, Inc. v. CH Rivas LLC*, 69 Agric. Dec. 831, 840 (2010).

51. MISREPRESENTATION AND MISTAKE

Upon arrival at 1:00 p.m. on Friday of a load of lettuce, respondent's buyer called for a federal inspection and was told that none would be available until Monday. Respondent's buyer then informed complainant that there was trouble in the lettuce and that an inspection had been requested but would not be available until Monday. Respondent's buyer then went home sick. A federal inspector finished his other work early and inspected the lettuce at 2:00 p.m. on Friday. The inspection showed the lettuce made good delivery and on the basis of the inspection, respondent's salesman sent the lettuce to respondent's customers who returned it that evening as unacceptable. On Monday, respondent's buyer returned to work, had the lettuce subjected to a federal inspection and reported the results to complainant without disclosing that the lettuce had been inspected on Friday. The Monday inspection showed sufficient damage to warrant a conclusion that the lettuce did not make good delivery and on the basis of such inspection, the parties agreed to a modification of the contract. Held: The lettuce made good delivery on basis of the Friday inspection, and the contract modification could be set aside on both grounds of misrepresentation and mistake. Extensive discussion of law relative to misrepresentation and mistake with reference to Restatement, UCC, and prior cases. *Nalbandian Farms, Inc. v. McDonnell & Blankfard, Inc.*, 46 Agric. Dec. 674, 682-83 (1987).

Misrepresentation causes contract modification to be a nullity. *McCabe v. Higgins Potato Co.*, 17 Agric. Dec. 1022, 1025 (1958).

Misrepresentation as to extent or timing of inspection, though inadvertent, was material. Party cannot be held to new agreement founded on incorrect information from opposing party. Modification held voided. *DeBruyn Produce Co. v. Battaglia Produce Sales, Inc.*, 45 Agric. Dec. 2492, 2494 (1986); *Garin Co. v. New Eng. Farms*, 41 Agric. Dec. 337, 339 (1982).

Where inspection of only 300 out of 700 cartons of lettuce was insufficient to show breach in light of amount of condition defects disclosed, a failure to disclose number of cartons inspected when reporting results rendered consignment agreement based on report of inspection rescindable by shipper. Rights and

liabilities determined on basis of original contract. *Tom Bengard Ranch v. Tomatoes, Inc.*, 41 Agric. Dec. 1637, 1639 (1982).

Where buyer correctly reported percentages of various defects to seller, but did not distinguish between condition and quality defects, and seller assumed that all reported defects were condition defects and that consequently goods did not make good delivery, whereas the true amount of condition defects did not show a failure to make good delivery, it was held that seller should have inquired as to whether defects were quality or condition, and there was no misrepresentation. (Since buyer did denominate the defects as to explicit type; i.e., "insect damage," "poorly trimmed," "decay," etc., the seller was a victim of his own ignorance in being unable to categorize the types of damage. Since seller obviously knew he was ignorant he should have inquired as to in what category the inspection placed the defects.) *Mel Finerman Co. v. A.J. Sales Co.*, 36 Agric. Dec. 1422, 1424-25 (1977).

Where the contract was modified following a crop disaster to call for reduced shipments at higher price, it was stated that, assuming complainant's version of the facts to be true, namely, that following the disaster complainant was contacted by respondent who asserted that if a higher price were not paid to its growers, there would be no potatoes to ship and "that shipments could not be made under any of the contracts," such communication did not constitute misrepresentation because the fact of the partial crop failure due to unforeseen circumstances was known to both parties at the time of the conversation, and complainant's assertions that it was misled by respondent's alleged contentions that potatoes were unavailable from other sources could not be credited in view of the concurrent discussions of the price of potatoes purchased on the open market. *C.J. Vitner Co. v. G & H Sales, Inc*., 50 Agric. Dec. 944, 948-49 (1991).

Where there was no showing that the particular inspections on the Hunts Point market of the tomato shipments at issue were falsified, but the inspections were performed by inspectors who pleaded guilty to accepting bribes for the falsification of inspection certificates, and the inspections were performed at the place of business of the buying firm whose employee pleaded guilty to the bribery of federal inspectors, it was held that the failure of the buying firm to disclose the bribery of the federal inspectors to the seller to whom it submitted the inspections as a basis for adjustments to the original contracts amounted to a misrepresentation, and that the adjustment agreement was void on that basis. It was also held that the seller made a mistake as to a basic assumption on which the adjustments were made, and that the adjustment agreements were also void on the basis of that mistake. *Dimare Homestead, Inc. v. Koam Produce, Inc.*, 59 Agric. Dec. 866, 872-76 (2000).

Complainant sold a load of grapes to respondent, and respondent sold the load to a firm on the Hunts Point Terminal Market whose employee later pleaded guilty to bribing federal inspectors. On the basis of inspections performed by inspectors who later pleaded guilty to accepting bribes, contract modifications were negotiated by the Hunts Point firm with respondent, and by respondent with complainant. It was held that the modifications negotiated between complainant and respondent were based upon a mutual mistake of fact, and were voidable by complainant. *Spencer Fruit Co. v. L & M Companies, Inc.*, 60 Agric. Dec. 799, 805 (2001).

52. NOTICE OF BREACH

See major topic **NOTICE TO BROKER -** this index.

See major topic **BREACH OF CONTRACT -** sub-topic

Where Respondent waited four days to look at onions received via railcar from Complainant, and upon discovery of a breach at that time gave notice to Complainant through the broker, found that such notice was not timely. We also noted, however, that the load remained intact in the railcar under constant refrigeration between the time of arrival and the time the car was opened. Moreover, after a U.S.D.A. inspection was performed on the onions the following day, Complainant had the opportunity, if the results of the inspection were in question, to request an appeal. Since the timeliness of the notice provided by Respondent therefore did not appear to have prejudiced Complainant's rights with respect to securing its own evidence of the condition of the onions following arrival, found the untimely notice of breach provided by Respondent should not bar Respondent's recovery of damages resulting from the breach. *Four Rivers Packing Co. v. Sam Wang Produce, Inc.*, PACA Docket No. R-08-089, decided September 4, 2009 (unpublished decision).

In *Sales King Int'l v. Danny & Sons, Inc.*, 52 Agric. Dec. 715, 736-37 (1993), where complainant sold potatoes to respondent, and respondent gave notice of material breach as to number of sacks shipped of particular sizes, and such notice gave complainant no hint that there might be any trouble with any other aspect of the shipment, such notice was not effective as to other material breach of contract or as to breach of warranty. We stated:

> It should also be noted that the notice given in this instance was precisely restricted to the material breach as to number of cartons shipped of the contracted sizes. Such notice was inherently self limiting in that it gave complainant no hint that any other problems might exist with the shipment. A general notice of trouble or breach would be sufficient to cover all breaches of contract that might exist. This notice was not.

Reason for requirement: *A.C. Carpenter, Inc. v. Boyer Potato Chips*, 28 Agric. Dec. 1557, 1559, 7 UCC Rep. Serv. 493 (1969) - good discussion of reasons for requirement; this case cited by *White & Summers, Handbook of the Law Under the U.C.C.*, § 8-3, p. 262 at n. 34, (1972).

Quote from A. C. Carpenter case:

> The Uniform Commercial Code, Section 2-607(3)(a) provides that "where a tender has been accepted the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of the breach or be barred from any remedy."
> . . .
>
> The requirement that notice be given within a reasonable time is important, especially when the alleged breach concerns perishables. The purpose of the rule, as stated in the comment to the UCC, is to defeat commercial bad faith. If the seller is notified of a breach within a reasonable time he has opportunity to ascertain for himself the nature and extent of the breach by taking advantage of UCC section 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.

In *Hunts Point Tomato Co. v. Md. Fresh Tomato Co.*, 47 Agric. Dec. 773, 778 (1988), this approach was in fact taken. However, *Hunts Point* has now been explicitly overruled as to this point. *See Diazteca Co. v. Players Sales, Inc*., 53 Agric. Dec. 909, 916 (1994), where we said:

> Although federal inspections might be thought to "freeze" the condition of perishable goods so as to create a situation similar to that which exists as to hard goods, and thus allow a large expansion of the period available for prompt notice, there are compelling reasons why this should not be the case. The Department has established an appeal process as to its inspections. The very existence of this appeal process is an admission by this Department that federal inspections can be wrong. Failure to give prompt notice as to a breach indicated by a federal inspection cuts the seller off from access to this appeal process. Moreover, if we apotheosize the federal inspection by allowing its conclusions to effectively stand in place of the perishable product, and transform the situation into one analogous to that which exists as to hard goods, we open the door to possible corruption of federal inspectors, or suspicion of corruption. This would be a grave disservice to a group of civil servants who have been virtually free of any hint of corruption over the many years of the existence of the inspection service. In spite of the harshness of decisions such as this, we cannot allow buyers, just because a product has been inspected, to keep quiet about an apparent breach until all opportunity to check on the accuracy of an inspection has passed.

White & Summers' reasons are quoted and additional reasons are given in the following case - "Had such notice been given the New Zealand shippers would have been put on notice that the highly perishable berries and asparagus were with some consistency failing to make good delivery at destination and could have ceased to make the shipments or have sought out more durable product if available." *Sun Rise Ranches v. Delta Package, Inc.*, PACA Docket Nos. 2-7201; 2-7220; and 2-7431; decided April 3, 1989, (unpublished).

Must be given promptly to seller so he may perform his own tests of chipping potatoes if he wishes. *Nicolls v. Fairmount Foods Co.*, 38 Agric. Dec. 469, 472-73 (1979).

Notice of inspection provided to the shipper on the date of inspection was considered untimely where provided after more than half of the shipment was resold, as the shipper was deprived of the opportunity for an appeal inspection. *Quail Valley Mktg., Inc. v. Cottle*, 60 Agric. Dec. 318, 337 (2000).

Need for quick notice is not as great in the case of frozen goods. *E.T.L. Corp. v. Baker's Services, Inc.*, 38 Agric. Dec. 1594, 1598 (1979).

In *Sales King Int'l v. Danny & Sons, Inc.*, 52 Agric. Dec. 715, 736-37 (1993), a slightly longer period of time than what would be allowed for notice of breach of warranty was allowed for a notice of material breach, where complainant did not contest the occurrence of the breach since the breach was not closely related to the perishability of the goods. We stated:

> Since a material breach of contract concerns matters not closely related to the perishability of the goods, and in this instance was uncontested by complainant, we have allowed a less strict time measure as to reasonableness of notice than would be allowed in the case of notice as to a breach in regard to "condition" of perishable goods. However, a material breach is not totally unrelated to the fact of the goods perishability since proof of the material breach, to a greater or lesser degree depending on the circumstances, will always relate to the continued existence of the goods.

Relative perishability of goods must be taken into consideration in determining whether notice of breach of warranty is timely. *Pace v. Sagebrush Sales Co.*, 56 P2d 789, 114 Ariz. 271 (1977). (Lumber described as semi-perishable when left outside. Notice four months after acceptance was not, as a matter of law, made within a reasonable time.)

Where there was the allegation of notice, the other party denied receipt of notice and no documentation of such notice was supplied, it was found that the required notice had not been given. *Declo Produce, Inc. v. Sun Valley Potatoes, Inc.*, 59 Agric. Dec. 433, 436 (2000).

Specific times:

Smith v. Fisher, 16 Agric. Dec. 1008, 1011 (1957) - 24 hour rule not applicable.

Bardin Bros. Produce Co. v. Farm Outlet, 38 Agric. Dec. 242, 244 (1979) - 15 days after *shipment* not timely as to sweet potatoes.

Produce Specialists of Ariz., Inc. v. Gulfport Tomatoes, Inc., 42 Agric. Dec. 1194, 1197-98 (1983) - 3 days after unloading and discovery of damage not timely as to tomatoes.

Spudco, Inc. v. Yick Lung Co., 36 Agric. Dec. 715-16 (1977) - seven days after arrival unreasonable as to chipping potatoes.

Hare v. H. Smith Packing Corp., 31 Agric. Dec. 670, 674 (1972) - 17 days after arrival untimely as to potatoes.

Alva Produce, Inc. v. Soik Sales, Inc., 51 Agric. Dec. 1480, 1483 (1992). Notice of breach as to chipping potatoes given two to three days after *shipment* from Alvarado, Minnesota, to Louisville, Kentucky, held timely.

Carmack v. Selvidge, 51 Agric. Dec. 892, 904 (1992) - 16 to 20 days after *shipment* of tomatoes from Tennessee to Texas untimely.

Notice given of breach as to onions six days following availability for survey after arrival in Taiwan was too long, but four days on a different container was timely. *SEL Int'l Corp. v. Brown*, 52 Agric. Dec. 740, 748 (1993).

Bay Area Pie Co. v. Mihok, 25 Agric. Dec. 851, 853-54 (1966) - Notice of breach as to frozen cherries given more than six months after arrival and more than one month after discovery of presence of pits was not timely. Decision quotes 3 Williston, *Sales*, § 484a that, "Time is counted not simply from the moment when the buyer knows of the defect, but from the time when he ought to have known it. Prompt exercise of opportunity for discovering defects is, therefore, essential."

53. NOTICE OF REJECTION

See major topic **NOTICE TO BROKER**, this index.

See major topic **REJECTION**, sub-topic **NOTICE**, this index.

a. MUST BE CLEAR

Notice of rejection must be given in clear and unmistakable terms. Report that there is "trouble" in goods is not sufficient. (However, it would constitute sufficient notice of a breach.) *Firman Pinkerton Co. v. Bobinell J. Casey*, 55 Agric. Dec. 1287, 1292 (1996); *Crowley v. Calflo Produce, Inc.*, 55 Agric. Dec. 674, 677 (1996); *River Valley Mktg. Inc. v. Tom Lange Co.*, 53 Agric. Dec. 918, 922 at n. 1 (1994); *W.T. Holland & Son. v. C.K. Sensenig Potatoes*, 52 Agric. Dec. 1705, 1707-08 (1993); *Teixeira Farms, Inc. v. Community-Suffolk, Inc.*, 52 Agric. Dec. 1700, 1702 (1993); *Supreme Berries, Inc. v. McEntire*, 49 Agric. Dec. 1210, 1216 (1990); *Yokoyama Bros. v. Cal-Veg Sales*, 41 Agric. Dec. 535-36 (1982); *Farm Mkt. Serv., Inc. v. Albertson's, Inc.*, 42 Agric. Dec. 429, 431 (1983); *Beamon Bros. v. Cal. Sweet Potato Growers*, 38 Agric. Dec. 71, 73-74 (1979); *Verd's Fruit Mkt. v. Zaccone*, 36 Agric. Dec. 1603, 1605 (1977); *Saikhon v. Russell-Ward Co.*, 34 Agric. Dec 1940, 1942 (1975); *Jarson & Zerilli Co. v. P. Tavilla Co.*, 30 Agric. Dec. 1360, 1363-64 (1971); *Schley Bros. v. Mercurio Bros.*, 23 Agric. Dec. 862, 866 (1964); *United Packing Co. v. Conn. Celery Co.*, 16 Agric. Dec. 810, 814 (1957); *John C. Lester Co. v. Victory Distrib. Co.*, 11 Agric. Dec. 376, 383 (1952); *San Pat Vegetable Co. v. Kyman*, 5 Agric. Dec. 483, 488-89 (1946).

Notice by a buyer to the seller that the buyer's customer has rejected is not notice of rejection by the buyer to the seller, ". . . rejections must be made by each buyer to [its] own seller, and must be clearly communicated as such." *Phoenix Vegetable Distrib. v. Randy Wilson Co.*, 55 Agric. Dec. 1345, 1348 (1996).

b. REASONABLE TIME

Notice of rejection must be given within a reasonable time of arrival of the produce.

7 C.F.R. § 46.2(cc)(2)
7 C.F.R. §46.2(dd)
UCC § 2-607(3)(2)

Having failed to timely reject the shipment, respondent is liable to pay the contract price less any provable damages sustained as a result of any breach of contract by complainant. *Merritt v. Kleiman & Hochberg, Inc.*, 47 Agric. Dec. 584, 586 (1988); *Wolf v. Mendelson-Zeller Co.*, 34 Agric. Dec. 690, 695 (1975).

Where notice of rejection as to a truck shipment was given to the broker after arrival at 8:00 p.m., and broker alleged only that he gave notice to seller on the following morning, it was held the eight-hour notice required by the Regulations should have been communicated to the seller by 4:00 a.m. on the following morning and that the broker's allegation fell short of proof of seasonable notice. *Robert Ruiz, Inc. v. Hale Bros.*, 43 Agric. Dec. 572, 574 (1984).

San Tan Tillage Co. v. Kaps Foods, Inc., 38 Agric. Dec. 867, 871 (1979).

Twenty-four hour time for notice in regard to rail shipments begins to run, not at time of arrival, but at the time of notice **to the receiver** of arrival. *G & S Produce Co. v. Niagara Frontier Services, Inc.*, 38 Agric. Dec. 722, 726 (1979); *Pac. Lettuce Co. v. M & C Produce Co.*, 24 Agric. Dec. 532, 534 (1965).

54. NOTICE TO BROKER

Notice to the broker is not notice to a party unless the broker is authorized to act on behalf of the party. A broker in a produce transaction is not normally a general agent of either party and after negotiation of the contract any and all duties of the broker come to an end. After negotiation of the contract a broker entrusted with a message by a party is the agent of the party which gave the broker the message only for the purpose of delivering the message. If the broker fails to deliver the message entrusted to it, the failure is attributed to the party which gave the broker the message. Therefore, notice to a broker is not normally notice to the other party unless it is shown that the broker actually conveyed the message to the other party. *Hunts Point Tomato Co. v. Md. Fresh Tomato Co.*, 47 Agric. Dec. 773, 779 (1988); *Robert Ruiz, Inc. v. Hale Bros.*, 43 Agric. Dec. 572, 574 (1984); *Mut. Vegetable Sales v. Lampros Bros., Inc.*, 37 Agric. Dec. 667, 669-70 (1978); *Fowler Packing Co. v. Assoc. Grocers Co. of St. Louis*, 36 Agric. Dec. 87, 91 (1977); *Stonoca Farms v. Clary*, 33 Agric. Dec. 956, 959 (1974); *Sanders v. Greenberg Fruit Co.*, 32 Agric. Dec. 1856, 1859-60 (1973).

Where the buyer rejected goods, it did not have the duty to notify the shipper directly when it did not know who the shipper was. Notification to the broker considered adequate under the circumstances. *C & E Enter., Inc. v. Edward G. Rahll & Sons*, 44 Agric. Dec. 1693, 1695 (1985).

55. NOTICE WITHIN AN ORGANIZATION

UCC § 1-201(27) gives the rules for determining when, and under what circumstances, an organization or company is deemed to have received effective notice. *See Nalbandian Farms, Inc. v. McDonnell & Blankfard, Inc.*, 46 Agric. Dec. 674, 679-80(1987).

56. OFFICIAL NOTICE

Section 7(d) of the Administrative Procedure Act (APA) states, "When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary." Due to the fact that reparation proceedings are subject to a subsequent trial *de novo* in federal court, such proceedings are excepted from this provision of the APA. However, it has been held that "many of the provisions of the APA, including the provision in question, are based upon fundamental principles of due process enunciated long before the passage of the APA." It was further stated that, "it would not be expedient or proper to put the parties involved in this proceeding to the necessity of a further proceeding in federal district court in order to submit evidence in rebuttal to the matters of which the Secretary has taken official notice." The party objecting to matters of which the Secretary had taken official notice was given opportunity to make a showing as to evidence which would be submitted if the matter was reopened and was informed that in order to rebut prices shown in Market News Service Reports of which Secretary had taken official notice, such party would need to submit evidence of numerous (four to seven) specific transactions at different prices than shown in the reports. *James Macchiaroli Fruit Co. v. Ben Gatz Co.*, 38 Agric. Dec. 1477, 1484-86 (1979).

Official notice may be taken of federal inspection certificates since they are documents issued by the Department. *Anonymous*, 13 Agric. Dec. 1010, 1014 (1954).

Official notice may be taken of publications of the Department. *Anonymous*, 7 Agric. Dec. 486, 492-93 (1948). (Technical bulletins on market quality of cantaloupes were cited.)

Official notice may be taken of another proceeding. *James Macchiaroli Fruit Co. v. Ben Gatz Co.*, 38 Agric. Dec. 1477, 1484 (1979).

Official notice taken of freight tariff rules. *Relias v. Frank Kenworthy Co.*, 16 Agric. Dec. 590, 600 (1957).

Official notice may be taken of the records of the Department (timely informal complaint that was not a part of the record in the proceeding.) *Colace Bros. v. Thomas J. Holt Co.*, 27 Agric. Dec. 932, 1302 (1968).

Official notice may be taken of the Department's Market News Service reports. *Macchiaroli v. Gatz,* 38 Agric. Dec. 565, 573 (1979).

57. OFFSETS

a. AGAINST AN UNPAID REPARATION AWARD

If a party fails to pay a reparation award, the other party may offset such unpaid amount by deducting it from an unpaid produce debt more than nine months after the original award. *Far South, Inc. v. He-Bo Farms, Inc.*, 47 Agric. Dec. 1081 (1988) (summarized); *Meadows v. Radio Indus.*, 222 F. 2d 347 (7th Cir. 1955); *Lide v. Cline*, 537 F. Supp. 643 (E.D. Ark., 1982).

b. DEDUCTIONS FOR ANOTHER TRANSACTION

A party may offset losses from one transaction by deducting them from payment due on another. *Weller v. George*, 41 Agric. Dec. 294, 296-97(1982); *McMillan v. Bushman Growers Sales, Inc.*, 32 Agric. Dec. 950, 955-56 (1973).

c. THIRD PARTY

Where Respondent admitted to accepting produce from Complainant, and cited as a defense against paying for that produce an offset agreement reached between Respondent and a third party, and the third party denied the existence of such an agreement (as did Complainant), Respondent could not offset the debt for accepted produce owed to Complainant with the debt owed by the third party under a previous growing arrangement between the third party and Respondent. *Rou v. Severt Sons Produce, Inc.*, 70 Agric. Dec. 489, 496 (2011).

58. OPEN PRICE

See **PRICE AFTER SALE** - this index.

UCC § 2-305(1) Open Price Term:

> (1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if
>
> (a) nothing is said as to price; or
> (b) the price is left to be agreed by the parties and they fail to agree; or
> (c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

Tomatoes were sold on an open price basis with the prices to be determined on a date certain by reference to Market News quotes. The fact that the seller offered further allowances on subsequent

transactions held inapplicable to the transaction in question. *Homestead Tomato Packing Co. v. Acme Pre-Pak Co.*, 47 Agric. Dec. 485-486 (1988).

