ANTHONY VINEYARDS, INC. v. SUN WORLD INTERNATIONAL, INC.
PACA Docket No. R-98-143.
Ruling on Respondent's Petition for Reconsideration.
Filed January 8, 2003.

PACA-R – Equitable estoppel defense – Complaint, amendment of, when new counsel – Attorney fees, prevailing party awarded – American rule, attorney fees – English rule, attorney fees – PACA, attorney fee awards to prevailing merchant, dealer or broker only in an oral hearing.

The prevailing party in a PACA reparation action may be awarded attorney's fees upon a properly filed request after hearing (7 CFR § 47.19(d)). The question of which party is the prevailing party is one that depends upon the facts of the case. Where 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 is determined to be the prevailing party, and is awarded attorney's fees and expenses, reduced by 32%..

Patricia J. Ryan, for Complainant.
Stephen P. McCarron, for Respondent.
Andrew Y. Stanton , Presiding Officer.
Decision and Order filed by William G. Jenson, Judicial Officer.

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Decision and Order (hereinafter, "Decision") was issued on February 7, 2001, awarding reparation to Complainant in the amount of $132,026.19 plus interest, and $300.00 as reimbursement for Complainant's handling fee. The Decision also awarded fees and expenses to Respondent in the amount of $53,782.55 plus interest. Complainant filed a Petition for Reconsideration and, on November 28, 2001, a Ruling on Petition for Reconsideration (hereinafter, "Ruling") was issued, awarding Complainant $186,971.40 plus interest, and $300.00 as reimbursement for Complainant's handling fee. The Ruling also awarded fees and expenses to Complainant in the amount of $93,485.70 plus interest.

Respondent filed a Petition for Reconsideration of the November 28, 2001, Ruling in which it makes several assertions of error. Complainant filed an Opposition to Petition for Reconsideration.

Respondent contends that the Ruling erroneously awarded Complainant $27,516.65 as damages for Respondent's overcharges for supplies and services, reversing the denial of such claim in the Decision. Respondent argues that Complainant's claim should be dismissed on the grounds of equitable estoppel. Respondent states that when the claim for overcharges was made in the formal complaint, Complainant did not allege a specific amount, but asserted that Complainant would "amend the Complaint to allege the precise amount of the

overcharges once it receives a breakdown of such overcharges from the PACA auditors." Respondent states that Complainant never did amend the complaint to include the specific amount of alleged overcharges prior to the hearing or at the hearing and did not mention the issue in its brief. Respondent claims that circumstances warranting equitable estoppel are present, citing *In re: S.E.L. International Corporation*, 51 Agric. Dec. 1407 (1992), asserting that Complainant, by its words, acts, conduct or acquiescence, caused Respondent to believe that Complainant had abandoned the claim for overcharges, that Complainant's words and conduct, indicating that it had abandoned the claim, were done willfully or negligently, and that Respondent relied on Complainant's representations that the claim was abandoned by not presenting any evidence with respect to this issue.

The $27,516.65 claimed by Complainant for overcharges comes from the finding of the Department's auditors, which was made after the filing of the formal complaint and was included in the Report of Investigation served upon both parties. The finding was referred to in the Ruling (at page 3) as follows:

> The audit further showed Sun World received discounts totaling $10,991.41 for its early payment of grape supply invoices. These discounts were not passed on to Anthony Vineyards. Sun World charged complainant $4,459.30 more than its actual cost for the supplies it invoiced complainant. Sun World overcharged complainant $12,065.94 for hauling the grapes from the field to its central facility. This was due to Sun World charging Anthony Vineyards for hauling a full truck when there was other grower's product on the truck. The USDA accounting allowed actual cost for the supply and hauling charges.

Respondent relies upon *S.E.L.* for the elements of equitable estoppel, but the decision in that case specifically makes reference to the fact that it is applying the law of the 11th Circuit (51 Agric. Dec. at 1419). In the case at hand, we must apply the standard for equitable estoppel utilized in the Circuit where Respondent is engaged in business, the 9th Circuit. That standard is set forth in *United States v. Hemmen*, 51 F.3d 883, 892 (9th Cir. 1995), as follows:

> The traditional elements of equitable estoppel are that: (1) the party to be estopped knows the facts, (2) he or she intends that his or her conduct will be acted on or must so act that the party invoking estoppel has a right to believe it is so intended, (3) the party invoking estoppel must be

ignorant of the true facts, and (4) he or she must detrimentally rely on the former's conduct. *Watkins v. United States Army,* 875 F.2d 699, 709 (9th Cir.1989) (en banc), *cert. denied,* 498 U.S. 957, 111 S.Ct. 384, 112 L.Ed.2d 395 (1990).