"Open Price" assumes parties will negotiate a price after the goods are sold. If they do not the reasonable value of the goods should be imputed. *A.P.S. Mktg. v. R.S. Hanline & Co.*, 59 Agric. Dec. 407, 411 (2000); *James Macchiaroli Fruit Co. v. Ben Gatz Co.*, 38 Agric. Dec. 565, 571-73 (1979). *See also Anonymous*, 5 Agric. Dec. 494, 499 (1946).

The buyer cannot expect a seller to share in any losses which might be incurred in an open sale. *Sharyland L.P. v. C.H. Robinson Co.*, 55 Agric. Dec. 1341, 1343 (1996).

The term "open" is a generic term used to describe a **SALE** without a price being agreed to when the contract is first made. Other similar terms (which all fit under the generic term "open") are "price after sale," "price arrival," "deferred billing," and "price after." These terms should be examined with care because they do not all have the same meaning. For instance, "price after sale" usually means that the parties will agree to a price after the buyer completes its resales at destination, whereas "price arrival" means that the parties will agree on a price when the goods arrive at destination after opportunity for inspection (*See* 7 C.F.R. § 46.43 (cc)). The terms "price after" and "deferred billing" are so vague that one must look solely to the context of the transaction and perhaps guess at what the parties intended. See *Eustis Fruit Co. v. Auster Co.*, 51 Agric. Dec. 865, 877 (1992) ("The term 'price after sale' usually contemplates the parties agreeing to a price following the prompt resale of the produce. Such a sale is either f.o.b., delivered, or some variation thereof, in accordance with the agreement of the parties. If the parties do not specify f.o.b. or delivered then the Department assumes that the sale is f.o.b."). *See also Bonanza Farms, Inc. v. Tom Lange Co.*, 51 Agric. Dec. 839, 846 (1992); *M. Offutt Co. v. Caruso Produce, Inc.*, 49 Agric. Dec. 596, 602 (1990); *Dennis Produce Sales, Inc. v. Caruso-Ciresi, Inc.*, 42 Agric. Dec. 178, 182-84 (1983); *Nw. Fruit Sales, Inc. v. Norinsberg Corp.*, 39 Agric. Dec. 1556, 1560 (1980); *Slayman Fruit Co. v. Wholesale Produce Supply, Inc.*, 30 Agric. Dec. 1751, 1755 (1971).

a. ABSENT AGREEMENT

When the original contract does not contain a price term, it is assumed a reasonable price was intended. *Syracuse & Jenkins Produce Co. v. Tom Lange Co.*, 46 Agric. Dec. 85, 88 (1987); *Sessions v. Universal Fruit & Produce Co.*, 19 Agric. Dec. 1177, 1182 (1960).

b. BUYER'S DUTY TO SELLER

In an "open" sale, the seller usually expects that the buyer and seller will agree on a price at some point following delivery, often following resale by the buyer. It is therefore implicit in such a contract that the seller expects to be dealing with a particular receiver, namely, the receiver disclosed to the seller at the time of sale. For a buyer in such a sale to convey the goods to a third party for resale without the permission of the seller is a breach of the contract between seller and buyer. *Growers Mktg. Serv., Inc. v. J & J Distrib. Co.*, 53 Agric. Dec. 892, 895-96 (1994).

c. DUTY TO ASSIGN LOT NUMBERS

"Since an 'open' sale is a sale, there is, strictly speaking, no requirement that the purchaser of goods on an 'open' basis assign lot numbers so as to distinguish between the resale of the goods subject to the 'open ' sale, and other similar goods on hand. A party buying 'open' should, however, be very hesitant to rely on the preceding sentence for several practical reasons. First, . . . it will frequently turn out to

have been very much to a buyer's advantage to have assigned lot numbers to produce sold 'open,' since, in determining a reasonable price after the parties default in agreeing on a price, there are a number of circumstances where we will give great weight to a proper accounting of the resale of the produce sold 'open.' Second, . . . if a party buying 'open' intends to render an accounting as a basis for arriving at an agreement as to price with the seller then lot numbers must be assigned." *Bonanza Farms, Inc v. Tom Lange Co.*, 51 Agric. Dec. 839, 848 (1992).

See **CONSIGNMENTS - SALE ON OPEN BASIS DISTINGUISHED FROM -DIFFERENCE BETWEEN CONSIGNMENT AND OPEN** - this index.

d. COMPUTATION OF REASONABLE PRICE IN OPEN SALE WHERE PARTIES FAIL TO AGREE

Market price is not necessarily the same as reasonable price. *See* J. White & R. Summers, *Handbook of the Law Under the Uniform Commercial Code*, § 3-7, p. 100 (1972). It would seem that if the buyer under "open" terms paid the freight, then freight would have to be deducted from destination market price, and also, since Market News prices on the destination market are sales to the buyer's customers, a strict pass through to the seller of the market price would deny any profit to the buyer. This result would not be within the contemplation of the parties or reasonable. Therefore, a deduction of 15% (we now allow 20% as more closely approximating the normal expectations of buyers – *See A.P.S. Mktg. v. R.S. Hanline & Co.*, 59 Agric. Dec. 407, 411 (2000), and *C.J. Prettyman, Jr., Inc. v. Am. Growers, Inc.*, 55 Agric. Dec. 1352, 1375 (1996)) for profit and handling is suggested. *See M.J. Duer & Co. v. J.F. Sanson & Sons Co.*, 49 Agric. Dec. 620, 625 (1990) where, in a "deferred billing" transaction, an accounting based on the erroneous assumption of breach was rendered. The parties failed to agree on a price, and we awarded a "reasonable price" based on market price for good product with the allowance of freight in the actual amount incurred (the same as claimed in the accounting), and a reasonable profit of 15%, or $930.00 (the accounting claimed a commission of $226.14). The accounting claimed inspection fees of $112.20 and a handling charge of $80.00. These charges were disallowed without comment.

In a recent case that involved a number of price after sale transactions where the shipper contended for the use of market price in determining how much the receiver should pay but failed to supply relevant market quotations, the receiver's resales were used as "the best evidence of the reasonable value . . . at time of delivery." Due to unusual circumstances, no relevant market quotations were available, but the decision indicates that even where such quotations are available, the results of a prompt and proper resale should be given consideration; i.e., they should be looked at, and if circumstances indicate that use of such results would enable us to arrive at a more accurate figure, they should be factored in. One situation which would render such results especially useful even in the presence of relevant market reports, would be where the produce arrived in poor condition. *M. Offutt Co. v. Caruso Produce, Inc.*, 49 Agric. Dec. 596, 605 (1990).

Flawed accounting accorded no weight in arriving at a price after parties' failure to agree on a price in price after sale transactions. Market News prices used exclusively. *Eustis Fruit Co. v. Auster Co.*, 51 Agric. Dec. 865, 879-80 (1992).

The Regulations do not place a duty to account upon a buyer who purchases on an open basis. However, should the parties fail to reach an agreement as to price, the receiver fails to account accurately and in detail at his own risk. *Carmack v. Selvidge*, 51 Agric. Dec. 892, 898 (1992).

In absence of market reports, results of personal audit by Department's investigator were used to determine amount due in an open sale after modification to correct erroneous assumption made by investigator. *Carmack v. Selvidge*, 51 Agric. Dec. 892, 901 (1992).

In the absence of market reports where goods were sold open, we used the buyer's highest reported resale price for the value the goods would have had if they had been as warranted. *See C.J. Prettyman, Jr., Inc. v. Am. Growers, Inc.*, 55 Agric. Dec. 1352, 1375 (1996). Also in this case, we allowed 20% profit for an open sale.

Where the tomatoes were originally sold at a f.o.b. price, the contract was modified to an "open" sale, a federal inspection made several days after arrival showed they met contract terms, and where the receiver did not account for the sales of the tomatoes, held that original f.o.b. price was an acceptable measure of the reasonable value of the fruit. *Whizpac, Inc. v. Franklin Produce Co.*, 46 Agric. Dec. 726, 729 (1987).

In an open sale transaction, dumping of any portion of the produce must be substantiated by a dump certificate or other appropriate evidence. *Carmack v. Selvidge*, 51 Agric. Dec. 892, 901-02 (1992).

In an "open" sale "to be priced on next week's market," the appropriate price was the average of the entire next week's shipping point prices as reported by the Federal State Market News Service. *A. Duda & Sons v. Pete Pappas & Sons*, 45 Agric. Dec. 2141, 2145 (1986).

59. PRACTICE AND PROCEDURE

a. ALTERNATIVE PLEADING

Requires dismissal where there is award on primary claim. *See A.J. Tebbe & Sons v. Fruit & Prod. Prepack*, 34 Agric. Dec. 1226, 1228-29 (1975). *See also* Rule 8(a), F.R.C.P.

b. AMOUNT AWARDED LIMITED BY PLEADING

A party's limitation of its claim in its pleading to a lesser amount than is eventually found due will be given effect in awarding reparation. *Mendelson-Zeller Co. v. M.K. Hall Produce*, 28 Agric. Dec. 1169, 1170 (1969); *Lockerman v. Jones*, 16 Agric. Dec. 1002 (1957); *Parkhill Produce Co. v. Zeidenstein Bros.*, 16 Agric. Dec. 997, 1002 (1957). ***However,*** where the "prayer" to the formal complaint specifies that the complainant desires to recover the amount the Secretary finds due, the Secretary's findings will determine the amount of the award even where the complainant has specified a lesser amount in the text of its complaint.

A reparation award is usually limited to the amount claimed by a party in its pleading, regardless of the fact that the amount found due as reparation by the Secretary is greater than the amount claimed in the party's pleading. In this case, although Respondent's Answering Statement contained a calculation of damages in a precise dollar amount, the prayer for relief in its counterclaim specified that it desired to recover that amount determined to be due by the Secretary. In view of the language in Respondent's prayer for relief, the Secretary's findings were utilized as the amount of the reparation award even though Respondent had calculated a lesser damage amount. *Perco USA, Inc. v. Eagle Fruit Traders LLC*, 67 Agric. Dec. 658, 670-71 (2008).

c. AUTOMATIC STAY PROVISION OF § 47.24 OF RULES

Jurisdiction to hear petitions filed before the order becomes final, but not within the ten-day automatic stay period where the stay order was not issued until more than 30 days following issuance of the order or not at all. *Homestead Tomato Packing Co. v. Ben E. Keith Co.*, 42 Agric. Dec. 2143-44 (1983).

See also Ligon Produce Co. v. Spinale Bros., Inc., 13 Agric. Dec. 515, 516 (1954), where it was said that § 47.25(b) does not restrict granting of extensions to cases in which request is made prior to regular time for filing.

See **STAYS - ISSUANCE MORE THAN 30 DAYS AFTER ORDER** - this topic.

d. BONDING REQUIREMENT FOR FOREIGN COMPLAINANTS – JURISDICTIONAL

Provincial Fruit Co. v. Brewster Heights Packing, Inc., 39 Agric. Dec. 1514-16 (1980); dismissal order ("Failure of non-resident of the United States to post bond deprives the Secretary of jurisdiction.") *Provincial Fruit Co. v. Brewster Heights Packing, Inc.*, 40 Agric. Dec. 171 (1981).

e. CONFLICTS OF INTEREST

No conflict of interest existed that would preclude the Secretary from adjudicating a reparation complaint involving an allegation that damage resulted to complainant from fraudulent inspections performed by former Department employees. *Procacci Bros. Sales Corp. v. B.T. Produce Co.*, 60 Agric. Dec. 341, 345 (2001).

f. COUNTERCLAIMS

A counterclaim must be filed within nine months after the accrual of the cause of action on which it is based unless it arises out of the same transaction as that in the complaint. *Sara's, Inc. v. Cont'l Farms*, Inc., 46 Agric. Dec. 1260, 1262 (1987); *Sanders & Drake v. Gardner Bros.*, 31 Agric. Dec. 128, 131-32 (1972).

Failure to file a reply to a counterclaim or set-off within 20 days after the service of the answer will constitute a waiver of hearing on the counterclaim or set-off and an admission of the allegations therein. 7 C.F.R. § 47.9.

g. COUNTERCLAIM - WHERE COMPLAINANT NOT LICENSED OR SUBJECT TO LICENSE

Where complainant was not licensed or subject to license and a counterclaim arose out of same transactions as those in the complaint although no positive award could be made thereon, it was held that amounts claimed in the counterclaim could be set-off against amounts found due to complainant in its complaint. *E.S. Harper Co. v. Magic Valley Growers Ltd.*, 46 Agric. Dec. 1864, 1866 (1987); *V.V. Vogel & Sons Farms v. Cont'l Farms*, 44 Agric. Dec. 886, 891 (1985).

Where complainant was not licensed or subject to license, and counterclaiming respondent was found to be due $7,381.09 from complainant, no award could be made in respondent's favor, and both the complaint and counterclaim were dismissed. *Reeder v. E. Growers & Shippers, Inc.*, 48 Agric. Dec. 693, 695 (1989).

h. CROSS-CLAIM AGAINST CO-RESPONDENT

THE FIRST THREE CITED CASES SHOULD BE CONSIDERED MODIFIED BY THE LAST CASE BELOW.

"There is no provision in the Rules of Practice for the filing of a cross-claim by one respondent against another." *Ben Gatz v. A. Levy & J. Zentner Co.*, 32 Agric. Dec. 1873, 1898-99 (1973).

The Secretary does not have jurisdiction to hear a cross-claim by one respondent against another respondent where such claim was not filed within nine months after the cause of action relative to such cross-claim accrued even though the cross-claim arises out of the same cause of action as a timely complaint filed in the same proceeding. *Larry Merrill Produce Co. v. L & P Vegetable Corp.*, 51 Agric. Dec. 802-803 (1992) (order dismissing cross-claim).

A cross-claim, arising out of the same nucleus of fact as that involved in the complaint, filed by one respondent against another respondent, was found to be outside the Secretary's jurisdiction because it was filed more than nine months after the causes of action relative to such claims accrued. *Newbern Groves, Inc. v. C.H. Robinson Co*., 53 Agric. Dec. 1766, 1768-69 (1994).

But: *United States for the Use of Bros. Builders Supply Co. v. Old World Artisans, Inc.; Ticor Construction Co.; and the Central Nat'l Insurance Co. of Omaha*, 702 F.Supp. 1561 (N.D. GA 1988) held:

> The issue of whether a cross-claim may relate back is resolved by federal common law in actions based upon federal question jurisdiction, and upon state law when the cause of action is based upon a state statute. . .
>
> In determining whether a cross-claim may relate back to the date of the original complaint, the federal courts distinguish between those wherein the defendant seeks to reduce the amount a plaintiff can recover, such as by recoupment, contribution, or indemnity, and those wherein the defendant is seeking affirmative relief. . .
>
> The cross-claim, to the extent that it seeks indemnity or contribution for sums it may owe to Builders Supply, relates back to the date of the filing of the original complaint and is therefore timely filed under the Miller Act. That part of the cross-claim that seeks payment for other labor, materials or damages, independent of the material for which Builders Supply seeks payment, is an independent cause of action. That part of the cross-claim does not relate back to the date of original complaint, and because it was not filed within the one-year period of the Act, it is barred.

i. DEATH OF INDIVIDUAL RESPONDENT

The Secretary has no jurisdiction to enter an award of reparation against a deceased individual respondent or the administrator or executor of the deceased. Substitution refused. Analogy with Federal Rules rejected. *Barbera Packing Corp. v. McCaffrey Bros. Co.*, 19 Agric. Dec. 123, 125 (1960).

j. DEFAULT

Where two or more respondents are joined by the complaint, and one respondent defaults in the filing of an answer, no default order is issued, and the defaulting respondent's liability is determined on the basis of the record made by the other parties. *Adams Bros. Produce Co. v. Peeples*, 36 Agric. Dec. 1588, 1590 (1977); *Coachella-Imperial Distrib. v. Tri-City Grocery Co.*, 35 Agric. Dec. 1429, 1430-32 (1976); *Maloney v. Frank's Food Fair, Inc*., 20 Agric. Dec. 259, 263 (1961).

k. DE NOVO TRIAL IN DISTRICT COURT

Based on constitutional concern to protect right to trial by jury. *Potato Sales, Inc. v. Perfection Produce*, 38 Agric. Dec. 273, 280 (1979).

l. DOCUMENTARY PROCEDURE – EVIDENTIARY PERIOD

In documentary cases where Respondent files a Counterclaim, no provision of the Rules of Practice allows for a separate period for submission of evidence for the Counterclaim. That is, the documentary procedure's evidentiary procedure consists of an Opening Statement (submitted by Complainant, if desired), an Answering Statement (submitted by Respondent, if desired) and a Statement in Reply (submitted by Complainant, if desired). All evidence to be adduced in the matter must be submitted within those documents. The Rules of Practice do not permit a separate Opening Statement, Answering Statement and Statement in Reply designated only to address the Counterclaim. (7 C.F.R. § 47.20) *Providencia Produce, Inc. v. Kaiser Int'l, LLC*, PACA Docket No. S-R-2015-355, decided July 21, 2016.

m. ELECTION OF REMEDIES

See **ELECTION OF REMEDIES -** this index.

Section 5(b) of the PACA requires that an election of remedies be made by a PACA complainant as between pursuit of reparation and pursuit of a civil suit in either state or federal court. *Kurt Van Engel Comm'n Co., Inc. v. Schultz Sav-O Stores, Inc.*, 48 Agric. Dec. 731-33 (1989); *Rigbee Potato Co. v. Belson Bros.*, 12 Agric. Dec. 750, 753 (1953). In *Gilliland & Co. v. San Antonio Comm'n Co.*, 2 Agric. Dec. 492, 495 (1943), we refused to find an election of remedies where a state court claim had been filed by a PACA claimant but had been dismissed by such claimant prior to the rendering of a decision on the merits by the state court and prior to the filing of the PACA complaint.

Suspension of state administrative proceedings at the request of a PACA complainant was deemed a sufficient basis for us to deny a motion for dismissal based on the allegation that complainant had made an election of remedies. No determination was made as to whether state administrative forum was a court of competent jurisdiction within the meaning of the PACA. *Magic Valley Produce, Inc. v. E & R Brokerage*, 40 Agric. Dec. 449, 450 (1981).

Where the PACA complainant is a party to a proceeding involving the same parties and subject matter in another forum by reason of having filed a compulsory counterclaim, no election of remedies will be deemed to have taken place. *Velderrain v. Dixon Tom-A-Toe Produce, Inc.*, 38 Agric. Dec. 51-52 (1979).

Where a PACA claimant is in another forum because of having filed a compulsory counterclaim, then both forums have concurrent jurisdiction and can both proceed with the litigation in their respective

forums. The first order to become final will be *res judicata*. *Trans W. Fruit Co. v. Ameri-Cal Produce, Inc.*, 42 Agric. Dec. 1955, 1957-58 (1983).

Where the PACA forum and a state forum have exercised concurrent jurisdiction over the parties and subject matter due to the PACA claimant having been compelled to file a counterclaim in the state forum, and the state forum has entered final judgment prior to a PACA order becoming final, a reparation order will be issued in the claimant's favor based on the state court judgment. Extensive discussion. *M.S. Thigpen Produce Co. v. Park River Growers, Inc.*, 48 Agric. Dec. 695, 697 (1989).

On motion of respondent, action before the Secretary was stayed pending disposition of state court action brought by a Packers and Stockyards Division complainant involving the same parties and subject matter as before the Secretary. *Stafford Bros. v. Center*, 24 Agric. Dec. 819, 821 (1965). (Cites U.S. Supreme Ct. and Ct. of Appeals cases.)

Where respondent was in default, and before issuance of the default order, the Department learned that complainant had obtained a judgment in state court involving the same parties and transaction, the complaint was dismissed. *Fitzgerald v. Noger*, 23 Agric. Dec. 897 (1964).

In *H.C. MacClaren v. M-T Fruit & Produce, Inc.*, 22 Agric. Dec. 1048, 1051-53 (1963), it was held that where respondent's complaint in state court against complainant, involving the same transactions as before the Secretary, was dismissed on procedural grounds, such dismissal would not be *res judicata* of the issues before the Secretary.

After filing of a state court action, parties have been given the option of electing to proceed before the Secretary by dismissing such action. *Valley Packing Serv. v. Fresno Frozen Foods, Inc.*, 22 Agric. Dec. 1179-80 (1963).

n. EXTENSIONS OF TIME

"Section 47.25(b) [of the Rules of Practice] provides for extensions of time and does not, as contended by complainant, restrict the granting of extensions to cases in which the request is made prior to the regular time for filing." *Ligon Produce Co. v. Spinale Bros., Inc.*, 13 Agric. Dec. 515, 516 (1954).

o. INFORMAL COMPLAINTS

See 7 U.S.C. § 499f and 7 C.F.R. § 47.3.

The Department's informal complaint procedure was challenged in *B.V. Int'l Fruit Co. v. Seald-Sweet Int'l, Inc.*¸ dismissed on request of complainant, 37 Agric. Dec. 957 (1978). Seald Sweet admitted the informal complaint was filed within nine months after the cause of action accrued, but alleged that no informal complaint procedure was contemplated by the Act and that such procedure was in conflict with the PACA. In a letter to Seald Sweet's counsel June 18, 1976, the Presiding Officer denied Seald Sweet's motion for dismissal of the complaint and gave an explanation and defense of the informal complaint procedure. This letter ruling is quoted extensively in 10 N. Harl, Agricultural Law § 72.10[2] at note 41.

See also Trans W. Fruit Co. v. Ameri-Cal Produce, Inc., 42 Agric. Dec. 1955, 1957 at n. 2 (1983).

p. LATE FILING

In spite of § 47.20(j) which provides for waiver of right to file a document when not filed within prescribed time, the examiner has power to receive a late document in evidence on own motion, even where no petition for an extension of time has been filed. *G. & S. Produce Co. v. Sol Salins, Inc.*, 36 Agric. Dec. 1412, 1413 (1977).

q. HANDLING AND FILING FEES

Where two respondents both violated the PACA, they were held jointly and severally liable for the handling fee. *Big Apple Pineapple Corp. v. Fashion Fruit Co*., 58 Agric. Dec. 1106, 1118 (1999).

The failure to pay both the filing fee and the handling fee was noted as a problem in connection with the attempted filing of a counterclaim over which it was held the Department lacked jurisdiction. However, the decision could as readily rest on the failure to file a timely claim as upon the failure to file the statutory fees. *C.H. Robinson Co. v. Kay Gee Produce Co.*, 60 Agric. Dec. 314, 316 (2001).

r. HEARING CASE - ADMISSIBILITY OF PLEADINGS

Not admissible over objection of opposing counsel. *Potato Sales, Inc. v. Perfection Produce*, 38 Agric. Dec. 273, 280 (1979).

s. HEARINGS - WHEN ALLOWED

An oral hearing need not be granted when the amounts claimed in neither the complainant nor counterclaim exceed the statutory amount, even though such amounts when added together do exceed such amount. *K & M Potato Co. v. Potato Processing Co.*, 28 Agric. Dec. 1088 (1969).

Hearing may be granted on grounds that such is desirable and necessary for proper disposition of case, even though amount involved does not meet the statutory amount. *Green Valley Farms v. Larry Miskell Co*., 38 Agric. Dec. 57, 59 (1979).

t. NECESSARY PARTIES

Neither the Secretary nor employees of the Secretary who performed fraudulent inspections of produce are necessary parties to a reparation complaint against a firm alleged to have procured fraudulent inspection. *Procacci Bros. Sales Corp. v. B.T. Produce Co.*, 60 Agric. Dec. 341, 345 (2001).

Where the counterclaim submitted by Respondent concerned produce that was part of a joint venture, and one of the joint venture partners had not and could not be joined in the proceeding, determined that the counterclaim must be dismissed, as any amount due Complainant or Respondent under the venture was dependent, at least in part, upon the contribution of and the proceeds due the third party, so an adequate judgment could not be rendered without the presence of the third party, (a necessary party to the action), to provide evidence and testimony in this regard. *Westberry Farms Ltd. v. Sungate Mktg. LLC*, 71 Agric. Dec. w, kk (USDA 2012), *published in* 72 Agric. Dec. w, kk (USDA 2013).

u. PAY-WHEN-PAID AGREEMENT

The Regulations Under the PACA (7 C.F.R. § 46.2(aa)(5)) require payment for produce by a buyer within ten (10) days after the day on which the produce is accepted. Respondent's invoices to its third-

party customer indicate that payment was due Respondent from that customer within twenty-one (21) days. We found it reasonable under the pay-when-paid agreement for Respondent to have collected the funds within twenty-one (21) days and to have paid Complainant within thirty-one (31) days after the day on which the produce was accepted. *Coastal Mktg. Serv., Inc. v. Vibo Produce LLC*, 71 Agric. Dec. n, v (USDA 2012), *published in* 72 Agric. Dec. n, v (USDA 2013).

v. PLACE OF HEARING

Where a case consisted of two separate claims: A v. B and B v. A, and B's claim against A was only defense interposed in claim of A v. B, the hearing was held at the place of business of A on the basis that only substantive issues in litigation pertained to the B v. A claim. *Harvey Kaiser, Inc. v. Raymond Bolzan, Inc.*, 39 Agric. Dec. 51, 52-53 (1980).

w. PLEADINGS - TECHNICAL PERFECTION NOT REQUIRED

A technical error in a pleading is not fatal to its validity. *B. G. Sales v. Sin-Son Produce Co.*, 43 Agric. Dec. 1991, 1996 (1984); *Armand Co. v. FTC*, 84 F.2d 973 (2d Cir., 1936), *cert. denied*, 299 U.S. 597 (1936).

Where a formal complaint alleged sale at a price and informal complaint alleged consignment and evidence showed sale on open price basis, it was held that pleadings apprised respondent of the essential nature of the claim and did not have to meet technical requirements. Good discussion, and citation of second circuit case. *Carmack v. Selvidge*, 51 Agric. Dec. 892, 896-97 (1992).

x. PLEADINGS - VERIFICATION - NOT NECESSARY UNLESS PLEADING TO BE CONSIDERED IN EVIDENCE UNDER DOCUMENTARY PROCEDURE

While an unverified pleading is not in evidence, it does serve to form the issues between the parties. *Oshita Mktg., Inc. v. Tampa Bay Produce, Inc.*, 50 Agric. Dec. 968, 972 (1991); *Chapman Fruit Co. v. Tri-State Sales Agency*, 44 Agric. Dec. 1366-67 (1985). *See also Perell, Inc. v. Anthony Abbate Fruit Distrib.*, 32 Agric. Dec. 1900, 1902 (1973) and *H. & M. Fujishige v. Mike Phillips Enter., Inc.*, 30 Agric. Dec. 1095, 1097 (1971).

Unverified answer not in evidence. *P. Tavilla Co. Miami v. Sanco Distrib., Inc.*, 45 Agric. Dec. 734-35 (1986). *H. & M. Fujishige v. Mike Phillips Enter., Inc.*, 30 Agric. Dec. 1095, 1097 (1971). Unsworn answer has no evidential value. *Bianchi & Sons Packing Co. v. G. & J. Produce, Inc.*, 45 Agric. Dec. 842, 843 (1986). Unverified complaint had no evidentiary value, and the buyer who filed sworn pleadings prevailed as to contract terms. *Agri-Nat'l Sales Co. v. Caamano Bros., Inc.*, 46 Agric. Dec. 983, 985 (1987).

Pleadings are not in evidence in a hearing case even if verified. *See* 7 C.F.R. § 47.20(a). *Compare* 7 C.F.R. § 47.15 (f)(1) and (f)(4). *See also Potato Sales, Inc. v. Perfection Produce*, 38 Agric. Dec. 273 (1979). (Note: the parties may, of course, stipulate to such being in evidence, and sometimes do so stipulate.)

y. PROPER PARTY

"Rule 17 (b) of the Federal Rules of Civil Procedure provides that individual partners need not be named as parties, and a partnership may sue in its common name to enforce a substantive right existing under

the Constitution or laws of the United States. This rule has been applied in cases arising under the act." *Sam Egalnick Co. v. Ben Cole Produce Co.*, 9 Agric. Dec. 1037, 1041-42 (1950).

See **STANDING AND PRIVITY OF CONTRACT -** this index.

z. RECONSIDERATION

The purpose of a petition to reconsider is to question facts and the legal conclusions of the decision, not to introduce new evidence. *Evergreen Farms v. P. Tavilla Co.*, 29 Agric. Dec. 1262, 1264 (1970); *Arnold J. Rodin, Inc. v. McKenzie*, 27 Agric. Dec. 1165-66 (1968).

New evidence cannot be considered in connection with a petition for reconsideration. *Dave Walsh Co. v. Liberty Fruit Co.*, 38 Agric. Dec. 1130, 1131 (1979); *Valley Packing Co. v. DeMase & Manna*, 29 Agric. Dec. 101-02 (1970); *Shelby Farms v. Wellworth Pickle Co*., 21 Agric. Dec. 399, 400-01 (1962).

Requirement that a petition to reconsider be filed no more than ten days after service on a party may be waived by the Secretary if it is filed prior to 30 days after the date of the Order. *Homestead Tomato Packing Co. v. Ben E. Keith Co.*, 42 Agric. Dec. 2143-44 (1983).

Second petition for reconsideration dismissed. "The Rules of Practice contemplate that a party may file, as a matter of right, a petition for reconsideration of an order that has been entered. The rules make no provision for filing more than one such petition. We think it is within our discretion whether to permit a party to file a second petition for reconsideration after the first one has been disposed of. At some point the administrative consideration of the case must be brought to a conclusion." *Wescott v. Yonk Rubin & Son*, 10 Agric. Dec. 358-59 (1951).

"The Rules of Practice do not specifically prohibit the filing of a second petition for reconsideration. However, as stated by Story, Circuit Justice, in *Jenkins v. Elderedge et al.*, 13 Fed. Cas. 504, No. 7267 (C.C.D. Mass 1845), 'If rehearings are to be had, until the counsel on both sides are entirely satisfied, I fear, that suits would become immortal, and the decision postponed indefinitely.'" We have heretofore held that a reasonable interpretation of the Rules of Practice under the PACA would not sanction a multiplicity of petitions for rehearing, reargument, or reconsideration, and that the Department would not be inclined to accept them. *Ernest E. Fadler Co. v. Apache Distributors*, 9 A.D. 1266." *Z.R. Hallock Co. v. Sawyer*, 15 Agric. Dec. 163-64 (1956).

aa. REHEARING - RIGHT OF NON-PARTY TO REQUEST

Granted after entrance of final order on application of non-party who claimed to be responsibly connected with respondent corporation. *A. D'Amico & Sons v. Rivas & Sons*, 37 Agric. Dec. 1482 (1978).

bb. REOPENING

The record may only be reopened to take further evidence prior to the issuance of a final order. 7 C.F.R. § 47.24(b). (However, see last paragraph - this subheading.)

After the issuance of the final order, new evidence cannot be considered even if it is material. *Valley Packing Co. v. DeMase & Manna*, 29 Agric. Dec. 101-02 (1970). Evidence was submitted along with a petition to reconsider; there was no petition to reopen.

Where counsel petitioned to take further evidence after the hearing claiming that he was misled into believing party would be present at hearing and such party was not present, the petition was denied. *Green Valley Farms v. Larry Miskell Co.*, 37 Agric. Dec. 1767-68 (1978).

Reopening to receive evidence in rebuttal to matter of which official notice was taken in the original opinion was required, not by APA, but by the fundamental principles of due process enunciated long before the passage of the APA. *James Macchiaroli Fruit Co. v. Ben Gatz Co.*, 38 Agric. Dec. 1477, 1485 (1979).

Reopening to take further evidence not permitted where evidence could have been submitted at original hearing. *Monc's Consol Produce, Inc. v. Black Diamond Fruit & Produce Co.*, 36 Agric. Dec. 97-98 (1977).

In *Israel Klein Co. v. S. Otis Sullivan & Co.*, 17 Agric. Dec. 910 (1958) (Order on Admission of Liability); 17 Agric. Dec. 500 (1958) (Order on Merits Dismissing Complaint); 17 Agric. Dec. 595 (1958) (Stay Order - pending issuance of further order); 17 Agric. Dec. 910 (1958) (Order Granting Petition to Rehear); 18 Agric. Dec. 54 (1959) (Final Order on Merits Awarding Reparation to Complainant), a proceeding was reopened to take further evidence after issuance of a decision and order on the merits.

cc. REOPENING AFTER DEFAULT

A motion to reopen after default should set forth reasons for the failure to file a timely answer, and it should also appear that the respondent is able to offer a valid defense to the allegations of the complaint. *Winter-Mex. Produce Co. v. Ellsworth & Boyd*, 22 Agric. Dec. 1299-300 (1963).

dd. RECOVERY OF UNPAID OBLIGATIONS ALLOWED

Where Complainant sought recovery of the f.o.b. plus freight contract price of lettuce sold to Respondent, but Complainant admitted that it had not yet paid the freight, we found that where the freight invoice was in evidence, and the record lacked any evidence to substantiate Respondent's claim of freeze damage in transit, Complainant remained obligated to pay the freight invoice and was therefore entitled to recover the full f.o.b. plus freight price of the lettuce from Respondent. *Charles Johnson Co. v. Alphas Co.*, 68 Agric. Dec. 544, 554 (2008).

ee. REPLY

See - **COUNTERCLAIM** - this subject heading.

ff. SET-OFF

Set-off of reparation awarded in prior proceeding (as between same two parties) and remaining unpaid was allowed against reparation awarded against opposite party in later proceeding. *Far South, Inc. v. He-Bo Farms, Inc.*, PACA Docket No. 2-7042; Order Granting Relief issued Jan 9, 1989.

gg. TIME FOR PAYMENT

The PACA requires full payment promptly for perishable agricultural commodities purchased in the course of interstate or foreign commerce. The parties' request to allow the reparation award to be satisfied in allotments must therefore be denied. *New Mundo Exp. Fruits, Inc. v. San Diego Point Produce, Inc.*, 67 Agric. Dec. 888, 893 (2008).

See **COUNTERCLAIM** - this subject heading.

See **JURISDICTION - LOSS OF 30 DAYS AFTER ISSUANCE OF AN ORDER** - this index.

60. PRICE AFTER SALE

The term "price after sale" is not defined in either the Uniform Commercial Code or the Act and Regulations (Other Than Rules of Practice) under the Act (7 C.F.R. § 46.43(j)). It is considered a subcategory of the "open price term" (U.C.C. § 2-305(1)), and is generally understood as meaning that the parties will agree on a price following the prompt resale of the produce. *See Eustis Fruit Co. v. Auster Co.*, 51 Agric. Dec. 865, 877 (1991). If the parties are unable to agree upon a price, U.C.C. § 2-305(1) provides that the price shall be a reasonable price at the time for delivery. *Titanium Fabrics LLC v. Watermelons, Inc., d/b/a All Sweet Watermelons*, PACA Docket No. E-R-2013-277, decided April 3, 2015 (unpublished decision).

Neither the UCC nor the PACA recognize the term "Price After Sale." The term is a subcategory of "Open Price." *A.P.S. Mktg. v. R.S. Hanline & Co.*, 59 Agric. Dec. 407, 410-11 (2000); *Sucasa Produce v. A.P.S. Mktg., Inc.*, 59 Agric. Dec. 421, 424 (2000); *Well Pict, Inc. v. Ag-West Growers, Inc.*, 39 Agric. Dec. 1221, 1227-28 (1980). *See Eustis Fruit Co. v. Auster Co.*, 51 Agric. Dec. 865, 877 (1991). (The term "price after sale" usually contemplates the parties agreeing to a price following the prompt resale of the produce. Such a sale is either f.o.b., delivered, or some variation thereof, in accordance with the agreement of the parties. If the parties do not specify f.o.b. or delivered then the Department assumes that the sale is f.o.b.) *Bonanza Farms, Inc. v. Tom Lange Co.*, 51 Agric. Dec. 839, 846 (1992); *M. Offutt Co. v. Caruso Produce, Inc.*, 49 Agric. Dec. 596, 602 (1990).

See **CONSIGNMENTS - SALE ON OPEN BASIS DISTINGUISHED FROM** - this index. See also **OPEN PRICE** - this index.

61. PRICE ARRIVAL

See 7 C.F.R. § 46.43(cc). A subcategory of "Open Price."

Contemplates is not a reference to actual sales of produce after arrival but rather contemplates that the parties will agree upon a price at time of arrival with reference being to market price at such time. *James Macchiaroli Fruit Co. v. Ben Gatz Co.*, 38 Agric. Dec. 1477, 1480-81 (1979). *See also Homestead Pole Bean Coop., Inc. v. So Fresh Produce Co.*, 48 Agric. Dec. 684, 686 (1989).

Where the parties agreed that the price would be set by reference to the market for the following week, the average of that week's Market News quotes was utilized to determine the amount due. *Homestead Tomato Packing Co. v. M. & M. Ponto, Inc.*, 46 Agric. Dec. 522-24 (1987).

Where the parties did not come to an agreement as to the price on a "price arrival" contract, respondent was found liable to complainant for the reasonable price as determined by the net proceeds realized by

respondent on resale of the oranges. *Sunny Valley Citrus v. Premium Produce Corp.*, 46 Agric. Dec. 1035, 1040 (1987).

See **CONSIGNMENTS – SALE ON OPEN BASIS DISTINGUISHED FROM** - this index. See also **OPEN PRICE** - this index.

62. PROFITS

FORMER RULE:

The prevailing party was not entitled to lost profits unless it notified the other party prior to entering the contract of the profits it expected to derive. *Ben Gatz Co. v. S. Albertson Co.*, 28 Agric. Dec. 1192, 1198 (1969).

NEW RULE:

"Consequential damages resulting from the seller's breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and (b) injury to person or property proximately resulting from any breach of warranty." UCC § 2 -715(2). Until recently, our test for awarding consequential damages (also termed special damages or loss of profits) required actual knowledge on the part of the seller of a specific contract of the buyer with a third party for the resale of the goods. Under a recent decision, a less restrictive test was adopted. *See Pandol Bros., Inc. v. Prevor Mktg. Int'l, Inc.*, 49 Agric. Dec. 1193, 1199-03 (1990). Note that to be awarded consequential or special damages, it is still necessary for a buyer to show a loss resulting from general or particular requirements and needs **of which the seller at the time of contracting had reason to know**. As was stated in *Pandol*, ". . . such damages must be proven in the normal manner, and comment 4 to section 2 – 715 states that '[t]he burden of proving the extent of loss incurred by way of consequential damage is on the buyer . . .'" In addition, the buyer must also show that the loss could not have "reasonably" been "prevented by cover or otherwise."

63. PROMISSORY NOTES

See **JURISDICTION - PROMISES TO PAY** - this index.

64. PROTECTION

"Protection," and "full protection," sometimes are given different meanings. "In certain transactions, 'protection' may be intended to apply only to a certain defect. In this case, complainant, i[n] stating it granted 'protection,' states that it exclusively protected respondent against any loss resulting from light weight. With 'full protection,' no exclusivity to one type of defect would be distinguished from another when determining losses." *Charles Johnson Co. v. Hoversen*, 57 Agric. Dec. 756, 761 (1998). (The terms usually have the same meaning - *see* **PROFIT & HANDLING NOT ALLOWED; FREIGHT ALLOWED** - this topic *supra*.)

a. AGAINST LOSS

When a seller protects the buyer against loss, the buyer must only pay the net proceeds received from a prompt resale. *Dick Monroe Co. v. Fred Karen & Sons*, 30 Agric. Dec. 546, 549 (1971); *Colina Banana*

Brokerage v. Washington, 27 Agric. Dec. 1303, 1306 (1968); *W.M. Produce Co. v. Harrisburg Daily Mkt*., 20 Agric. Dec. 773, 778 (1961) (brokerage and phone charges specifically disallowed).

See Vener Co. v. McCaffrey Bros. Co., 15 Agric. Dec. 405, 409-10 (1956), where "full protection" was granted as to foods found to be defective on delivery. "The meaning of the term is self-evident, that is, that the one suffering the protection will save the other party harmless from any loss which may result from the defective condition of the merchandise. The contract . . . as modified . . . is not the same as a consignment transaction. The most [the buyer] would be obliged to pay [would be the f.o.b. contract price]. However, if the net returns derived from the resale of the [goods] were less than the contract price, the protection agreement would take effect and [the buyer] would be responsible only for the net proceeds obtained from such resale, exclusive of any commission."

See also Anonymous, 11 Agric. Dec. 754, 759 (1952).

See also Nw. Ark. Produce Co., v. Creasey Co., 27 Agric. Dec. 760, 762 (1968), where protection was granted to the buyer prior to acceptance because the buyer's personal inspection of watermelons on arrival revealed a percentage of green melons. The buyer later dumped a large poundage of melons because of alleged decay which was not supported by a prompt federal inspection. The buyer was required to pay at contract rate for all melons, except the buyer was allowed a deduction for 149 melons returned because they were green and as to which it had issued credit slips to its customers.

b. DISTINGUISHED FROM CONSIGNMENT

"A protection agreement has reference to a base price, and concerns goods that are sold, whereas in the case of a consignment there is no sale of the produce, and the shipper at all times retains title to the produce." *Border Fruit Co. v. Fruit Distrib. Corp.*, 45 Agric. Dec. 2453, 2455 (1986); *See also Dave Walsh Co. v. Liberty Fruit Co*., 38 Agric. Dec. 533, 536 (1979).

c. FAILURE TO KEEP RECORDS VOIDS

". . . it is incumbent upon a receiver who has such an agreement to keep records which substantiate its resales and losses . . . 'failure to keep such records voids the protection agreement.'" (citing *Dave Walsh Co. v. Liberty Fruit Co*., 38 Agric. Dec. 533, 536 (1979)). *Roger Harloff Packing, Inc. v. John Livacich Produce, Inc.*, 45 Agric. Dec. 1280, 1282 (1986); *DeMarco Produce Co. v. J.R. Cortes & Co*., 39 Agric. Dec. 1256, 1259 (1980). (While the voiding of the protection agreement throws us back to the original contract, *DeMarco* held that it would be pointless to discuss whether there was a breach under such contract by the shipper since the failure of the buyer to keep records of the resales precluded the award of damages. However, since the decision in *G & T Terminal Packaging Co., Inc. v. Joe Phillips, Inc.*, 798 F. 2d 579 (2d Cir. 1986), we have endeavored to assess damages by use of percentage of condition defects or some other means. See paragraph I.A.29.c., this index.)

However, where there was no inspection and there is no other evidence of the extent of damages, the voiding of a protection agreement by a failure to keep records necessitates the award of the original contract price. *Albert Fisher Sales/Pompano v. T. B. Fruit & Vegetable, Inc.*, 54 Agric. Dec. 1448, 1450 (1995). *See also Merrill Farms v. Tom Lange Co.*, 45 Agric. Dec. 2488, 2491 (1986).

The seller was held to have been released from a protection agreement entered into after arrival of asparagus in apparent poor condition by the buyer's failure to resell produce in a commercially reasonable manner. *Oshita Mktg., Inc. v. Tampa Bay Produce, Inc*., 50 Agric. Dec. 968, 973 (1991).

In a case where full protection was granted, the duty to render an accounting was abrogated by contract. *Am. Growers, Inc. v. Cal. Citrus Selectors*, 59 Agric. Dec. 430, 432 (2000).

d. PROFIT & HANDLING NOT ALLOWED; FREIGHT ALLOWED

Where the seller granted protection against loss due to condition and quality, the buyer's charge for "handling" was not allowed because it was not clear that such a charge did not come under the category of overhead or sales commission which, it was stated, would not be proper expenses. Freight was allowed. *AJM Farms, Inc. v. Am. Fruit & Produce Corp.*, 47 Agric. Dec. 461, 464 (1988); *Manzo v. Jarson & Zerrilli Co.*, 9 Agric. Dec. 1230, 1234 (1950).

Protection means that the party being protected will be saved harmless from any loss. Such party "would be responsible only for the net proceeds obtained from . . . resale, exclusive of any commission." *Vener Co. v. McCaffrey Bros. Co.*, 15 Agric. Dec. 405, 409 (1956); *David Pepper Co. v. Harris Packing Co.*, 14 Agric. Dec. 185, 187 (1955).