With respect to the first and third elements, there is no doubt that both parties knew or should have known the facts - that the Department's audit contained a finding that $27,516.65 was overcharged by Respondent - as that finding was part of the Report of Investigation. We do not conclude that the second element was present; that Complainant intended that its conduct, the failure to formally amend the complaint to note the amount of damages for overcharges found by the audit, would give Respondent the right to believe that Complainant was abandoning its claim. We believe Complainant assumed, with good reason, that Respondent was aware that the amount of the alleged overcharges was $27,516.65, so there was no reason for Complainant to formally amend its complaint. Further, we do not believe that Respondent detrimentally relied on Complainant's failure to amend the complaint, in view of the fact that the findings of the audit, showing the amount of the alleged damages as $27,516.65, were made known to Respondent. Respondent had the opportunity at the hearing to present evidence to attempt to rebut Complainant's claim for overcharges, but elected not to do so. Under these circumstances, equitable estoppel is not warranted.

Respondent claims that the Decision erred in determining that Complainant's June 9, 1997, letter, filed on June 11, 1997, was an informal complaint that preserved jurisdiction over transactions that accrued within nine months prior to the date of filing. Respondent asserts that of the six allegations of wrongful conduct alleged in the letter, only the first was made with specificity. With respect to the remaining five allegations, Respondent contends Complainant did not provide any details but merely requested that the Department conduct an audit. Respondent argues that Complainant's letter did not comply with section 47.3(a)(2) of the Rules of Practice (7 C.F.R. § 47.3(a)(2)), as it did not contain "the essential details of the transaction complained of."

Complainant asserts that Respondent should not be permitted to raise the issue of whether Complainant's letter qualifies as an informal complaint, as it was not one of the findings made in the Ruling. However, the Ruling did discuss whether various transactions were within the Department's jurisdiction, and concluded that certain transactions did so qualify because they were referred to, in general terms, in Complainant's letter and accrued within nine months prior to June 11, 1997 (Ruling, at pages 1-3, 9). As the issue of the jurisdictional effect of Complainant's letter was addressed in the Ruling,

Respondent is not precluded from raising the issue of whether the letter is a valid informal complaint for jurisdictional purposes.

However, we do not agree with Respondent's contention that Complainant's letter was not a valid informal complaint. While Respondent is correct that section 47.3(a)(2) of the Rules of Practice states that the informal complaint shall set forth the "essential details" of the transactions, that section also states that these details shall be set out "so far as practicable." *Six L's Packing Company, Inc. v. Preciosa Packing House, Inc.*, 41 Agric. Dec. 1233 (1992). Complainant's June 9, 1997, letter is a five page document containing a wealth of detail about the alleged violations committed by Respondent. While the letter requests the Department to conduct an audit to obtain additional information, which eventually took place, the letter includes as much detail about Respondent's alleged violations as was possible at the time it was written. We conclude that Complainant's June 9, 1997, letter meets the criteria for a valid informal complaint as set forth in the Rules of Practice.

Respondent disputes the conclusion of the Decision that Complainant did not waive the contractual requirement that Respondent consult with Complainant prior to granting price adjustments in excess of 30%. Complainant argues, as it did with respect to the jurisdictional effect of its June 9, 1997, letter, that Respondent should not be permitted to raise this issue, as it was addressed in the Decision but not the Ruling, and Respondent should be limited to only those issues discussed in the Ruling. Although we found that the Ruling discussed the jurisdictional effect of Complainant's letter, and that such issue may thus be addressed here, the Ruling never mentioned the waiver issue. If Respondent desired to contest the finding in the Decision that Complainant did not waive its contractual right to be consulted, Respondent could have filed a petition for reconsideration of the Decision, but elected not to do so. Respondent is precluded from raising the waiver issue at this time.

Even if the waiver issue were given consideration, Respondent has merely repeated the argument raised in its brief that Complainant failed to complain about not being consulted on many transactions where Respondent granted adjustments exceeding 30%. The Decision found that Complainant did complain about the failure to consult through communications by Complainant's then controller, Carla Dodd, with Respondent, and by the fact that, in May 1996, Complainant filed suit in state court regarding the 1995 growing season, alleging, among other things, Respondent's failure to comply with the consultation provisions of the contract, which were essentially the same provisions present for the 1996 growing season at issue here (Decision, at page 24). Respondent has not provided any basis for changing the finding in the

Decision that Complainant did not waive the consultation requirement.