Rationale for Denying Profit, Commission, and Handling Charge, and for Allowing Freight:

In a protection against loss situation, the protected party is not getting the goods on consignment (in which case they would remain the property of the shipper). Rather the protected party is buying and taking title to the goods, and the original contract price remains the base-line price. Following a breach, such party still has the potential (though perhaps remote) to make a profit on the goods. **(Suppose, for instance, that the goods arrive in poor condition and the parties negotiate a protection agreement. Even though the goods are in poor condition, the market might, under certain conditions, rise precipitously and the protected party might sell for double the original contract price. In such case, he would be liable to the seller only for the original price and would be able to keep all the profit.)** The protected party's protection extends only to protection against loss. There is ever present a potential for profit, not a right to profit **(the potential is contained in the original contract which has been modified, but not extinguished)**, and realization of the potential depends upon the protected party reselling for more than the original contract price. Thus, the protected party under a protection agreement is not entitled to a profit when the resales turn out to be so low as to invoke protection nor is such party entitled to a commission (which is a substitute for profit in a consignment transaction), nor a handling fee (which, unless explained, might be a euphemism for profit.) *See Charles Johnson Co. v. Hoversen*, 57 Agric. Dec. 756, 760 (1998); *Oshita Mktg., Inc. v. Tampa Bay Produce, Inc.*, 50 Agric. Dec. 968, 973 (1991).

"Protection," "full protection," and "protection against loss" usually have the same meaning and should be distinguished from "market protection," or "price protection." A protection agreement is a modification of the original sale contract which leaves the original sale price as the base line price for determining whether the buyer makes a profit, or is entitled to protection. The potential for profit remains after the conclusion of the protection agreement, and this potential can only be realized in the same manner as it is realized in any sale contract, namely by the buyer reselling at prices above the original price plus expenses. Therefore, when a buyer with protection fails to resell at such favorable prices and experiences a loss, the protection should only compensate for the loss and should not include a profit in the form of a commission or handling fee. *Romney & Assoc., Inc. v. Super Fresh, Inc.*, 57 Agric. Dec. 1670, 1682-83, *recon. dismissed*, 1683 (1998).

Freight: The fundamental object of the protection agreement, which is to protect the buyer against any loss, requires that no monetary loss occur. This means that a buyer who has paid freight must be credited with the freight paid. If gross proceeds of the buyer's resale exceed the f.o.b. contract price plus freight, then the buyer gets to keep the excess as profit. (The buyer would pay the freight to the carrier, the f.o.b. price to the seller, and keep the excess.) On the other hand, if gross proceeds of the resale are less than the buyer's costs (f.o.b. price, plus freight), then the buyer deducts freight costs from such gross proceeds and remits the balance, thus suffering no loss. If gross proceeds are not enough to cover freight, then the seller who grants full protection must chip in and pay the remainder of the freight costs. Any attempt to leave freight out of the equation will result in a loss to the buyer and thus infringe on the protection against loss granted by the seller. *See Manzo v. Jarson & Zerrilli Co.*, 9 Agric. Dec. 1230, 1234 (1950).

65. PURCHASE AFTER INSPECTION

The Regulations, § 46.43 (7 C.F.R. § 46.43) provide in relevant part that:

> The following terms and definitions, when used in any contract of communication involving any transaction coming within the scope of the Act, shall be construed as follows:
> . . .
> (ff) "Purchase after inspection" means a purchase of produce after inspection or opportunity for inspection by the buyer or his agent. Under this term the buyer has no right of rejection and waives all warranties as to quality or condition, except warranties expressly made by the seller.

a. FAILURE TO USE TERM IN CONTRACT NEGOTIATIONS SIGNIFICANT

"Purchase after inspection" is a trade term defined in the Regulations and must be employed by the parties to be applicable. Under the UCC, an actual inspection of the very goods shipped, or a sample thereof, voids ***implied*** warranties, but the suitable shipping condition warranty made applicable by use of f.o.b. terms is an ***express*** warranty, and inspection of the goods shipped will not void such warranty in the absence of proof that it was the intent of the parties to do so. *Primary Exp. Int'l v. Blue Anchor, Inc.*, 56 Agric. Dec. 969, 981 (1997). *See also Rich-SeaPak Corp. v. Pro-Ag, Inc*., 56 Agric. Dec. 1958, 1968 (1997), where the sale was delivered, but the breach was of an express warranty.

The inspection of individual packages of a shipment by buyer's agent, coupled with failure to object, was found to have waived objections to any problems with the produce under UCC § 2-316 where inspection was at time of arrival under a delivered sale. *Produce Connection, Inc. v. Lincis*, 59 Agric. Dec. 442, 444 (2000). (This issue was incorrectly categorized under UCC § 2-316(3)(b), which applies only to inspections made before entering into the contract. However, it could have been correctly categorized under UCC § 2-607(3)(a) for failure to give notice of breach with the same result. An inspection at shipping point by the buyer's agent prior to entering into a delivered sale contract would succeed in voiding implied warranties under UCC § 2-316(3)(b).)

". . . 'purchase after inspection' is a trade term which the Regulations contemplate being expressly used by the parties in their communication with each other when the contract is formed. Whether or not there was an express usage of the term or of words of similar import, has been deemed highly significant in past decisions. *See Ritepak Produce v. Green Grove Mkts*., 29 Agric. Dec. 165, 169 (1970); *Goldstein Fruit & Produce v. E. Coast Distrib.*, 18 Agric. Dec. 493, 496 (1959)." *Jim Hronis & Sons v. Luna Co*.,

47 Agric. Dec. 1497, 1499-01 (1988). (These cases have been superceded by the *Primary Exp.* case, but show the direction in which the law was headed before that case was decided.)

See also G.D.I.C., Inc. v. Misty Shores Trading, Inc., 51 Agric. Dec. 850, 860 (1992), which follows *Jim Hronis & Sons*.

b. INSPECTION OF SPECIFIC COMMODITY VOIDS IMPLIED WARRANTY

Where lettuce was inspected by a commercial lettuce inspector on behalf of the buyer prior to the parties finalizing their contractual agreement, and it was clear that such inspection was an inspection of the specific lettuce in question and not simply an inspection of the general run of goods available, it was held that UCC § 2-316 (3)(b) provides that there is no implied warranty, and that the long-standing decisions of the Secretary are in accord. *N. Am. Produce Buyers v. Source Produce Distrib. Co.*, 48 Agric. Dec. 1101 (1989). *See also Hyder v. Williamson*, 48 Agric. Dec. 721-22 (1989); *Frosteg v. Dade Tomato Co.*, 48 Agric. Dec. 701, 702 (1989).

NOTE: The f.o.b. suitable shipping condition warranty has now been held to be an express warranty, and where f.o.b. terms are used, inspection of the specific commodity sold does not negate such warranty. *Primary Exp. Int'l v. Blue Anchor, Inc.*, 56 Agric. Dec. 969, 980-81 (1997). The above cases, however, might have applicability to the implied warranty of merchantability.

c. MORE THAN INSPECTION OF GENERAL RUN OF GOODS REQUIRED

Where buyer's agent inspected the general run of goods, but not the load under dispute and the sale was f.o.b., it was held to not be a purchase after inspection. *Malone v. Al Kaiser & Bros.*, 18 Agric. Dec. 1214, 1218-19 (1959), *aff'd. on reconsideration* 19 Agric. Dec. 84, 85 (1960); *aff'd on reconsideration* 19 Agric. Dec. 367, 369 (1960); *aff'd on reconsideration* 19 Agric. Dec. 444, 445 (1960).

Where the buyer's agent looked at four or five cartons of B. R. brand lettuce at cooler and later ordered a carload of the same brand by phone, it was held that the inspection of the four or five cartons was for the purpose of checking the quality and condition of the general run of B. R. brand lettuce and not an inspection of quality and condition of a specific quantity. *Kirby & Little Packing Co. v. United Fruit & Produce Co.*, 16 Agric. Dec. 1066, 1069 (1957).

66. QUALITY AND CONDITION

"'Quality' and 'condition' are terms of art as used in inspection certificates, U.S. Grade Standards and within the produce industry. 'Grade' is often, but not always used as a synonym for 'quality.'" *Supreme Berries, Inc. v. McEntire*, 49 Agric. Dec. 1210, 1216 at n. 4 (1990).

". . . Generally 'condition' defects are those which are subject to change due to an inherent worsening of the defect with decay being the prime example, whereas 'quality' or 'grade defects' are generally not subject to change. An example would be field scaring . . ." 10 N. Harl, Agricultural Law § 72.10(4)(b) at note 82 (1983).

". . . In general, the more permanent of the inherent properties of a product are classed as quality, while its state of preservation, including deterioration, decomposition or changes of a progressive nature which may have developed or occurred since the product was packed, is classed as condition." *General Market Inspection Instructions for Use of Fresh Fruit and Vegetable Inspectors*, Specialty Crops Inspection

Division, Specialty Crops Program, Agricultural Marketing Service, United States Department of Agriculture, p. 148, para. 425 (April, 1988). *See* the same publication, pp. 150-157, for a listing of condition factors for different commodities.

Shipping point and destination inspectors, when stating a percentage of grade (for example "85% U.S. No. 1 quality"), lump condition and quality together to come up with a percentage statement. This is an aberrant usage of the term "quality." Generally, in shipping point inspections, there is no breakdown of the quality and condition factors except that a factor such as decay must be specified.

67. REAL PARTY IN INTEREST

See **STANDING AND PRIVITY OF CONTRACT**

68. REJECTION

See **ACCEPTANCE OF REJECTION** - this index.
See **NOTICE OF REJECTION** - this index.
See **COMMERCIAL UNIT** - this index.

a. IN GENERAL

Where the buyer rejected two lots of onions and communicated such rejection to the seller in a timely fashion, the rejections were effective and title was revested in the seller. The seller took possession of the onions and had them resold. However, the seller only had one lot inspected. It was held that complainant seller had the burden of proof as to whether rejections were wrongful, and that the inspection of one lot showed that the buyer's rejection of that lot was wrongful, but that there was no showing that the rejection of the other lot was wrongful. Damages could not be awarded on the basis of the difference between resale price and contract price because complainant did not submit an accounting of the resale into evidence. Damages were awarded on the basis of the difference between market price and contract price. *McKay v. Lusk Onion, Inc.*, 54 Agric. Dec. 721, 723 (1995). *See also Nikademos Dist. Co. v. D & J Tomato Co.*, 50 Agric. Dec. 1884, 1888-89 (1991).

Complainant sold a load of melons which were to be of specific sizes and brand, and which, under the contract, could go to any point between Maryland and Massachusetts, but the load was billed to respondent's customer in Maryland. While the load was en route, respondent learned that the sizes were not as specified and diverted the load to Massachusetts, where it was inspected and found not to have been in suitable shipping condition when shipped. Respondent then rejected the load, and complainant stated that it did not acquiesce in the rejection, but nevertheless disposed of the load to protect its value. It was held that the diversion was an acceptance, and that respondent's rejection of the load following its act of acceptance was a rejection without reasonable cause. Complainant signaled to respondent that it did not agree with its rejection of the load, but in order to preserve the value of the load, complainant arranged for the disposal of the melons. This was stated to have been entirely proper under the circumstances. *Jen Sales, Inc. v. S. Friedman & Sons, Inc.*, 53 Agric. Dec. 810, 814 (1994).

In *G. Tanaka Farms v. Garden State Farms, Inc.*, 48 Agric. Dec. 729, 730 (1989), complainant seller asserted that it would never have agreed to "accept Respondent's rejection" had it not been for the fact that respondent misrepresented the temperatures shown by the Ryan temperature tape. We stated that complainant's acceptance of the rejection was immaterial since we have held many times that a seller always has the duty of accepting a procedurally effective rejection even if the rejection is wrongful.

Citing *Cal-Mex Distrib., Inc. v. Tom Lange Co.*, 46 Agric. Dec. 1113, 1121 (1987); *Yokoyama Bros. v. Cal-Veg Sales*, 41 Agric. Dec. 535, 537 (1982); *Pope Packing & Sales, Inc. v. Santa Fe Vegetable Growers Coop. Ass'n*, 38 Agric. Dec. 101, 104 (1979); *Produce Brokers & Distrib. v. Monsour's, Inc.*, 36 Agric. Dec. 2022, 2025 (1977); *Bruce Church, Inc. v. Tested Best Foods Div*., 28 Agric. Dec. 377, 382 (1969).

Respondent buyer received frozen potatoes and did not reject them within 24 hours as specified by 7 C.F.R. 46.2(cc)(1), so there was no effective rejection. *Global Reliance, Inc. v. Pinnacle Food Groups LLC*, 73 Agric. Dec. 342, 353 (2014).

b. DIFFERENT TYPES

The UCC makes a distinction between procedurally effective and substantively wrongful rejections. Subsection 4 of UCC § 2 - 401 provides:

> A rejection or other refusal by the buyer to receive or retain the goods, *whether or not justified*, or a justified revocation of acceptance revests title to the goods in the seller. Such revesting occurs by operation of law and is not a "sale". (emphasis supplied)

(*See* White & Summers on UCC, 1972 ed., at §§ 7-3, 8-3 at p. 264, last paragraph on page for explanation of effective and ineffective rejections.) A rejection was held to have been procedurally effective but substantively wrongful in *Pope Packing & Sales, Inc. v. Santa Fe Vegetable Growers Coop. Ass'n*, 38 Agric. Dec. 101, 104 (1979).

An ineffective rejection has the same legal consequence as acceptance. *Dew-Gro, Inc. v. First Nat'l Supermarkets, Inc.*, 42 Agric. Dec. 2020, 2025 (1983).

c. DUTIES OF RECEIVER AFTER

A buyer, post-rejection, is only to act in good faith in an attempt at reworking. A buyer assuming the duty acts as the seller's agent for disposition. However, the type of agency here enforced upon a buyer is restricted, and the buyer is only required to act in good faith. Good faith means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade. *Main St. Produce, Inc. v. W. Veg. Produce, Inc.* and *Main St. Produce, Inc. v. Florance Distrib. Co.*, 74 Agric. Dec. 193, 226 (2015).

After rejecting produce, a receiver has a duty to dispose of the goods in commercial channels upon the request of the shipper or in lieu of instructions from the shipper. *Derrick Ranches, Inc. v. Purity Supreme, Inc*., 46 Agric. Dec. 1245, 1247 (1987); *Yokoyama Bros. v. Cal-Veg Sales*, 41 Agric. Dec. 535, 537 (1982).

See Crowley v. Calflo Produce, Inc., 55 Agric. Dec. 674, 677 (1996), briefed below under **SELLER'S DUTY TO TAKE POSSESSION AFTER REJECTION**.

See U.C.C. § 2-603

d. GROUNDS

Failure "in any respect" to conform to the contract justifies rejection. UCC § 2-601.

The perfect tender requirement of UCC § 2-601 was applied in *Harvey Kaiser, Inc. v. Kay Packing Co.*, 52 Agric. Dec. 762, 765 (1993). The case involved tender of cabbage in wooden boxes when the contract excluded wooden boxes because customers would object.

Untimely delivery - *La Mantia-Cullum-Collier v. Sol Salins, Inc.*, 41 Agric. Dec. 307, 309 (1982).

75 cartons out of 608 were wrong brand - *Garin Co. v. Mitchell*, 30 Agric. Dec. 1534, 1539 (1971).

e. MUST BE CLEARLY STATED

For a rejection to be effective, it must be made in clear, unmistakable terms, and a mere complaint is insufficient. *Firman Pinkerton Co. v. Casey*, 55 Agric. Dec. 1287, 1292 (1996); *Crowley v. Calflo Produce, Inc.*, 55 Agric. Dec. 674, 677 (1996); *River Valley Mktg. Inc. v. Tom Lange Co.*, 53 Agric. Dec. 918 (1994); *W.T. Holland & Son. v. C.K. Sensenig Potatoes*, 52 Agric. Dec. 1705, 1707-08 (1993); *Teixeira Farms, Inc. v. Community-Suffolk, Inc.*, 52 Agric. Dec. 1700, 1702 (1993); *Supreme Berries, Inc. v. McEntire*, 49 Agric. Dec. 1210, 1216 (1990); *Yokoyama Bros. v. Cal-Veg Sales*, 41 Agric. Dec. 535, 536 (1982); *Farm Market Serv., Inc. v. Albertson's, Inc.*, 42 Agric. Dec. 429, 431 (1983); *Saikhon v. Russell-Ward Co.*, 34 Agric. Dec 1940, 1942 (1975); *Jarson & Zerilli Co. v. P. Tavilla Co.*, 30 Agric. Dec. 1360, 1363-64 (1971); *Schley Bros. v. Mercurio Bros.*, 23 Agric. Dec. 862, 866 (1964); *United Packing Co. v. Conn. Celery Co.*, 16 Agric. Dec. 810, 814 (1957); *John C. Lester Co. v. Victory Distrib. Co.*, 11 Agric. Dec. 376, 383 (1952); *San Pat Vegetable Co. v. Kyman*, 5 Agric. Dec. 483, 488-89 (1946). (None of these cases states the reason for this rule, but it should be obvious upon reflection. A complaint, no matter how vociferous, may not be intended to communicate rejection, but merely notice of breach. Rejection and notice of breach are very different things with very different consequences. It is therefore necessary that we uphold a very clear distinction between the notices required for each.)

Terminology "not acceptable" could be merely an expression of displeasure such as would qualify as notice of breach but not as notice of rejection. *Beamon Bros. v. Cal. Sweet Potato Growers*, 38 Agric. Dec. 71, 73-74 (1979). "The need for a clear and unmistakable rejection is doubly necessary where there is a subsequent unloading of the produce by the receiver with a claim that the produce was to be handled for the shipper's account." *Id.* at 74. *See also Ritclo Produce, Inc. v. Mich. Repacking & Produce Co.*, 45 Agric. Dec. 1577, 1580 (1986).

f. NOTICE

A rejection is not effective unless the buyer seasonably notifies the seller and the burden of proving seasonable notice rests upon the buyer. *San Tan Tillage Co. v. Kaps Foods, Inc.*, 38 Agric. Dec. 867, 871 (1979); *Sun World Mktg. v. Bayshore Perishable Distrib., Inc.*, 38 Agric. Dec. 480, 482-83 (1979).

Notice by a buyer to the seller that the buyer's customer has rejected is not notice of rejection by the buyer to the seller. ". . . rejections must be made by each buyer to their own seller and must be clearly communicated as such." *Phoenix Vegetable Distrib. v. Randy Wilson Co.*, 55 Agric. Dec. 1345, 1348 (1996).

See major topic **NOTICE OF REJECTION -** this index.

g. PARTIAL LOAD

See 7 C.F.R. § 46.43(ii) and UCC §§ 2-105(6) and 2-606(2). See **COMMERCIAL UNIT** - this index.

h. PRECLUDED BY DOWN THE CHAIN, BUT NOT UP THE CHAIN, ACCEPTANCE

Where A sold to B, B sold to C, and C sold to D, a rejection by D to C was effective even though it occurred following C's acceptance of the lot of produce, because the lot was accepted by unloading at C's warehouse, and D was on hand to reject when the lot was unloaded. However, following C's acceptance, C could not reject to B, nor could B reject to A. It was found that, in fact, no such rejection had been attempted, but that C and B had merely communicated the fact that D had rejected to C. A's subsequent repossession of three-fourths of the lot of produce was wrongful and precluded A from entitlement to the contract price as to more than the one-fourth of a lot left in C's possession even though the entire lot had been accepted. *Phoenix Vegetable Distrib. v. Randy Wilson Co.*, 55 Agric. Dec. 1345, 1349-50 (1996).

The buyer claimed to have rejected potatoes to the seller following failure to ship on arrival but showed only that the potatoes were rejected by the buyer's customer to the buyer and failed to show rejection by the buyer to the seller. *Alva Produce, Inc. v. Soik Sales, Inc.*, 51 Agric. Dec. 1480, 1484 (1992).

i. SELLER'S DIVERSION OF LOAD TO ANOTHER MARKET FOLLOWING REJECTION

Where a carload of lettuce sold f.o.b., without reference as to grade, was inspected on arrival in Chicago on October 27th, and found to contain an average of 2% damage by tipburn, 10% damage by reddish brown discoloration following bruising affecting outer leaves and three to five head leaves, and 2% decay, Respondent buyer rejected. The lettuce was found to have made good delivery, and the rejection was found to be wrongful. Notice of rejection was given on October 27th, and on the following day the parties exchanged telegrams in an unsuccessful effort to reach an understanding. On October 29th, the seller turned the load over to a third party to resell, and the third party diverted the load to New York where it arrived on November 3rd. The load was there determined to be in too deteriorated condition to bring freight charges, and was abandoned to the carrier. The seller sought to recover the contract price, and the buyer contended that the seller failed to use due diligence in mitigating damages following rejection. We said:

> There is no evidence of any negligence, delay, or bad judgment in the attempted resale of this shipment. The diversion of the shipment to another market for resale is not shown to have been unreasonable. Complainant testified that it is often difficult or impossible to resell a shipment of lettuce on the same market where it has been rejected by the original buyer. We have previously held that if, in the seller's judgment, a resale can be made to a better advantage by diverting it to another market than that at which it was rejected, and there is no indication of bad faith or lack of diligence in so doing, the validity of the seller's action will be upheld. *The S. A. Gerard Company v. Metzler and Sons, Inc.*, 12 Agric. Dec. 781, 786. It is concluded that the diversion and attempted resale of this shipment was handled in a reasonable and diligent manner.

Navajo Mktg. Co. v. Kaiser, 19 Agric. Dec. 894, 898-99 (1960).

j. SELLER'S DUTY TO TAKE POSSESSION AFTER REJECTION

A seller always has the duty of accepting a procedurally effective rejection, whether the rejection is rightful or wrongful. *Main St. Produce, Inc. v. W. Veg. Produce, Inc.* and *Main St. Produce, Inc. v. Florance Distrib. Co.*, 74 Agric. Dec. 193, 219 (2015).

A seller must take possession of rejected goods (assuming rejection was procedurally effective) even if the rejection is wrongful. *Yokoyama Bros. v. Cal-Veg Sales*, 41 Agric. Dec. 535, 537 (1982); *Produce Brokers & Distrib. v. Monsour's, Inc.*, 36 Agric. Dec. 2022, 2025 (1977).

The fact that a seller takes back product and resells it after an unwarranted rejection does not, in and of itself, establish that there was a mutual rescission of the original contract of sale. *G & S Produce Co. v. L.R. Morris Produce Exch.*, 31 Agric. Dec. 1167, 1170 (1972).

Where the buyer made an effective rejection of load of strawberries, the title automatically reverted to the seller, and the seller had the burden of proving contractual warranty inapplicable. The seller's refusal to accept the rejection was meaningless, and the seller had a primary duty to dispose of the goods. Where the seller did not dispose of the goods, the buyer's duty to dispose of the goods was contingent upon the seller having no agent or place of business in the market of the rejection, and the burden of proof was on the seller to establish that it had no such agent or place of business. However, where the buyer assumed the duty of resale, it was assumed that duty did rest on the buyer, but the buyer was held only to good faith standards in making the resale. *Crowley v. Calflo Produce, Inc.*, 55 Agric. Dec. 674, 681 (1996). *See also* U.C.C. § 2-603.

See also U.C.C. § 2-703.

k. TITLE

An effective rejection revests title to goods in the seller. *Bruce Church, Inc. v. Tested Best Foods Div.*, 28 Agric. Dec. 377, 382 (1969).

Where the buyer rejected two lots of onions and communicated such rejection to the seller in a timely fashion, the rejections were effective and title was revested in the seller. *McKay v. Lusk Onion, Inc.*, 54 Agric. Dec. 721, 723 (1995).

See also U.C.C. § 2-401(4).

l. WITHOUT REASONABLE CAUSE

Section 46.2(bb) of the Regulations (7 C.F.R. § 46.2(bb)) defines "reject without reasonable cause" as a refusal or failure without legal justification to accept produce within a reasonable time (eight hours for truck shipments), in reality states the time limits within which a rejection of produce may be made. A rejection attempted after the described periods will be ineffective. "Reject without reasonable cause" is thus, in some cases, a description of an ineffective rejection. Thus, a receiver could allow a truck to sit at its dock without looking at its contents or taking any other action indicating acceptance. After eight hours expires, a "rejection without reasonable cause" will have taken place, but since no communication of such rejection has been made, the rejection is ineffective, and the legal consequences are the same as an acceptance. *See* 7 C.F.R. § 46.2(dd)(3). *See also Fresh W. Mktg., Inc. v. McDonnell & Blankfard,*

Inc., 53 Agric. Dec. 1869, 1874 (1994); *River Valley Mktg. Inc. v. Tom Lange Co.*, 53 Agric. Dec. 918, 922-23 (1994).

A rejection after acceptance is usually a rejection without reasonable cause. *See* 7 C.F.R. § 46.2(bb).

Where the buyer "rejected" following acceptance, the seller rightly refused to accept the "rejection" but nevertheless had the goods resold to preserve their value. The seller was awarded the contract price less the net proceeds of the resale. The seller was credited with the freight, which it paid as a result of having taken possession of the goods. *Salinas Lettuce Farmers Coop. v. Ag-West Growers, Inc.*, 50 Agric. Dec. 984, 989 (1991).

Where respondent gave notice of rejection following the unloading of produce, the rejection was ineffective, and the load was deemed to have been accepted. *Lionheart Group, Inc. v. Sy Katz Produce, Inc.*, 59 Agric. Dec. 449, 456 (2000).

However, revocation of acceptance is allowed in a proper case. *See Cal-Swiss Foods v. San Antonio Spice Co*., 37 Agric. Dec. 1475, 1480 (1978); *Highland Grape Juice Co. v. T.W. Garner Food Co.*, 38 Agric. Dec. 1001, 1008 (1979).

A rejection of goods is wrongful when it is done without reasonable cause. *Turtle Valley Farms v. Riehm Produce Co*., 20 Agric. Dec. 43, 49 (1961).

69. RESCISSION OF CONTRACT

See U.C.C. § 2-720. *See also* A. Corbin, *Corbin on Contracts*, § 1236-37, pp. 989-93 (one vol. ed. 1952).

A party may repudiate its rescission of a contract if its action resulted from material misrepresentations of fact by the other party to the contract. *Salinas Mktg. Coop. v. Fred Meyer, Inc.*, 48 Agric. Dec. 1107, 1109-10 (1989); *Tom Bengard Ranch v. Tomatoes, Inc*., 41 Agric. Dec. 1637, 1639 (1982).

Facts indicating rescission, burden of proof and exercise of control over commodity as indicating - *E. Potato Dealers of Me., Inc. v. Commodity Mktg. Co.*, 36 Agric. Dec. 2017, 2022 (1977); *Grower Sales, Inc. of Wash. v. Indep. Potato Co.*, 36 Agric. Dec. 1757, 1761 (1977).

70. RES JUDICATA

The terminology now generally used is *claim preclusion*. For collateral estoppels, the term is *issue preclusion*.

In *H.C. MacClaren v. M-T Fruit & Produce, Inc*., 22 Agric. Dec. 1048, 1051-53 (1963), it was held that where respondent's complaint in state court against complainant involving the same transactions as before the Secretary was dismissed on procedural grounds, such dismissal would not be *res judicata* of the issues before the Secretary.

Where a Colorado state administrative forum was limited in its jurisdiction to hearing claims for alleged injury resulting by reason of "fraud, deceit, or willful negligence," and made an award not on the basis of such finding, but rather on the basis of an offer of compromise that it deemed an admission of liability by one of the parties, such award was found not to be *res judicata* of breach of contract issues relative to the same transactions before the Secretary. *Shriver v. Mkt. Pre-Pak, In*c., 39 Agric. Dec. 290, 301 (1980).

State court final judgment used as basis for award of reparation where issue had been before state court on compulsory counterclaim and no election of remedies had taken place. *M.S. Thigpen Produce Co. v. Park River Growers, Inc.*, 48 Agric. Dec. 695, 699-70 (1989). (The case discusses the distinction between *res judicata* and collateral estoppel. Note that identity of parties is required for both.) *See also Weyman v. Wash. Fruit & Produce Co.*, 32 Agric. Dec. 1748, 1753 (1973).

In *Woods v. Conogra Inc.*, 50 Agric. Dec. 1018, 1026 (1991), where a claim was previously filed with the California Department of Food and Agriculture, such Department's determination of the claim in a letter was not *res judicata* in regard to the issues in the proceeding before the Secretary. The letter evidenced a lack of finality. In any event, respondents' counsel were stated not to have shown that "the California Department of Food and Agriculture is accorded such jurisdiction under California law, in matters such as this, as would make it fall within the category of "a court of competent jurisdiction" within the meaning of that phrase as used in Section 5(b) of the Act."

In *Tom Lange Co., Inc. v. Atl. Produce Co.*, 52 Agric. Dec. 1675, 1677 (1993), a previous default order did not include freight bills pertaining to the shipments, and complainant sought to recover such freight charges in the subsequent action. It was held that the subsequent action was barred by res judicata, and we quoted Moore's Federal Practice as follows:

> As a general principle, then, the plaintiff must assert in his first suit all the legal theories that he wishes to assert and his failure to assert them does not deprive the judgment of its effect as *res judicata*. So, too, with the demand for relief. The plaintiff must seek in his first suit all the relief to which he is entitled, and the judgment in that suit bars a second suit seeking different or additional relief.

J. Moore, J. Lucas & T. Currier, Moore's Federal Practice, § 410(1) (2nd Ed., 1992).

In *Powell v. Georgia Sweets Brand, Inc.*, 58 Agric. Dec. 1136, 1143 (1999), it was held that a state administrative forum in Georgia was a court of competent jurisdiction within the meaning of section 5(b) of the Act, and that complainant had made an election of remedies by filing with that forum. It was determined that an administrative forum can be found to be a court of competent jurisdiction when (A) the administrative tribunal has authority over the parties and can render a decision on the merits that would be *res judicata* of the factual issues presented in the reparation case; and/or (B) the administrative tribunal has the authority to issue an enforceable monetary judgment based upon a breach of a contractual duty.

In *C.H. Robinson Co. v. Buddy's Produce, Inc.*, 61 Agric. Dec. 838, 843-44 (2002), complainant filed a trust action in federal district court involving the same parties and subject matter as in a reparation action before the Secretary, and the trust action was opposed by respondent so as to bring the merits of the matter before the District Court. We held that there was no election of remedies under section 5(b) of the PACA. However, a voluntary dismissal with prejudice in the trust action by order of the District Court upon stipulation of the parties was *res judicata* of all the issues before the Secretary and precluded maintenance of the claim before the Secretary. The complaint was dismissed.

See Trans W. Fruit Co. v. Ameri-Cal Produce, Inc., 42 Agric. Dec. 1955, 1957-58 (1983).

71. REVOCATION OF ACCEPTANCE

Respondent took samples of the frozen potatoes, performed microbiological testing in its own lab, and submitted samples to an independent lab for chemical testing. When buyer later attempted to revoke the acceptance based on the lab results, complainant seller refused to reclaim the potatoes without retesting. Respondent buyer made two of the four lots available for retesting, and withheld the other two lots. Complainant did not refute buyer's evidence through evidence from retesting, so buyer's revocation of acceptance was justified for the two lots it made available. Since buyer's evidence was controverted, its revocation of acceptance was not justified for the two lots it withheld from retesting. *Global Reliance, Inc. v. Pinnacle Food Groups LLC*, 73 Agric. Dec. 342, 358 (2014).

To revoke its acceptance, the buyer must show the produce failed substantially to conform to the contract; that its acceptance was based on an assumption the problem would be cured or that it received an inducement to accept the produce; and that the revocation occurred in a reasonable time after discovery of the non-conformity and before other substantial damage occurred. *Highland Grape Juice Co. v. T.W. Garner Food Co.*, 38 Agric. Dec. 1001, 1007-14 (1979); *Cal-Swiss Foods v. San Antonio Spice Co.*, 37 Agric. Dec. 1475, 1479-80 (1978); *Pappageorge Produce Co. v. Dixon Produce Co.*, 33 Agric. Dec. 1160, 1162 (1974).

Respondent returned a portion of a lot that it had previously purchased and accepted, and sought to prove that Complainant agreed to a contract modification assenting to the return of the commodities. As a result of Respondent's failure to obtain an inspection, failure to revoke its acceptance in a timely manner, and failure to prove its allegations of a prior course of dealings whereby Complainant issued credits for returned merchandise, Respondent failed to prove that it properly revoked its acceptance of the commodities. As a consequence, damages were awarded to Complainant. *D.M. Rothman Corp., Inc. v. Good Luck Produce, Inc.*, 66 Agric. Dec. 1472, 1482-83 (2007).

Once a proper revocation of acceptance is made, the buyer has the same rights and duties with regard to the goods involved as if they originally were rejected. *Grasso Foods, Inc. v. Quaker Oats Co.*, 46 Agric. Dec. 188, 190 (1987) *on reconsideration*.

See U.C.C. § 2-608.

72. STANDING AND PRIVITY OF CONTRACT

Failure to show existence of contract. *Phila. Fruit Exch., Inc. v. Garden State Farms, Inc.*, 41 Agric. Dec. 1793, 1796 (1982); *Sawyer Fruit & Vegetable Co. v. Phoenix Pie Co.*, 18 Agric. Dec. 946, 949 (1959); *Food Sales Co. v. Smeltzer Orchard Co.*, 18 Agric. Dec. 1209, 1211-12 (1959).

a. BROKERS

To have a cause of action, a complainant must ordinarily prove it had a contractual relationship with the respondent. Evidence showed that complainant was a broker with no title to the produce. *Adams v. Cal. Wine Growers Co.*, 48 Agric. Dec. 703, 704 (1989); *Montgomery v. V.F. Lanasa, Inc.*, 41 Agric. Dec. 556, 558 (1982); *C.H. Robinson, Inc. v. Tomato Sales Co.*, 15 Agric. Dec. 486, 489 (1956), where complainant had advanced payment to the principal and was found to have standing that otherwise would not exist. *See also Allen, Inc. v. Willard*, 15 Agric. Dec. 388, 393 (1956), where complainant broker was allowed to provide assignment of interest from the principal, thereby obtaining title to the debt.

In *Harrisburg Daily Mkt., Inc. v. S. Boova & Co.*, 19 Agric. Dec. 689, 695 (1960), we stated:

> It has been held in previous decisions under the act that the complainant in a reparation proceeding must be a real party in interest as recognized by established legal principles. [*Anonymous*], 15 A.D. 5[1]. The real party in interest is the person who can discharge the claim upon which the suit is brought and control the action brought to enforce it, and who is entitled to the benefits of the action, if successful, and can fully protect the one paying the claim by other persons. *Caughey v. George Jensen & Sons*, 258 P. 2d 357 (1953). A person who acts merely as a broker or agent in a purchase and sale cannot maintain an action against the buyer for the purchase price in the absence of an assignment from his principal or other legal basis. *Anonymous*, 14 A.D. 766; *Moise Products Company v. William Faehndrich, Inc.*, 140 N.Y.S. 2d 49 (1955); and *Awner v. Moscowitz*, 176 N.Y.S. 737 (1919).

Where complainant was a broker relative to transaction in perishables and was authorized by its principal, the seller, to **invoice** the buyer, **collect and remit** to the principal, the agency contract did not contemplate that such broker would be enabled to bring a legal action to collect the debt. Complainant was under no obligation to pay its principal if complainant was not paid and was not the real party in interest for the purpose of bringing a reparation action against the buyer. *PurePac Brokers, Inc. v. Procacci Bros. Sales Corp.*, 54 Agric. Dec. 734 (1995).

Where complainant was a broker relative to a transaction in perishables and was authorized by its principal, the seller, to invoice the buyer, collect and remit to the principal, the agency contract did not contemplate that such broker would be enabled to bring a legal action to collect the debt. The fact that the principal was undisclosed at the time of contracting did not alter this rule, where the existence of the principal was later disclosed. Complainant was under no obligation to pay its principal if complainant was not paid and was not the real party in interest for the purpose of bringing a reparation action against the buyer. *Produce Serv. & Procurement, Inc. v. Vestal*, 55 Agric. Dec. 1284, 1286-87 (1996).

Broker who guaranteed its suppliers that cost of produce sold to respondent buyer would be paid, and upon failure of respondent buyer to pay the suppliers, paid such suppliers itself, had standing to file a reparation complaint. We stated that, "[w]hen a guarantor had made payment to its principal(s), it is subrogated to the principal's right to recover amounts owed from the debtor who necessitated the indemnification." *C.H. Robinson Co. v. Olympia Produce Co.*, 49 Agric. Dec. 1204, 1206 (1990).

b. COOPERATIVE ASSOCIATIONS

A cooperative does not have standing to bring an action for damages for injury to its members where all the members may not have suffered injury, and suffered it in equal degree.

Complainant, a produce cooperative, filed a reparation case on behalf of its farmer members and some non-member farmers whose produce was sold by respondent, a growers' agent. Complainant failed to prove that the individual farmers effectively assigned their rights authorizing complainant to initiate a reparation complaint on their behalf. Complainant was only able to prove that an effective assignment took place in reference to one non-member farmer and three farmer members who represented complainant at the oral hearing. As to the remaining individual farmers who did not effectively assign their rights to complainant, complainant has the burden of proving that it possesses the requisite standing to file a reparation action on behalf of those individual farmers. We set forth a three-prong test to determine whether a cooperative has standing. The prerequisites, set forth by the United States Supreme

Court in *Warth v. Seldin*, 422 U.S. 490 (1975) and later in *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977), require that an association has standing to bring suit on behalf of its members when (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Complainant failed to prove that it satisfied all of the requirements as to the individual farmers (members and non-members) necessary to establish its associational standing to initiate a reparation complaint on behalf of those who had not effectively assigned their rights to complainant. *Pee Dee Produce Coop. v. Sun Valley*, 55 Agric. Dec. 684, 700 (1996).

c. FACTORING COMPANY

Where evidence in the file indicated that some of the invoices at issue in the complaint were sold to a factoring company, it was determined that for those transactions that were factored, Complainant had forfeited its right to recover the invoice amount from Respondent. The factoring company is the real party in interest on the factored invoices. *Bedland Produce Assoc. LLC v. Platinum Produce Inc.*, 67 Agric. Dec. 672, 676-77 (2008).

Where invoices issued by Complainant to Respondent bore a prominent statement advising the account was sold to a factoring company and that the invoice amount should be remitted to the factoring company, found that Complainant had standing to sue in the absence of evidence showing the factoring company, as part of its agreement to purchase the receivables, assumed the risk of non-payment by the account debtor. In other words, the purchase of the receivables by the factoring company effectively placed a lien on any monies collected by Complainant from Respondent for the subject invoices, but did not prevent Complainant from pursuing such collection. *Fresh Harvest Int'l, Inc. v. Tomahawk Produce, Inc.*, 69 Agric. Dec. 841, 845 (2010).

d. INTERVENING PARTY

Where complainant sold produce to a third party which in turn sold the produce to respondent, complainant had no standing to bring a reparation action against respondent. *Ro-Bee Produce Co. v. Quaker City Produce Co.*, 32 Agric. Dec. 283, 285 (1973).

Where a reparation action was brought against a produce receiver involved in the bribery of federal inspectors on the Hunts Point Market instead of against the firm that purchased the produce from complainant and negotiated an adjustment with complainant, it was held that there was no privity of contract between complainant and respondent, and no jurisdiction under the PACA. *Pac. Tomato Growers v. B.T. Produce Co.*, 60 Agric. Dec. 348 (2001).

73. STATUTE OF FRAUDS

a. APPLICATION OF STATE LAW

Whether state law or PACA law prevails as regards the necessity for a writing depends on whether the applicable state statute of frauds is substantive or procedural. *Rothenberg v. H. Rothstein & Sons*, 183 F.2d 524 (3rd Cir., 1950).

In *Branch v. Mission Shippers, Inc.*, 35 Agric. Dec. 726, 731-32 (1976), we stated our policy relative to the applicability of State statutes of frauds to reparation proceedings:

> In matters involving the statute of frauds under the Perishable Agricultural Commodities Act, the Department has long followed the guidelines laid down in *Joseph Rothenberg v. A. Rothstein & Sons*, 183 F.2d 524 (3rd Cir. 1950), 9 A. D. 1272. In that case the court made it clear that a federal district court hearing a case on appeal from the Secretary under the Act does not sit as another court of the state and is not governed by the rule of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Such a case is rather "to be determined under the same rules of substantive and procedural law as were involved in the Secretary's proceedings." (*Rothenberg*, supra). By the same token, *Rothenberg* also makes it clear that where the Act or regulations of the Secretary do not provide a solution to a problem of the validity of a contract, then state law is applicable. In the *Rothenberg* case the Court of Appeals, recognizing that Pennsylvania law was applicable, determined that since the statute of frauds of Pennsylvania was procedural rather than substantive it would not be applicable in a reparation proceeding. The court reasoned that "the federal act intends to grant a new remedy which is not dependent upon but is in addition to such other remedies as may be available to the parties at common law or by the statute of any state", and that where the statute of frauds of a particular state only precluded *enforcement* of an oral contract *as a remedy*, but left it otherwise valid, though unenforceable, such a procedural statute would have no effect upon a proceeding before the Secretary or a subsequent appeal therefrom.

In *Woods v. Conogra, Inc.*, 50 Agric. Dec. 1018, 1021 (1991), where the California statute of frauds (drawn from UCC § 2-201) was in issue, we found that the statute relates to the enforceability of an existent contract, and that *Rothenberg* applied. We stated:

> We feel that the substantive - procedural distinction as drawn in *Rothenberg* is valid and should remain applicable in reparation proceedings before the Secretary . . . we feel warranted in holding that in future cases the burden of showing that a particular statute of frauds is a part of the substantive law of a state in the sense that it renders an agreement null and void as a contract and not merely unenforceable should be upon the party claiming the benefit of the statute.

In *Faris Farms v. Lassen Farms*, 59 Agric. Dec. 471, 478-79 (2000), the statute of frauds embodied in the UCC was stated to be procedural and not substantive and, therefore, oral modifications of the written contract were a matter for proof in a reparation proceeding.

See also Nathan's Famous, Inc. v. Merberg, 36 Agric. Dec. 243, 247-50 (1977).

Where employees of respondent dealt exclusively with complainant regarding his crop of potatoes and, in so doing, induced him to delay delivery beyond the dates provided in the written contract, respondent was held to have given such agents apparent authority to modify the contract on its behalf. It was held that an oral modification of the written contract did not violate the statute of frauds. Further, having relied to his detriment on the promises of respondent's agents, complainant may claim that respondent is estopped to deny that the contract was modified. *Willoughby v. Frito-Lay, Inc.*, 45 Agric. Dec. 1245, 1259-60 (1986).

See also **CONFLICT OF LAWS** - this index.

b. WRITTEN CONFIRMATION

A written confirmation of sale meets any requirements which may be imposed under the Statute of Frauds. *Rothenberg v. H. Rothstein & Sons*, 183 F. 2d 524 (3rd Cir. 1950); *Whitfield Brokerage Co. v. City Wide Distrib., Inc.*, 44 Agric. Dec. 936, 945 (1985); *Branch v. Mission Shippers, Inc.*, 35 Agric. Dec. 726, 731 (1976).

See UCC 2-201.

74. STATUTE OF LIMITATIONS

Complainant filed more than nine months after accrual of cause of action was timely when it came within special legislation extending time limit for claims alleging false inspections on Hunts Point Terminal Market. *Procacci Bros. Sales Corp. v. B.T. Produce Co.*, 60 Agric. Dec. 341, 344-45 (2001).

See **JURISDICTION**, subheading **NINE MONTH STATUE OF LIMITATIONS** - this index.

See **CAUSE OF ACTION** - this index

75. SUITABLE SHIPPING CONDITION

See **F.O.B.** - this index.

See **GOOD DELIVERY** - this index.

See **TRANSPORTATION** - this index.

Harvest Fresh Produce, Inc. v. Clark-Ehre Produce Co., 39 Agric. Dec. 703, 708-09 (1980) explores the history and basic working of the suitable shipping condition rule more succinctly than perhaps any other resource.

a. ABNORMAL DETERIORATION

The warranty of suitable shipping condition warrants that the produce was in a condition when loaded such that under normal shipping conditions, it would arrive at contract destination without abnormal deterioration. What is abnormal deterioration, which would constitute a breach of the warranty, is determined by PACA standards and regulations, and abnormal deterioration is not determined by the laws and regulations of the foreign country which is the ultimate destination. *Good v. Europacific Fruit Exp., Inc.*, 66 Agric. Dec. 891, 910 (2007).

b. CONTRACTUAL EXCLUSION OF A DESTINATION

Shipment of four loads of grapes to a destination that the parties agreed to exclude, but that was equidistant from the contract destination, was held not to cause the warranty of suitable shipping condition to be inapplicable but to instead be a material breach of the contract in *Quail Valley Mktg., Inc. v. Cottle*, 60 Agric. Dec. 318, 338, *pet. recon. denied with discussion* at 338 (2001).

c. DEFINED

7 C.F.R. § 46.43 (i)

Major case which explains concept and many aspects of the rule. *Harvest Fresh Produce, Inc. v. Clark-Ehre Produce Co*., 39 Agric. Dec. 703, 708-09 (1980).

> The Regulations,[4] in relevant part, define f.o.b. as meaning "that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition . . . , and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed." Suitable shipping condition is defined,[5] in relevant part, 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." 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.[6] 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.[7] 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.[8] If the

[4] 7 C.F.R. **§** 46.43 (i).
[5] 7 C.F.R. **§** 46.43(j).
[6] *See Williston Sales* **§** 245 (rev. ed. 1948).

[7] *See Pinnacle Produce, Ltd. v. Produce Prod., Inc*., 46 Agric. Dec. 1155, 1157 (1987); *G & S Produce v. Morris Produce*, 31 Agric. Dec. 1167, 1170 (1972); *Lake Fruit Co. v. Jackson*, 18 Agric. Dec. 140, 143 (1959); and *Haines Ass'n v. Robinson & Gentile*, 10 Agric. Dec. 968, 972 (1951).
[8] As an illustration, the *United States Standards for Grades of Lettuce* (7 C.F.R. **§** 51.2510 *et seq.*) allow lettuce to grade U.S. No. 1 with 1% decay at shipping point or 3% decay at destination. The good delivery standards, however, allow an additional "2 percent decay. . . in excess of the destination tolerances provided . . . in the U.S. Standards for Grades of Lettuce." Thus, lettuce sold as U.S. No. 1, f.o.b., could have 4% decay at destination and therefore fail to grade U.S. No. 1, but nevertheless make good delivery since the amount of decay would not exceed the total of 5% allowed by the good delivery standards. Of course, in the case of other

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.[9]

d. DELAY IN SHIPMENT

Where the buyer's carrier was late (a breach by the buyer of the express terms of the contract) in picking up the lettuce sold f.o.b. and on arrival at destination, the lettuce had total defects that exceeded the good delivery standards by one percentage point, there was nevertheless a breach of the warranty by the seller. "Complainant should have taken some action, either by attempting to renegotiate the contract terms to reflect the change of circumstances or by refusing to ship if it was the complainant's opinion that the lettuce was no longer in suitable shipping condition." *W. Vegetable Sales v. W. Coast Produce, Inc.*, 37 Agric. Dec. 195, 199-200 (1978); *See also Shopwell, Inc. v. Royal Packing Co.*, 43 Agric. Dec. 902, 906 (1984); *Joe Phillips, Inc. v. Produce Brokers & Distrib., Inc*., 37 Agric. Dec. 791, 793 (1978).

See dicta in *J.R. Norton Co. v. Phil Dattilo & Co. of Ohio*, 37 Agric. Dec. 1940, 1944 (1978). "However, even had the evidence indicated that the shipping delay was the fault of respondent, complainant's argument must fail since where a shipper has actual knowledge of a buyer's tardiness prior to shipment of the produce and allows the produce to be shipped without altering contract terms, the shipper cannot then raise the buyer's tardiness as evidence of abnormal transportation service negating good delivery requirements."

Where a load was delayed in transit two to three days due to misdirection by the seller such delay was discounted in determining whether there was abnormal transportation. *Woods Co. v. PSL Food Mkt.*, 50 Agric. Dec. 976, 981 (1991).

e. DETERMINING CONTRACT DESTINATION

In an f.o.b. transaction, when the parties do not agree as to the contract destination, the significant factors in determining the intended contract destination are: 1) indication in writing, such as a broker's memorandum or other memorandum, of the agreed contract destination; 2) indication of knowledge on the part of the seller as to the ultimate destination; and 3) the absence of an intermediate point of acceptance by the buyer. *Mirabella Farms, Inc. v. Fruit Patch Sales, LLC*, 67 Agric. Dec. 621, 635 (2008).

Contract destination is not necessarily identical with the destination specified in the freight contract. *See Ont. Int'l, Inc. v. Nunes Co*., 52 Agric. Dec. 1661, 1669-72 (1993).

Where the parties do not agree on a contract destination, the suitable shipping condition warranty is inapplicable. *Ga. Vegetable Co. v. Battaglia Produce Sales, In*c., 41 Agric. Dec. 969, 974 (1982); *Joseph F. Byrnes Produce, Inc. v. Kaleck Distrib. Co.*, 40 Agric. Dec. 997, 999 (1981); *Florance Distrib. Co. v. M. Offutt Brokerage Co.*, 35 Agric. Dec. 1276, 1279 (1976).

commodities for which specific good delivery standards have not been promulgated, the concept of good delivery allows a similar expansion of any destination grade tolerances under the judicial determination of good delivery. See cases cited in note 16, *supra*.

[9] See *Harvest Fresh Produce, Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703, 708-09 (1980).

Where the seller shipped broccoli to an intermediate cold storage facility where it was accepted by the buyer and then shipped to the buyer's customers in the Orient, and there was no documentation as to an agreed contract destination but the seller admitted knowing that the broccoli was destined for the Orient, it was found that the acceptance at the cold storage facility by unloading the broccoli into a common storage with other previous or subsequent shipments from other transactions between the parties indicated that the seller did not intend the contract destination to be the Orient. This was stated to be especially true absent a showing that the seller had knowledge that the shipments were segregated in storage, and promptly shipped to a known destination for each shipment. The decision makes the following comments as to what factors are important in determining contract destination:

> Neither knowledge of the ultimate destination by a seller, nor the destination specified in a freight contract is a conclusive consideration. Particularly pertinent to the transactions in this case is the fact that acceptance by a buyer at shipping point, or at an intermediate point, does not necessarily relieve a seller of responsibility to the ultimate destination. The crucial and ultimate question is what did the parties consider to be the *contract* destination as to the contract between themselves. Or, put another way, did they intend that the seller was to assume the obligation of shipping goods that would carry, without abnormal deterioration, to the ultimate destination, or only to the intermediate point? If we were to list the significant factors for determining intended contract destination in descending order of importance they would rank as follows:
>
> 1). Indication in writing, such as a broker's memorandum or other contract memorandum, of the agreed contract destination.
>
> 2). Indication of knowledge on the part of the seller as to the ultimate destination. This might be shown by a freight contract, phytosanitary certificates, or other documents, or it might be admitted.
>
> 3). The absence of an intermediate point of acceptance by the buyer.

Clark Produce v. Primary Exp. Int'l, Inc., 52 Agric. Dec. 1715, 1720-21 (1993).

On the other hand, where strawberries were billed to intermediate destination for consolidation with other produce and accepted at such destination by the buyer, but invoice and bill of lading stated more a distant destination in addition to the intermediate destination, it was held that the acceptance at the intermediate point did not void the suitable shipping condition rule and that such rule was applicable to the more distant destination. A breach found on the basis of an inspection at the ultimate destination which was three thousand miles removed from the intermediate acceptance point. *Bud Antle, Inc. v. Pac. Shore Mktg. Corp*., 50 Agric. Dec. 954, 958 (1991). Here, unlike the preceding case, the contract documents stated the more distant destination.

In an f.o.b. sale of four truckloads of sweet corn, the invoices stated that the produce was to be shipped to respondent at Bainbridge, Georgia, and the bills of lading stated the destination as respondent, but did not give an address. The contract was negotiated between a grower's agent, representing complainant, and an employee of respondent. The parties offered no testimony as to the contractual agreement, but complainant's representative admitted that the truck driver requested of complainant's dock foreman that phytosanitary certificates be issued as to three of the loads because they were going to Canada. The dock foreman was unprepared for the request and the certificates were supplied later to respondent. It

was held that the contract destination was Bainbridge, Georgia. *Alger Farms, Inc. v. Foster*, 57 Agric. Dec. 1655, 1661-65 (1998).

Knowledge of a seller as to the ultimate destination of a load may, under certain circumstances, be incidental, and not form a part of the contract so as to make the warranty applicable to the known destination. *Ritclo Produce, Inc. v. Benavidez*, 43 Agric. Dec. 1594-95 (1984); *James Burns & Son v. Chi. Potato Exch.*, 19 Agric. Dec. 1062, 1067-68 (1960).

Complainant sold a load of melons which were to be of specific sizes and brand and which, under the contract, could go to any point between Maryland and Massachusetts, but the load was billed to respondent's customer in Maryland. While the load was *en route*, respondent learned that the sizes were not as specified and diverted the load to Massachusetts where it was inspected and found not to have been in suitable shipping condition when shipped. Respondent then rejected the load, and complainant stated that it did not acquiesce in the rejection but nevertheless disposed of the load to protect its value. It was held that the diversion was an acceptance, and that the subsequent rejection was wrongful. Contract destination was found to be any point between Maryland and Massachusetts for purposes of the suitable shipping condition rule. *Jen Sales, Inc. v. S. Friedman & Sons, Inc.*, 53 Agric. Dec. 810, 813-14 (1994).

Where respondent sold complainant two Sealand containers of apples in response to confirmation requiring that apples meet all requirements for export to Holland and, at complainant's request, supplied phytosanitary certificates showing that the apples were to be exported to Holland, but the containers were billed by respondent to complainant in Pennsylvania, and complainant billed the containers on the same day with respondent's knowledge to Port of Elizabeth, Elizabeth New Jersey for shipment to Holland. It was held that the contract destination was Holland. *Raymond "Mickey" Cohen & Son, Inc. v. Great Lakes Fruit & Produce, Inc.*, 52 Agric. Dec. 1686, 1697 (1993).

f. DIVERSION

The warranty of suitable shipping condition may be found inapplicable if produce is diverted while in transit to a more distant destination. *Valley Avocado Sales, Inc. v. Walsh Tropical Fruit Sales*, 35 Agric. Dec. 1776, 1779 (1976); *A.A. Corte & Sons v. J. Lerner & Son*, 14 Agric. Dec. 320, 324 (1955); *Anonymous*, 13 Agric. Dec. 699, 703-04 (1954); *Anonymous*, 10 Agric. Dec. 1334, 1340-41 (1951); *Gillarde Co. v. Frankenthal Co.*, 10 Agric. Dec. 1284, 1289-90 (1951); *Assoc. Fruit Distribs. of Cal. v. Mailloux Fruit & Produce Co.*, 5 Agric. Dec. 290, 293 (1946); *Anonymous*, 3 Agric. Dec. 425, 430 (1944).

The receiver's diversion of the tomatoes to a gassing and de-greening facility after they left the shipper's location represented abnormal transit conditions and voided the warranty of suitable shipping condition. *Six L's Packing Co. v. Tray-Wrap, Inc.*, 46 Agric. Dec. 1266, 1270-71 (1987).

See **WHEN APPLICABLE AT A SECONDARY DESTINATION** - this topic.

g. EXCEPTION TO NORMAL TRANSPORTATION REQUIREMENT

A judicial exception to the requirement that transportation be normal in order for the warranty to apply has been long recognized. This exception allows a buyer to prove a breach of the seller's warranty of suitable shipping condition, in spite of the presence of abnormal transportation if the nature of the damage found at destination is such as could not have been caused or aggravated by the faulty

transportation service. The exception was explained in *Anonymous*, 12 Agric. Dec. 694, 698 (1953) as follows:

> It is a well established rule that evidence of abnormal deterioration of the commodity upon its arrival at destination is evidence of breach of the warranty of suitable shipping condition only in cases in which the transportation was normal . . .
>
> The reason for the rule is obvious. Whether the commodity, at time of billing, was in good enough condition to travel to destination without abnormal deterioration can be determined only from the condition in which it did arrive at destination, and where the carrier provides such faulty service as may have damaged the commodity in transit, it becomes impossible to attribute the abnormal deterioration found at destination to the condition at time of billing. The rule does not necessarily assume that abnormal transportation service caused the damage. It merely acknowledges such possibility, and even though the possibility of unsuitable condition at time of billing remains, it bars a recovery for want of proof that the damage resulted therefrom.
>
> Since this is the rational of the rule, it has been held, as an exception to the rule, that a buyer may prove breach of the seller's warranty of suitable shipping condition in spite of proof of abnormal transportation service if the nature of the damage found at destination is such as could not have been caused by or aggravated by the faulty transportation service.

The exception has also been applied where, even though the faulty transportation service would have most certainly aggravated the damage found at destination, the damage is nevertheless deemed to be so excessive that the commodity would clearly have been abnormally deteriorated even if transit service had been normal. *See Sharyland Corp. v. Milrose Food Brokers*, 50 Agric. Dec. 994, 998-99 (1991); *Mut. Vegetable Sales v. Hite*, 42 Agric. Dec. 1576, 1583(1983); *Garin Co. v. Santisi Produce Co.*, 35 Agric. Dec. 1452, 1455 (1976); *Royal Packing Co. v. Quaker City Produce Co.*, 37 Agric. Dec. 1486, 1492 (1978); *Sanbon Packing Co. v. Spada Distrib. Co.*, 28 Agric. Dec. 230, 234 (1969). *See also Tony Misita & Sons Produce v. Twin City Produce*, 41 Agric. Dec. 195, 201 (1982) where we said:

> Abnormal transportation service or condition voids the warranty of suitable shipping condition applicable in f.o.b. sales . . . unless the abnormal deterioration found at destination is of such a nature or extent that it could not have been caused or substantially aggravated by the faulty transportation.

A transit period of three and one-half to four days was held to be abnormal where the usual transit period was one and one-half to two days. However, under the judicial exception to the abnormal transportation rule, the seller was found to have breached the contract. *Pac. Tomato Growers v. Am. Banana Co.*, 60 Agric. Dec. 352, 377-78 (2001).

See also Nikademos Dist. Co. v. D & J Tomato Co., 50 Agric. Dec. 1884, 1890-92 (1991); *Admiral Packing Co. v. Sam Viviano & Sons*, 40 Agric. Dec. 1993, 1998-99 (1981) (exception discussed and not applied where lettuce had average 24% rot in advanced stages, load was delayed two days, temperature tape showed 40-45º F, and arrival temperatures were 54-60º F. We stated such factors "prevent us from concluding that the damage in the lettuce was so excessive that we can say with certainty that the

commodity would have been abnormally deteriorated even if transit services and conditions had been normal."); and *Inter Harvest, Inc. v. Vegetable Mkt. of Cleveland, Inc.*, 34 Agric. Dec. 697, 700 (1975).

Related case which deals with standard of proof in similar situation. *Martori v. Hous. Fruitland, Inc.*, 55 Agric. Dec. 1331, 1338-39 (1996).

h. HELD TO BE AN EXPRESS WARRANTY

Under the UCC, an actual inspection of the very goods shipped, or a sample thereof, voids implied warranties, but the warranty of suitable shipping condition is made applicable by the use of f.o.b. terms, an express warranty, and inspection of the goods shipped will not void such warranty in the absence of proof that it was the intent of the parties to do so. *Primary Exp. Int'l v. Blue Anchor, Inc.*, 56 Agric. Dec. 969, 980-81 (1997).

i. INHERENT DEFECT

This subject does not properly fall under suitable shipping condition, but under the warranty of merchantability. In *Lookout Mountain Tomato & Banana Co. v. Consumer Produce Co. of Pitts.*, 50 Agric. Dec. 960, 967 (1991), we stated:

> It must be remembered that the warranty of suitable shipping condition is an extension of the common law warranty of merchantability. The warranty of merchantability is applicable only at shipping point. The suitable shipping condition warranty allows us to look at the condition of *perishables* at contract destination and to conclude on the basis of their condition at destination whether there was a breach (when they were loaded at shipping point). The question is always: were the perishables, at shipping point, in suitable condition for shipment to a specific destination? If no destination was specified in the contract the warranty does not apply because the seller is deemed to be giving a warranty only that the perishable goods will last so as to arrive at the agreed destination without *abnormal* deterioration. It is a given that perishables deteriorate. Under the warranty we must consider whether the deterioration was normal in degree or abnormal. Thus when we speak of "inherent" defects it must first be understood that there is a fundamental sense in which all perishables could be thought of as inherently defective. Furthermore, the warranty of suitable shipping condition takes us to a second level of inherent defect, i.e. to consideration of the question of whether there was abnormal deterioration. Admittedly, we have on rare occasions, gone to a third level of consideration of the question of inherent defect--the only level on which we use the term "inherent defect" as a special legal category. However, this has thus far been restricted to one situation only, namely, that of green tomatoes which arrive green, and in apparent good condition, but which fail, when set aside for ripening, to ripen properly.[10] To find an inherent defect in the present case would take us to a forth level.

[10] *See Brown & Hill v. U.S. Fruit Co.*, 20 Agric. Dec. 891, 894 (1961); *J.D. Bearden Produce Co. v. Pat's Produce Co.*, 12 Agric. Dec. 682, 692-93 (1953). It is interesting that the *Bearden* case, which was the first in which the question was considered, explicitly refused to find a breach of the warranty of suitable shipping condition, and instead went back to the common law warranty of merchantability as embodied in the Uniform Sales Act of Colorado which was deemed applicable under the relevant choice of law

For Latent Defects - see **MERCHANTABILITY - WARRANTY OF, subheading - WARRANTY'S APPLICABILITY TO LATENT DEFECTS** - this index.

j. INSPECTION BY BUYER

Formerly, it was held that if a buyer, directly or through its agent, inspects specific produce prior to its purchase, the warranty of suitable shipping condition does not apply, as the buyer is deemed to have made a purchase after inspection at shipping point. *Goldstein Fruit & Produce v. E. Coast Distrib*., 18 Agric. Dec. 493, 496 (1959); *Anonymous*, 9 Agric. Dec. 146, 149 (1950). **However**, in *Primary Exp. Int'l v. Blue Anchor, Inc.*, 56 Agric. Dec. 969, 981 (1997), it was held that while under the UCC an actual inspection of the very goods shipped, or a sample thereof, voids implied warranties, the suitable shipping condition warranty, made applicable by use of f.o.b. terms, is an express warranty, and inspection of the goods shipped will not void such warranty in the absence of proof that it was the intent of the parties to do so. (Remember that this does not apply to the implied warranty of merchantability.)

k. RELATIONSHIP TO GRADE STANDARDS

See **GOOD DELIVERY - GRADE STANDARDS AS REFERENCE POINT FOR DETERMINING** - this index.

A commodity sold as U.S. No 1, f.o.b., may be inspected at destination and fail to grade U.S. No. 1, but still make good delivery. *See Sunfresh, Inc. v. Brown*, 49 Agric. Dec. 626, 630 (1990); *Pinnacle Produce Ltd. v. Produce Prod., Inc.*, 46 Agric. Dec. 1155, 1157 (1987); *G & S Produce v. Morris Produce*, 31 Agric. Dec. 1167, 1170 (1972); *Lake Fruit Co. v. Jackson*, 18 Agric. Dec. 140, 143 (1959). (The case involved the sale of oranges U.S. No. 1, f.o.b. Separate destination tolerances existed for oranges, and the federal inspection at destination, after normal transit, found that the oranges failed to grade. It was nevertheless held that the oranges made good delivery. "Complainant did not warrant that the oranges would be U.S. No. 1 at destination, but under the f.o.b. contract did warrant that they were in suitable shipping condition at time of shipment.") *Haines City Growers Ass'n v. Robinson & Gentile*, 10 Agric. Dec. 968, 972 (1951); *Robert E. Fadler Co. v. J. Dicola & Co*., 8 Agric. Dec. 1251-53 (1949).

l. VOID WHEN FINAL DESTINATION NOT SPECIFIED

The warranty of suitable shipping condition is void when a final destination is not agreed upon in the contract. *B & L Produce, Inc. v. Florence Distrib. Co.*, 37 Agric. Dec. 78, 80-81 (1978); *Brannan, Chapman & Edwards, Inc. v. Silverstreak Distrib., Inc*., 26 Agric. Dec. 1152, 1154 (1967).

Warranty inapplicable where buyer took possession of commodity at shipping point and no destination was specified in the contract of sale. *Turtle Valley Farms v. Riehm Produce Co.*, 20 Agric. Dec. 43, 49 (1961); *James Burns & Sons v. Dakota Chief Sales Co.*, 19 Agric. Dec. 110, 113 (1960); *McCabe v. Higgins Potato Co.*, 17 Agric. Dec. 1022, 1025-26 (1958).

7 C.F.R. § 46.43 (j)

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rule. In *Welch Fruit Sales v. Jos. Notarianni & Co.*, 38 Agric. Dec. 589 (1979), it was acknowledged that the concept might be applied to other commodities if the situation were truly analogous.

m. WHEN APPLICABLE AT A SECONDARY DESTINATION

The following cases are set forth in a progressive fashion so as to show the development of this subject. The definitive case is *Alger Farms, Inc. v. Foster*, 57 Agric. Dec. 1655, 1665 (1998), which is digested near the end of this sub-topic.

In *Magic Valley Potato Shippers, Inc. v. C.B. Marchant & Co.*, 42 Agric. Dec. 1602-04, (1983), we said (dicta) "the diversion of the car to a different destination than that specified in the contract would not necessarily leave respondent totally without benefit of the warranty since the condition of the commodity at that different point may be relevant in determining whether the commodity would have been abnormally deteriorated at the destination specified." The statement was truly dicta because transportation was found to be abnormal on other grounds, however, three cases were cited for the dicta:

The first case was *A & R Lettuce Co. v. John L. Senini Co.*, 15 Agric. Dec. 997, 1003 (1956), where the shipping point was Salinas, California, and the contract destination for two cars of lettuce was Kansas City, Missouri. The two loads were shipped to Chicago where they were inspected, and then to Boston where they were inspected again. We stated, ". . . the condition of the produce at the more distant point may be relevant in determining whether the produce was abnormally deteriorated at the destination specified in the contract." The private inspections in Chicago were not deemed useable because they did not show an average percentage of decay. The inspections in Boston showed serious decay but were deemed too remote in time (six days after the Kansas City arrival) to be used.

With the second cited case, *A.A. Corte & Sons v. J. Lerner & Son*, 14 Agric. Dec. 320, 324 (1955), we come to a significant and definitive decision. Two carloads of potatoes were shipped from Summerdale, Alabama, to contract destination in Chicago. Shortly after shipment, the buyer diverted them to Pittsburgh. After stating that the "scheduled shipping time from Summerdale, Alabama, to Pittsburgh is one day longer than the scheduled time from Summerdale to Chicago), the Judicial Officer said:

> It is a misinterpretation of the regulation quoted above to hold that the diversion of a shipment to any point other than the destination specified in the contract of sale automatically and arbitrarily voids the implied warranty of suitable shipping condition. If it can be established by reliable evidence that a shipment which has been so diverted is so deteriorated upon arrival that it can be concluded *with assurance* that it would also have been abnormally deteriorated had it been delivered at the destination specified in the contract, the requirements of the regulation are met and the implied warranty is applicable. Cf. *United Packing Co. v. Schoenburg*, 13 A.D. 175. (emphasis supplied).

The first car arrived in Pittsburgh on time (one day beyond arrival time for Chicago) and showed 13% average slimy soft rot. On this basis, it was found that the warranty of suitable shipping condition was breached. The second car arrived in Pittsburgh three days after they would have arrived in Chicago. Although the inspection found an average of 20% slimy soft rot the Judicial Officer said, ". . . it cannot be said *with certainty* that they would have been abnormally deteriorated at Chicago three days earlier . . ." emphasis supplied), and no breach was found.

In the third case, *United Packing Co. v. Schoenburg*, 13 Agric. Dec. 175, 180 (1954), two carloads of cantaloupes were shipped from California to Chicago and diverted by the buyer to Atlanta. It was stated that the cars arrived in Atlanta only one day later than when they should have arrived in Chicago, the degree of deterioration did not indicate a breach of the warranty of suitable shipping condition.

In *Kirby & Little Packing Co. v. United Fruit & Produce Co.*, 16 Agric. Dec. 1066, 1069 (1957), ". . . the contract destination of the shipment was St. Louis, with respondent diverting en route to Chicago. While the warranty of suitable shipping condition does not apply where a shipment is to go beyond the contract destination, *A.A. Corte & Sons v. J. Lerner & Son*, 14 Agric. Dec. 320, 324 (1955), it was established at the oral hearing that the shipping time from Salinas to Chicago was the same as that from Salinas to St. Louis. Accordingly, the implied warranty of suitable shipping condition still applies." We found a breach on the basis of the inspection in Chicago and awarded damages.

Similarly, in *Stake Tomatoes v. World Wide Consultants*, 52 Agric. Dec. 770, 773 (1993), where the contract destination was Dallas, Texas, and tomatoes were instead diverted to Cleveland, Ohio, it was held that since the travel time from Ruskin, Florida to Cleveland, Ohio, was no greater distance than the travel time from Ruskin, Florida to Dallas, Texas, the diversion did not contribute to the breach, and the express warranty as to the color of the tomatoes was upheld.

Where the contract destination was Minneapolis, Minnesota, and the goods were diverted by the buyer to Philadelphia and New York, it was stated that, "it cannot be said that the condition of the fruit at the more distant points establishes that the fruit would have been abnormally deteriorated if delivered directly to Minneapolis." *Sunny Roza Fruit & Produce Co. v. Northwest*, 20 Agric. Dec. 1193, 1197 (1961).

In *Justice v. E. Potato Dealers of Me., Inc.*, 30 Agric. Dec. 1352, 1359 (1971), the potatoes were sold and shipped from Horntown, Virginia, to Horsey, Virginia, but the seller testified that he knew the potatoes were going to eastern markets. The buyer accepted the potatoes in Horsey and sold and shipped them to eastern markets where they arrived showing considerable decay. We said, "[i]f respondent wished to have the warranty of suitable shipping condition apply to a farther destination than Horsey, Virginia, in connection with the f.o.b. shipments, it should not have made Horsey, Virginia, the contract destination." *See also Martin Produce, Inc. v. Basil Co.*, 30 Agric. Dec. 836, 844-45 (1971); *John Moon Produce Co. v. Wolverine Fruit Co.*, 27 Agric. Dec. 938, 943-44 (1968); *Fla. Planters, Inc. v. A.A. DeLorenzo & Assoc., Inc.*, 27 Agric. Dec. 795, 798 (1968).

The warranty was held not applicable where respondent took delivery under an f.o.b. contract at shipping point (bill of lading said ship to respondent at shipping point city), and the commodity was shipped to a distant destination. Prompt inspection at a distant destination showed substantial condition defects in tomatoes, but respondent was held liable for the full price. *Rancho Vergeles, Inc. v. Shelton*, 46 Agric. Dec. 1031, 1034 (1987). The same result was reached where product was sold f.o.b. and the destination on the invoice and bill of lading was in a nearby city in the same state (Florida), but the product was carried to New York. *Lindeman Produce, Inc. v. Ben Litowich & Son, Inc.*, PACA Docket R-91-068, decided November 12, 1991. (Unpublished). *See also Burnand & Co. v. Essential Produce Int'l Corp.*, 34 Agric. Dec. 1021, 1026 (1975), where Mexican tomatoes were shipped from Nogales to respondent in Nogales, and by respondent to Tennessee and Ohio. The inspection in Youngstown was not considered. We said, "[o]ne of the express conditions rendering the warranty applicable to an f.o.b. sale is an agreement between the parties concerning the contract destination of the goods. Since we have already found that complainant did not agree, or even know, that Youngstown was the destination of the goods at the time of sale to EPIC, the warranty is not applicable to this transaction."

On the other hand, where strawberries were billed to an intermediate destination for consolidation with other produce and accepted at such destination by the buyer, but the invoice and bill of lading stated a more distant destination in addition to the intermediate destination, it was held that the acceptance at the

intermediate point did not void the suitable shipping condition rule and that such rule was applicable to the more distant destination. A breach found on the basis of an inspection at the ultimate destination which was three thousand miles removed from the intermediate acceptance point. *Bud Antle, Inc. v. Pac. Shore Mktg. Corp*., 50 Agric. Dec. 954, 958 (1991).

By analogy to the judicial exception to the requirement that transportation be normal in order for the warranty of suitable shipping condition to apply, it was found that Canadian inspections could be used to attempt proof that corn shipped to Georgia was not in suitable shipping condition. This proof would relate to the condition of the corn that would have been shown by a timely inspection following a timely arrival at the contract destination in Bainbridge, Georgia, and would have to demonstrate the breach of the warranty at that point with reasonable certainty. There was no question of application of the warranty at the alternative destination, but it was purely a question of proof of condition at contract destination. It was found that, although the condition factors shown by the Canadian inspections were extensive, the standard of reasonable certainty had not been met. *Alger Farms, Inc. v. Foster*, 57 Agric. Dec. 1655, 1665-69 (1998).

A related case which deals with the standard of proof in a similar situation is *Martori v. Hous. Fruitland, Inc*., 55 Agric. Dec. 1331, 1337 (1996). For synopsis of holding, see **EVIDENCE - SELF-EVIDENT AND CERTAIN** - this index.

It thus appears that most of the cases that state the principle allowing the use of a distant inspection end up not finding a breach. The one case that did find a breach, the 1955 *A. A. Corte & Sons* case, speaks of "assurance" and "certainty" being necessary for finding a breach. This case and the 1998 *Alger Farms* case give the most extensive treatment of the rationale for use of an inspection made at a distant point. The latter case requires that it be "self-evident and certain" that the commodity would have been non-conforming at the contract destination. The reason for this stricture is to preserve the intent of the parties. The suitable shipping condition rule is applicable by its express terms only to the contract destination agreed upon by the parties. If we use an inspection at a different destination it must be only for the purpose of determining the condition at the contract destination. The vagaries that inevitably attach to making such a determination dictate that we adopt a rule requiring certainty, or the "contract destination" provision of the suitable shipping condition warranty becomes meaningless.

n. WHEN TRANSPORTATION NOT NORMAL

See **EXCEPTION TO NORMAL TRANSPORTATION REQUIREMENT** - this topic.

See **TRANSPORTATION** - this index.

The warranty of suitable shipping condition is void when there is abnormal transportation with respect to time (or temperature, etc.). *Raymond "Mickey" Cohen & Son, Inc. v. Great Lakes Fruit & Produce, Inc.*, 52 Agric. Dec. 1686, 1698-99 (1993); *C & E Enter., Inc. v. Santa Maria Sales, Inc.*, 48 Agric. Dec. 727, 728 (1989); *Bodine Produce Co. v. Cusumano Bros. Co.*, 37 Agric. Dec. 1569, 1576 (1978); *Pacific Farm Company v. John E. Russo Produce Co., Inc.*, 37 Agric. Dec. 428 (1978); *Freshpict Foods, Inc. v. Navilio*, 32 Agric. Dec. 1600, 1604 (1973); *Hatcher & Holland v. Bell Tomato Co.*, 29 Agric. Dec. 1057, 1063 (1970); *Berman, Propper & Co. v. Luft Produce Co.*, 9 Agric. Dec. 863, 866-67 (1950).

Where tomatoes were packed in the field and not pre-cooled, it was found that the failure of the refrigeration equipment to bring the temperature down to the temperature specified on the bill of lading

did not constitute abnormal transportation. A transit period of three and one-half to four days was held to be abnormal where the usual transit period was one and one-half to two days. However, under the judicial exception to the abnormal transportation rule, the seller was found to have breached the contract. *Pac. Tomato Growers v. Am. Banana Co.*, 60 Agric. Dec. 352, 377-78 (2001).

76. TRANSPORTATION

See **SUITABLE SHIPPING CONDITION - EXCEPTION TO NORMAL TRANSPORTATION REQUIREMENT**.

BASIC LAW:

". . . In an f.o.b. transaction, the buyer is responsible for paying the freight and the buyer has the risk of loss in transit. [footnote omitted] A delivered sale is the opposite of an f.o.b. sale, *i.e.*, it is one in which the seller is responsible for paying the freight and the seller has the risk of loss in transit. [footnote omitted]

"In an f.o.b. sale, since the buyer is responsible for paying the freight, if the seller initially finds a trucker, pays the freight and invoices the buyer for the freight, the seller is, as a matter of law, the agent of the buyer, and the law of agency is applicable. Under the law of agency, such a seller is in a fiduciary capacity and cannot make a secret profit on the freight. The seller can, of course, charge the buyer whatever fee or service charge is agreed upon to compensate him for procuring the truck and paying the freight, but this must be disclosed to the buyer. In the absence of an agreement and disclosure, the buyer has a right to assume that the amount of freight shown on the invoice is the amount of freight paid by the seller on the buyer's behalf. (footnote: "Different considerations would be involved if the seller was also in the trucking business and used his own trucks and employees to haul the produce. But that is not involved here. [The law of agency would still apply if the sale was f.o.b.].")

"Similarly, in an f.o.b. sale, since the buyer has the risk of loss in transit, if the seller procures an adjustment because of transportation loss, the seller is, as a matter of law, the agent of the buyer, and the seller must pass on to the buyer all of the proceeds of the adjustment, less any agreed and disclosed service charge."

"However, in a delivered sale, since the seller is responsible for paying the freight and has the risk of loss in transit, if the seller shows the freight charge separately on the invoice, it is merely the amount the seller is including in the total charge for hauling the produce to the buyer. The seller is not paying the freight on behalf of the buyer, and the seller is free to charge what the traffic will bear. Any adjustments the seller receives for loss in transit belong to the seller." *In re Ben Gatz Co.*, 38 Agric. Dec. 1038, 1039 (1979).

a. ABNORMALITY

In the absence of abnormality of transportation service being raised, either on the face of the record, or by a party, such transportation is assumed to be normal. *Dave Walsh Co. v. Rozak's*, 39 Agric. Dec. 281, 284 (1980); *Veg-A-Mix v. Wholesale Produce Supply*, 37 Agric. Dec. 1296, 1922 (1978); *Hartsell v. Angel Produce Co.*, 29 Agric. Dec. 153, 156 (1970).

The seller has the burden of proving that transportation services and conditions were abnormal so as to void the warranty where the goods were effectively rejected. *Bud Antle, Inc. v. J.M. Fields, Inc.*, 38 Agric. Dec. 844, 847 (1979).

Ethylene gas emanating from cantaloupes loaded on same truck with lettuce created abnormal transit conditions. Suitable shipping condition rule held inapplicable. Cantaloupes were loaded on truck by buyer after truck left seller's place of business. *D'Arrigo Bros. Co. of Cal. v. Colonial Stores*, 42 Agric. Dec. 173, 176-77 (1983). *See also D'Arrigo Bros. Co. of Cal. v. Plainville Produce*, 43 Agric. Dec. 663, 666 (1984).

b. NORMALITY

Indicated by presence of good lots on same load as bad lot. This is only a factor to be considered, as all lots could have been in suitable shipping condition, but good lots may have had especially good keeping quality. Discussed in *Tony Misita & Sons Produce v. Twin City Produce*, 41 Agric. Dec. 195, 201 (1982).

A foreign survey that lumped together apples from three sea-land containers was utilized to determine whether apples arrived with abnormal deterioration even though this method of survey made it impossible to associate the apples surveyed with the transit conditions applicable to each container. This was permitted because the temperature history for the three containers was sufficiently similar and sufficiently within normal parameters that transit conditions could safely be said not to void the suitable shipping condition warranty as to any of the containers. *Primary Exp. Int'l v. Blue Anchor, Inc*., 56 Agric. Dec. 969, 981 (1997).

c. RISK OF LOSS

In an f.o.b. transaction, the buyer assumes the risk of all in transit damage, delays or mishandling not caused by the seller. *Woods Co. v. PSL Food Mkt.*, 50 Agric. Dec. 976, 980 (1991); *Six L's Packing Co. v. Sloan Produce, Inc*., 29 Agric. Dec. 615, 620-21 (1970).

Where buyer requested that trucker remain overnight after arrival of lettuce so that inspection could be made next day and trucker instead took lettuce away, an inspection seven days later was too remote in time to show a breach and the delay in inspection was chargeable to the buyer. *Woods Co. v. PSL Food Mkt*., 50 Agric. Dec. 976, 980 (1991).

A shipper failed to remain open until 12:00 p.m. as he had promised the buyer, and left lettuce uncooled on the dock. No one was present to load the lettuce when the buyer's truck arrived at 11:30 p.m., and the lettuce was not loaded and shipped until the following morning. Held: Suitable shipping rule was still applicable. Decision was against the shipper even though the destination inspection was not made until three days after arrival and good delivery standards were exceeded by only a moderate amount. *J.R. Norton Co. v. Phil Dattilo & Co. of Ohio*, 37 Agric. Dec. 1940, 1943 (1978).

Where the shipper placed a barrier between cabbage and melons and pineapples so as to block the flow of cool air through the trailer, as a result of which the melons and pineapples arrived out of grade, the shipper was held responsible for deterioration because it has the duty to load goods properly for shipment. *Val-Mex Fruit Co. v. Tom Lange Co.*, 46 Agric. Dec. 1042, 1044 (1987).

Where the shipper failed to properly load the lettuce, it suffered freezing injury. Held that the shipper was responsible for the condition of the lettuce upon arrival and was liable to the receiver for damages. *Cal-Veg Sales, Inc. v. Sears-Schuman Co.*, 40 Agric. Dec. 476, 478 (1981).

In an f.o.b. transaction, the seller gives an implied warranty that it will use reasonable care and judgment in selecting the transportation service. The shipper therefore had an affirmative obligation to notify respondent that its use of an unrefrigerated truck to transport the produce was inadequate, and its failure to do so was a breach of duty on its part. Complainant will not be later heard to complain about the receiver's choice of transport vehicle as a means of proving abnormal transportation. *Firman Pinkerton Co. v. Casey*, 55 Agric. Dec. 1287, 1294-95 (1996).

d. TEMPERATURES

Lettuce - Recommended transit temperature is 32º F.; however, temps. are normally specified a little higher (33º F. or 34º F.) because the freezing point is 31.7º F. 45º F. is at the borderline for abnormal transportation.

Where pulp temperatures were used as a reason for rejecting lettuce, held that temperatures cannot be used by themselves to show a breach, as they would not solely account for the condition defects in the lettuce. *R.T. Englund Co. v. Jos. Notarianni & Co.*, 36 Agric. Dec. 1385 (1977).

The temperature recorder read 50º F. Pulp temperatures on a prompt inspection were 44º to 46º F. Held that "[p]ulp temperatures of lettuce at 45º F. are considered to be usual. The fact that some of the lettuce was one degree higher in temperature was not sufficient for us to conclude that during transit the lettuce was subjected to abnormal transportation conditions. *Eckel v. Sam Wang Food Corp*., 47 Agric. Dec. 324, 326 (1988).

Carrots - The temperature recorder in the rail car revealed transit temperatures of 40ºF. Since the desired transit temperatures for carrots is 32-36º F., it was ruled that the 5% decay was caused by abnormal transportation. *Bodine Produce Co. v. Cusumano Bros. Co.*, 37 Agric. Dec. 1569, 1576 (1978).

42º to 61º F. shown by the inspection certificate at destination coupled with 13% decay on half the load. Held transportation abnormal - no breach of warranty. *Garin Co. v. Preciosa Packing House, Inc.*, 41 Agric. Dec. 2276, 2278 (1982).

The seller's claim that the warranty of suitable shipping condition did not apply because the carrier did not maintain proper temperatures based on a destination inspection showing pulp temperatures of 40º F. not accepted. The buyer showed through testimony from a pomologist that a thermostat setting of 36º F. would cause pulp temperatures from 36º to 41º F. Also established that any transit temperatures below 40º F. would be acceptable. *Borsellino & Perlisi Grape Co. v. Delcor Fruit Sales*, 34 Agric. Dec. 909, 912-13 (1975).

44º to 48º F. shown by inspection certificate at destination coupled with 6% decay. Held transportation abnormal - no breach of warranty. *Green Valley Produce Coop. v. Ben H. Roberts Produce, Inc*., 41 Agric. Dec. 531, 534 (1982).

Temperature recorder showed 35º to 40º F. for most of a five-day trip with a rise to about 42º F. after 30 hours where it remained for about six hours, another rise to 44º F. after 68 hours where it remained for about nine hours, and a third rise to 42º F. after 98 hours where it remained for about three hours. Pulp temperature shown by inspection at destination was 38º to 49º F. Decay was 7%. Transportation held abnormal - no breach of warranty. *Tom Bengard Ranch v. Prevor-Mayrsohn Int'l*, 40 Agric. Dec. 1781, 1787 (1981).

Where other products on the load were found to have been frozen in transit and the commodity in question showed extensive decay, it was found that after thawing rapid deterioration set in prior to the inspection being made. *Agra, Inc. v. J.A. Wood Co*., 44 Agric. Dec. 1684, 1689 (1985).

Although the transit temperatures were abnormal for a period of time, the below freezing temperature did not adversely affect the condition of the grapes as shown by the inspection. Consequently, the f.o.b. warranty of suitable shipping condition was applicable. *Everkrisp Vegetables, Inc. v. J. Randazzo & Sons*, 46 Agric. Dec. 1536, 1538 (1987).

Strawberries - Recommended temperature 32º F. Any substantial period of transit above 40º F. is clearly abnormal. *G. Tanaka Farms v. Garden State Farms, Inc.*, 48 Agric. Dec. 729, 731 (1989).

Strawberries shipped in a Tectrol atmosphere will warm somewhat in transit as a result of their own respiration. In light of this, we found that a USDA inspection performed while the strawberries were still on the truck, which listed pulp temperatures of 40 to 42º F., was not evidence of abnormal transportation where there was no evidence that the strawberries were exposed to such elevated ambient air temperatures for more than a brief period in transit. *Corona Fruits & Veggies, Inc. v. Class Produce Group LLC*, 68 Agric. Dec. 1245, 1258 (2009).

e. TEMPERATURES - DISCREPANCY BETWEEN AIR AND TAPE

Complainant sold and shipped a truckload of lettuce to respondent on an f.o.b. basis. Following acceptance on arrival, a prompt federal inspection in respondent's warehouse showed pulp temperatures substantially lower than ambient air temperatures shown by the tape from the temperature recorder. The pulp temperatures were found to show that transit was normal and good delivery standards were therefore applicable. *Sahara Packaging Co. v. N.P. Deoudes, Inc.*, 45 Agric. Dec. 810, 812-13 (1986).

For the subject shipment of strawberries, which travelled from California to Maryland, we found that the temperatures in transit, which predominantly ranged from 31 to 37º F. as indicated by the ambient air temperatures recorded by instruments placed in the nose and tail end of the truck, were normal. Although the bill of lading specified a transit temperature of 32º F., stated that the mechanics of refrigeration are such that a trailer with a reefer unit set to run at 32º F. will necessarily show fluctuations in temperature due to factors such as outside temperatures, loading patterns, and the respiration of the product itself. We held that these fluctuations are permissible as long as temperatures do not remain at or exceed 37º F. for an extended period of time. *Corona Fruits & Veggies, Inc. v. Class Produce Group LLC*, 68 Agric. Dec. 1245, 1255-56 (2009).

f. TEMPERATURE TAPES

Where no temperature recorders are placed on trucks in transit, inspections performed after arrival in transit are accorded little weight. *La Valenciana Avocados Corp. v. Tomato Specialties, LLC*, PACA Docket No. W-R-2013-403, decided July 22, 2015 (unpublished decision).

Analysis of temperature tape to determine abnormality of transit conditions. *Garin Co. v. Tom Lange Co.*, 36 Agric. Dec. 705, 708 (1977).

". . . 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. Gatz*, 38 Agric. Dec. 1486, 1500-01 (1979). *See also Sharyland, L.P. v. Miller*, 57 Agric. Dec. 762, 767 (1998); *G.D.I.C., Inc. v. Misty Shores Trading, Inc.*, 51 Agric. Dec. 850, 863-64 (1992); *Mendelson-Zeller Co. v. Tom Lange Co.*, 46 Agric. Dec. 182, 185 (1987); *Monc's Consol. Produce Inc. v. A.J. Produce Corp.*, 43 Agric. Dec. 563, 566 (1984); *Joe Phillips, Inc. v. G & T Terminal Packaging Co.*, 41 Agric. Dec. 1803, 1810 (1982).

"There are commonly only two parties with the opportunity, or motive, to wrongly 'lose' a temperature recorder or tape, namely the receiver and the trucker. In both cases the only motive would be that the tape disclosed improper transportation. Therefore if a shipper proves by submitting a bill of lading signed by the trucker (as the shipper in this case did) that a temperature recorder was placed on the truck, it is hard to imagine an adequate excuse for a receiver's failure to produce the tape. In this case respondent has offered no excuse. A receiver may, indeed, be entirely innocent, in that the recorder may have been thrown away by the trucker before arrival of the truck. However, since a trucker would thus dispose of a recorder only if transportation was bad, one is inevitably led to the presumption that transportation temperatures were abnormal." *Sharyland, L.P. v. Miller*, 57 Agric. Dec. 762, 767 (1998). *See also* the *Monk's Consolidated Produce* case cited above.

g. WHEN SHIPPER RESPONSIBLE

Where a load of onions sold f.o.b. arrived at the contract destination showing elevated temperatures following shipment in an unrefrigerated truck, and the shipper claimed abnormal transit, it was found that warranty of suitable shipping condition remained applicable, as the seller had a duty of reasonable care to inform the buyer that the use of a dry van to ship the onions was unacceptable, the seller did not do so. *Muller Trading Co. v. Fresh Group Ltd.*, 67 Agric. Dec. 695, 700 (2008).

The shipper is responsible for problems during transit in a f.o.b. transaction when it causes them, does not use reasonable care in the selection of the trucker, or does not give the trucker proper instructions. *Progressive Groves v. Bittle*, 31 Agric. Dec. 436, 439 (1972); *Gilmer Packing Co. v. D.L. Piazza Co.*, 21 Agric. Dec. 783, 786-87 (1962).

The Regulations specifically state that "the buyer assumes all risk of damage and delay in transit not caused by the seller" in f.o.b. sales. 7 C.F.R. § 46.43(i).

Where the shipper failed to properly load the lettuce, it suffered freezing injury. Held that the shipper was responsible for the condition of the lettuce upon arrival and was liable to the receiver for damages. *Cal-Veg Sales, Inc. v. Sears-Schuman Co.*, 40 Agric. Dec. 476, 478 (1981).

The responsibility is on the shipper for damage in transit due to faulty transit equipment if shipper knew of defect in the equipment when he loaded the commodity. This is true even if the receiver secured the truck. *Joe Phillips, Inc. v. Wisill, Inc.*, 34 Agric. Dec. 763, 765-66 (1975). *See also Friedrich Enter., Inc. v. Benny's Farm Fresh Distrib., 57 Agric. Dec. 1695, 1700 (1998)*; *Firman Pinkerton Co. v. Casey*, 55 Agric. Dec. 1287, 1294-95 (1996); *Berwick Vegetable Coop. v. A.G. Shore Co.*, 37 Agric. Dec. 1247, 1252 (1978).

However, where the shipper told respondent that the truck which the receiver sent was a flat bed with tarps (likely to sweat onions) and was nevertheless told by respondent to ship, it was held that respondent failed to prove transit conditions were normal, suitable shipping condition rule did not apply, and there was no breach by shipper. *Parsons Packing, Inc. v. Pac. Gamble Robinson Co.*, 38 Agric.

Dec. 760, 763 (1979). *See also Firman Pinkerton Co. v. Casey*, 55 Agric. Dec. 1287, 1294-95 (1996) for similar result.

RESPONSIBILITY FOR DECEPTION:

Where the seller was to ship on a "Martin" truck to be secured by the buyer, and the buyer's truck broker sent a "Seminole" truck which represented itself to the seller as a "Martin" truck and subsequently converted the load to its own use, it was held that it would be an undue extension of principle enunciated in *Berwick Vegetable* to hold a shipper liable for failure to ferret out a deception perpetrated by a buyer's agent. *Green Valley Produce v. Pupillo Fruit Co.*, 40 Agric. Dec. 1176, 1178 (1981).

77. TRUST, CONSTRUCTIVE

Where a shipper and receiver had no contact with each other except through the broker, and the broker sent conflicting memoranda resulting in no contract of sale being formed between the parties, the receiver was found to be a constructive trustee of the goods which it received, and obligated to return them or, in the event of their sale, to pay the reasonable value of such goods to the owner. *Cypress Gardens Citrus Products, Inc. v. Joseph Wedner & Son Co.*, 28 Agric. Dec. 218, 221 (1969).

78. TRUST FUND

a. LIABILITY OF SALES AGENT

A sales agent may be liable to its principal for the failure of the buyer to pay if the principal can show that the agent's failure to file a timely trust notice resulted in its inability to collect money it otherwise would have received. *Payette Valley Fruit, Inc. v. Gem State Sales, Inc.*, 48 Agric. Dec. 723-724 (1989).

See also Griffin-Holder Co. v. Smith, 49 Agric. Dec. 607, 609 (1990), which discusses when filing is timely and date accrual of seller's cause of action from day after last date on which trust notice should have been filed. See **CAUSE OF ACTION** - this index.

Where broker failed to file trust notices as to a party that subsequently filed for bankruptcy, it breached its duty under the Act, but was not liable for damages because either modifications of some of the contracts had been agreed to by complainant, or the broker had already been found liable to complainant for concluding modifications without complainant's authority. *Newbern Groves, Inc. v. C.H. Robinson Co.*, 53 Agric. Dec. 1766, 1853 (1994).

b. PAYMENT OF REPARATION NOT BARRED

Respondent, under court order to place all receivables in an account to be held in trust for certain PACA creditors, was not barred from paying complainant in reparation proceeding. *C.H. Robinson Co. v. ARC Fresh Food Sys., Inc.*, 50 Agric. Dec. 950, 952 (1991); *C.H. Robinson Co. v. Olympia Produce Co.*, 49 Agric. Dec. 1204, 1207 (1990).

79. UNIFORM COMMERCIAL CODE - SECTION INDEX

"Federal law governs where a Federal statute or interest is involved, and in 'fashioning the federal law that is applicable,' courts are 'guided' by the Uniform Commercial Code." *In re Am. Fruit Purveyors, Inc.*, 30 Agric. Dec. 1542, 1557 (1971).

See **CONFLICT OF LAWS** - this index.
See **ELECTION OF REMEDIES** - this index

See A. Sam & Sons Produce Co. v. Sol Salins, Inc., 50 Agric. Dec. 1044, 1060 (1991).

a. § 1-102(3)
Primary Export Int'l v. Eco-Farm Citrus, Inc., PACA Docket R-92-129, decided ---__, (1993) (unpublished decision). "The standards of reasonable proof and notice normally applied by us in the implementation of f.o.b. terms may be varied by agreement of the parties as long as the standards as altered are not manifestly unreasonable."

b. § 1-201(20)
Nalbandian Farms, Inc. v. McDonnell & Blankfard, Inc., 46 Agric. Dec. 674, 680 (1987).

c. § 1-105
UCC choice of law rule held to be equivalent of "significant contacts" test of second Restatement of Conflict of Laws. *A. Sam & Sons Produce Co. v. Sol Salins, Inc.*, 50 Agric. Dec. 1044, 1060 (1991).

d. § 1-106
Shriver v. Mkt. Pre-Pak, Inc., 39 Agric. Dec. 290, 307 (1980).

e. § 1-201(15)
Delivery defined as voluntary transfer of possession. *Crawford v. Ralf & Cono Comunale Produce Corp*., 51 Agric. Dec. 804, 809 (1992).

f. § 1-202(f)
Notice or knowledge within an organization. *Nalbandian Farms, Inc. v. McDonnell & Blankfard, Inc.*, 46 Agric. Dec. 674, 679 (1987).

g. § 1-207
A. Sam & Sons Produce Co. v. Sol Salins, Inc., 50 Agric. Dec. 1044, 1048 (1991).

h. § 2-103(1)(b)
Primary Exp. Int'l v. Eco-Farm Citrus, Inc., PACA Docket R-92-129, decided ---__, (1993) (unpublished decision). "An unreasonable claims policy would not be allowable under U.C.C. §§ 1-102(3) and 2-103(b). For instance, one of the requirements of the subject claims policy is that "[t]he survey must be performed within forty-eight (48) hours of vessel discharge." While the record shows only the expected arrival time for the MV Magleby and does not show discharge time for the containers, it seems unlikely that the survey was performed within the 48-hour time limit in this case. Respondent did not make this an issue but if it had, we would want to inquire whether, considering the time normally necessary for customs clearance, the 48-hour requirement could be considered reasonable." *See also Nalbandian Farms, Inc. v. McDonnell & Blankfard, Inc.*, 46 Agric. Dec. 674, 680 (1987).

i. § 2-103(4)
Crawford v. Ralf & Cono Comunale Produce Corp., 51 Agric. Dec. 804, 809 (1992).

j. § 2-105(6)

Definition of commercial unit discussed and decided. *Salinas Lettuce Farmers Coop. v. Larry Ober Co.*, 39 Agric. Dec. 65, 68-69 (1980); *A.W. Fabrizio & Son v. Ft. Lauderdale Produce*, 39 Agric. Dec. 60, 63 (1980).

k. § 2-207

Extensive discussion in *Nw. Fruit Sales, Inc. v. Norinsberg Corp.*, 39 Agric. Dec. 1556, 1558-59 (1980).

Where terms contrary to the original terms agreed to by the parties were expressed in subsequent memoranda they were not effective under this section because they materially altered the original accepted terms of the contract. *Or. Onions, Inc. v. JAC Trading Co.*, PACA Docket R-97-118, decided July 15, 1998 (unpublished decision).

l. § 2-305

Macchiaroli v. Gatz, 38 Agric. Dec. 1477, 1481 (1979).

m. § 2-314

Anthony Brokerage, Inc. v. Auster Co., 38 Agric. Dec. 1643, 1651-52 (1979).

n. § 2-316(2)

Primary Exp. Int.'l v. Blue Anchor, Inc.,56 Agric. Dec. 969, 980 (1997); *River Valley Mktg. Inc. v. Tom Lange Co.*, 53 Agric. Dec. 918, 924 (1994); *L.E. Jensen & Sons, Inc. v. Huston Produce, Inc.*, 51 Agric. Dec. 814, 826 (1992); *Davis v. Goldman-Hayden Co.*, 50 Agric. Dec. 1014, 1017 (1991).

o. § 2-316(3)(b)

N. Am. Produce Buyers v. Source Produce Distrib. Co., 48 Agric. Dec. 1101 (1989). *See Primary Exp. Int'l v. Blue Anchor, Inc.*, 56 Agric. Dec. 969, 981 (1997), where the suitable shipping condition warranty was found to be an express warranty. *See also Rich-SeaPak Corp. v. Pro-Ag, Inc.*, 56 Agric. Dec. 1958, 1968 at n. 4 (1997), where the sale was delivered, but the breach was of an express warranty.

p. § 2-319

Macchiaroli v. Gatz, 38 Agric. Dec. 1477-78 (1979).

q. § 2-401

Bruce Church, Inc. v. Tested Best Foods Div., 28 Agric. Dec. 377, 382 (1969).

r. § 2-401(4)

Pope Packing & Sales, Inc. v. Santa Fe Vegetable Growers Coop. Ass'n, 38 Agric. Dec. 101, 104 (1979).

s. § 2-503(1)(a)

Where goods were not held kept available for a reasonable period of time for buyer to take possession, there was no tender under this section. *Crawford v. Ralf & Cono Comunale Produce Corp.*, 51 Agric. Dec. 804, 809 (1992).

t. § 2-504

Warren Fruit Co. v. Cavazos Candy & Produce, 37 Agric. Dec. 1754, 1757-58 (1978).

u. § 2-601

Perfect tender. *See White & Summers*, § 8-3, p. 256. *See Harvey Kaiser, Inc. v. Kay Packing Co*., 52 Agric. Dec. 762, 765 (1993), where perfect tender requirement was applied. Hawkland states:

> Quite apart from the broad construction adopted by the UCC in defining the concept of conformity, the perfect tender rule is qualified by the general obligation of good faith imposed by Section 1-203. Accordingly, the buyer's right to reject involves two questions: (1) Do the goods conform to the contract? (2) If the answer to (1) is no, did the buyer reject in good faith?

2 Hawkland UCC Series § 2-601:3 (footnotes omitted). In other words, rejection on a falling market because of some inconsequential non-conformity should not be countenanced. See **REJECTION-GROUNDS** - this index.

v. § 2-601(c)

Salinas Lettuce Farmers Coop. v. Larry Ober Co., 39 Agric. Dec. 65, 68 (1980); *A.W. Fabrizio & Son v. Ft. Lauderdale Produce*, 39 Agric. Dec. 60, 62 (1980).

w. § 2-602

Where there is no delivery or tender, notice requirement of this section is not triggered. *Crawford v. Ralf & Cono Comunale Produce Corp*., 51 Agric. Dec. 804, 808-10 (1992).

x. §§ 2-602, 2-603, and 2-703

Seller required to exercise ownership over a rejected commodity where he has received prompt notice of rejection. *Crowley v. Calflo Produce, Inc.*, 55 Agric. Dec. 674, 677 (1996); *Pope Packing & Sales, Inc. v. Santa Fe Vegetable Growers Coop. Ass'n*, 38 Agric. Dec. 101, 104-05 (1979); *Bruce Church, Inc. v. Tested Best Foods Div.*, 28 Agric. Dec. 377, 382 (1969).

y. § 2-603(1)

"The ultimate responsibility for not allowing . . . abandonment falls upon the receiver as the party in closest proximity to such commodity." *Dew-Gro, Inc. v. First Nat'l Supermarkets, Inc.*, 42 Agric. Dec. 2020, 2025-26 (1983); *Yokoyama Bros. v. Cal-Veg. Sales*, 41 Agric. Dec. 535, 537 (1982); *Cal-Swiss Foods v. San Antonio Spice Co.*, 37 Agric. Dec. 1475, 1480 (1978).

Following rejection, respondent at complainant's direction resold a portion of the rejected goods and remitted the proceeds to complainant. This was found to conform with respondent's duties as to the rejected goods as set forth in UCC § 2-603. *Harvey Kaiser, Inc. v. Kay Packing Co.*, 52 Agric. Dec. 762, 765 (1993).

z. § 2-607(2)

Fresh W. Mktg., Inc. v. McDonnell & Blankfard, Inc., 53 Agric. Dec. 1869, 1874 (1994).

aa. § 2-608

Revocation of Acceptance. *Highland Grape Juice Co. v. T.W. Garner Food Co.*, 38 Agric. Dec. 1001, 1007 (1979).

bb. § 2-609

Where parties entered into a written installment contract, respondent canceled the contract after complainant made late payments as to several loads. It was found that although the late payments were

a violation of the contract, the Regulations and the Act, they did not furnish grounds for cancellation of the contract. Respondent, under section § 2-609 of the UCC could have taken the late payments as reasonable grounds for insecurity, asked for adequate assurance of due performance, and suspended performance until receipt of such assurance, but cancellation prior to a failure to receive requested assurance was not an option. *Rich-SeaPak Corp. v. Pro-Ag, Inc.*, 56 Agric. Dec. 1958, 1966-67 (1997).

cc. § 2-609(3)

Complainant's right to demand assurance was not prejudiced by its delay in making the demand, and complainant was justified in withholding performance under a supply contract while it awaited a response to its demand for assurance, and following respondent's failure to respond to its demand. *R & R Produce, Inc. v. Fresh Unlimited, Inc.*, 56 Agric. Dec. 997, 1008 (1997).

dd. § 2-610

V.V. Vogel & Sons Farms v. Cont'l Farms, 44 Agric. Dec. 886, 894 (1985). Notice of intent to cover not required; *See DNE Sales, Inc. v. Richfood, Inc*., 50 Agric. Dec. 1037, 1041-42 (1991).

ee. § 2-612

Shriver v. Mkt. Pre-Pak, Inc., 39 Agric. Dec. 290, 305 (1980).

ff. § 2-615

R & R Produce, Inc. v. Fresh Unlimited, Inc., 56 Agric. Dec. 997, 1005 (1997); *G. & H. Sales Corp. v. C.J. Vitner Co.*, 50 Agric. Dec. 1892, 1897-99 (1991); *Bliss Produce Co. v. A.E. Albert & Sons*, 35 Agric. Dec. 742, 746 (1976).

gg. §§ 2-703, 2-706, and 2-710

Pope Packing & Sales, Inc. v. Santa Fe Vegetable Growers Coop. Ass'n, 38 Agric. Dec. 101, 105 (1979); *Bruce Church, Inc. v. Tested Best Foods Div.*, 28 Agric. Dec. 377, 382 (1969).

hh. §§ 2-703(d), 2-706, 2-708, and 2-710

"In our opinion there is nothing in section 2-706 of the UCC that permits a resale of anything other than the same goods which were the subject of a rejection." Shipper had intermingled wrongfully rejected apples with its normal inventory for purposes of resale. *Gwin, White & Prince v. Nat'l Food Corp.*, 42 Agric. Dec. 445, 448-49 (1983).

ii. §§ 2-706 and 2-708

See Valley Pride Sales, Inc. v. Dairy Rich Ice Cream Co., 53 Agric. Dec. 879, 884-86 (1994).

jj. §§ 2-711 and 2-713

"[L]earned of the breach" means "time for performance" in anticipatory repudiation case. Extensive discussion. Also extensive discussion of buyer's damages for non-delivery where buyer fails to cover. *V.V. Vogel & Sons Farms v. Cont'l Farms*, 44 Agric. Dec. 886, 894-95 (1985).

kk. § 2-712

Cover purchases of white onions in substitute for yellow onions allowed because of showing of similar prevailing prices at time of cover. *Al Campisano Fruit Co. v. Shelton*, 50 Agric. Dec. 1875, 1883 (1991); *See also Bliss Produce Co. v. A.E. Albert & Sons*, 35 Agric. Dec. 742, 747 (1976).

For cover under a supply contract and use of a substitute supply contract as cover *See R & R Produce, Inc. v. Fresh Unlimited, Inc.*, 56 Agric. Dec. 997, 1009 at n. 9 (1997).

ll. § 2-714(1)

Where an f.o.b.a.f. contract called for the supply of gas green tomatoes and, at a distant destination, the contract was discovered to have been breached by the supply of vine ripe tomatoes which could not be expected to carry to a distant destination as well as gas green tomatoes, it was held that it was reasonable under the peculiar circumstances of the case to assess damages by the differential between market price and the value of delivered product at destination even though the warranty of suitable shipping condition was not applicable and even though acceptance took place at shipping point. *DeSomma v. All World Farms, Inc.*, 61 Agric. Dec. 821, 834 (2002). *See also Outten v. Prettyman*, 24 Agric. Dec. 339, 342 (1965).

mm. § 2-715

Formerly, our test for awarding consequential damages (also termed special damages or loss of profits) required actual knowledge on the part of the seller of a specific contract of the buyer with a third party for the resale of the goods. Under a 1990 decision, a less restrictive test was adopted. *See Pandol Bros., Inc. v. Prevor Mktg. Int'l, Inc.*, 49 Agric. Dec. 1193, 1203 (1990). Note: that to be awarded consequential or special damages, it is still necessary for a buyer to show a loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know. As was stated in Pandol ". . . such damages must be proven in the normal manner, and comment 4 to section 2-715 states that '[t]he burden of proving the extent of loss incurred by way of consequential damage is on the buyer . . .'" In addition, the buyer must also show that the loss could not have "reasonably" been "prevented by cover or otherwise."

Incidental expenses such as an attempted charge for commission (note exception where buyer *properly* retains services of a commission merchant to resell goods or a portion thereof) or handling fee which is not the result of the seller's breach should not be allowed. *See Pan Am. Fruit Co. v. Bova*, 17 Agric. Dec. 774, 779-80 (1958). On the other hand, a charge for sorting out bad merchandise or a fee for dumping produce (where there is evidence to support such dumping) should be allowed.

Late delivery of potatoes caused a shutdown of the buyer's processing plant, and the overtime operation was caused when three loads arrived later, all at one time. The buyer was allowed to prove plant overhead costs resulting from the shutdown, and overtime costs resulting from the delivery of three loads at one time. Both costs were awarded as consequential damages under § 2-715. *Process Supply Co. v. Perfect Potato Chips, Inc.*, 40 Agric. Dec. 800, 805 (1981).

nn. § 2-722

See this index under **F.O.B. - CONVERSION**.

oo. § 2-723

Shriver v. Mkt. Pre-Pak, Inc., 39 Agric. Dec. 290, 306 (1980).

pp. § 2-723(2)

Macchiaroli v. Gatz, 38 Agric. Dec. 1477, 1483-84 (1979).

qq. § 3-311

Debtor tendered payment in one check for six produce transactions. Four of the transactions were undisputed, and the check covered these transactions in their full amount. The remaining two transactions were disputed, and as to these, the check tendered only partial payment. The creditor negotiated the check and then sought to recover the balance alleged due on the disputed transactions.

The debtor pled accord and satisfaction. It was held that the good faith tender requirement of UCC § 3-311 would not be met by such a check especially in view of the "full payment promptly" requirement of the Act and Regulations. The situation was distinguished from that in which the parties maintain a running account. *Lindemann Produce, Inc. v. ABC Fresh Mktg., Inc.*, 57 Agric. Dec. 739, 743-44 (1998).

Under UCC § 3-311 the return within 90 days of an amount paid in full satisfaction of a claim disputed in good faith precludes the discharge of the claim unless the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim. *Pac. Tomato Growers v. Am. Banana Co.*, 60 Agric. Dec. 352, 370 (2001).

rr. § 3-408

A. Sam & Sons Produce Co. v. Sol Salins, Inc., 50 Agric. Dec. 1044, 1053 n. 13 (1991).

80. VERIFICATION

An unsigned verification of a pleading is acceptable when the pleading has been signed and the verification is attached to it. *Perez Ranches, Inc. v. Pawel Distrib. Co.*, 48 Agric. Dec. 725-26 (1989).

Unverified pleadings cannot be given evidentiary value. *C.H. Robinson Co. v. ARC Fresh Food Sys., Inc.*, 50 Agric. Dec. 950, 952 (1991); *Prillwitz v. Sheehan Produce*, 19 Agric. Dec. 1213, 1215 (1960).

While an unverified pleading is not in evidence, it does serve to form the issues between the parties. *Oshita Mktg., Inc. v. Tampa Bay Produce, Inc.*, 50 Agric. Dec. 968, 972 (1991); *Chapman Fruit Co. v. Tri-State Sales Agency*, 44 Agric. Dec. 1366, 1367 (1985). *See also Perell, Inc. v. Anthony Abbate Fruit Distrib.*, 32 Agric. Dec. 1900, 1902 (1972); *H. & M. Fujishige v. Mike Phillips Enter., Inc.*, 30 Agric. Dec. 1095, 1097 (1971).

A verified statement by a party's representative or legal counsel is assumed to be hearsay unless there is clear indication that such person had personal knowledge of the subject matter of the statement. Such statements are mere argument and will not be given evidentiary value. *Merit Packing Co. v. Pamco Airfresh, Inc.*, 47 Agric. Dec. 1345, 1337 (1988).

Since October 18, 1976, 28 USC § 1746 has permitted, ". . . the use of unsworn declarations under penalty of perjury as evidence in Federal proceedings." This does not apply to a deposition, oath of office, or an oath required to be taken before an official other than a notary public. The form to be used is specified by statute:

> (1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.
>
> Executed on (date).
>
> (Signature)

(2) If executed within the United States, its territories, possessions or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on (date).