Respondent's final assertion of error is that, by concluding that Complainant was the prevailing party, and thus entitled to attorneys fees, the Ruling did not follow the precedent set in *Newbern Groves, Inc. v. C. H. Robinson Company*, 53 Agric. Dec. 1766, 1855 (1994), *petition for reconsideration denied*, 54 Agric. Dec.1444 (1995). Respondent notes that the conclusion in the Ruling was based solely on the fact that Complainant was awarded 34% (actually 36%)[1] of the amount it originally claimed, compared to 25% awarded the complainant in *Newbern Groves*, which found that the respondent had prevailed. Respondent contends that additional factors should have been considered in determining the identity of the prevailing party. In response, Complainant argues that the principle enunciated in *Newbern Groves*, that under certain circumstances, the party that is awarded damages may not be the prevailing party, conflicts with a recent Supreme Court case, *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't. of Health and Human Resources*, 532 U.S. 598, 121 S. Ct. 1835 (2001), which held that a prevailing party is the party in whose favor judgment is rendered, regardless of the amount of damages awarded.

Complainant's contention that *Newbern Groves* conflicts with *Buckhannon* requires a consideration of the underlying purpose of fee-shifting under section 7(a) of the Act. There are three approaches to dealing with attorney fees in litigation in the United States. The most basic is the American rule in which there is no fee-shifting, and both parties are responsible for their own attorney fees. This is the primary rule at the federal level, and in all states except one. Exceptions to the American rule are always statutory. The second approach to fee-shifting is the English rule in which the loser, whether plaintiff or defendant, pays the winner's attorney fees. The English rule has existed as a statutory exception to the American rule in Alaska since it was established as a territory[2]. The English rule also has existed in Arizona since 1976 as to commercial cases

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[1]Respondent's assertion that Complainant was awarded 34% of its total claim of damages is based on a figure contained in the November 28, 2001, Ruling. However, the Ruling was in error, as the amount of reparation awarded therein, $186,971.40, constitutes about 36% of Complainant's claimed damages of $524,814.72.

[2]Alaska Stat. § 09.60.010 (1962, amend. 1986). Since 1993 the English rule has existed in that State in a modified form that gives fees to a prevailing party according to a fixed schedule with a discretionary override provision. *See* Alaska Rules of Civil Procedure, Rule 82.

only,[3] and in Florida, for a five year period, as to medical malpractice cases only[4]. The third approach is private attorney general type fee-shifting with the aim of promoting a degree of private enforcement of legislatively mandated policy. This type fee-shifting is applicable by statute at the federal and state levels in multiple selective areas, and favors the award of attorney fees to successful plaintiffs, but is restrictive in the award of attorney fees to successful defendants.

In *Buckhannon* the Court had under consideration private attorney general type fee-shifting statutes. The question under consideration was whether, under the applicable civil rights statutes, attorney fees should be awarded to a claimant whose lawsuit provoked the defendant to change its illegal policy without a judgment on the merits, or a consent decree, being entered. The holding in *Buckhannon* is spelled out at the beginning of the opinion:

> The question presented here is whether this term [prevailing party] includes a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. We hold that it does not.

Thus, the fundamental distinction in *Buckhannon* was between litigation ending in a judgment, and litigation not ending in a judgment. We will have more to say about this later. A subsidiary factor distinguishing *Buckhannon* from *Newbern Groves* is the fact that *Buckhannon* dealt with private attorney general type fee-shifting while *Newbern Groves* was a commercial case decided under a statute with a very different Congressional purpose.

The purpose of private attorney general type fee-shifting statutes is to

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[3]Ariz.Rev.Stat.Ann. § 12-341.01 (1982), which allows a "successful party" to recover attorney fees in breach of contract actions.

[4]Fla. Stat. Ann. § 768.56 (1984) provided, in pertinent part, as follows:

> . . . the court shall award a reasonable attorney's fee to the prevailing party in any civil action which involves a claim for damages by reason of injury, death, or monetary loss on account of alleged malpractice by any medical or osteopathic physician, podiatrist, hospital, or health maintenance organization. . . . When there is more than one party on one or both sides of an action, the court shall allocate its award of attorney's fees among prevailing parties and tax such fees against unprevailing parties in accordance with the principles of equity.

enhance private enforcement efforts[5]. As Justice Ginsburg said in the dissent to Buckhannon:

> The Civil Rights Act of 1964 included provisions for fee awards to "prevailing parties" in Title II (public accommodations), 42 U.S.C. § 2000a-3(b), and Title VII (employment), 42 U.S.C. § 2000e-5(k), but not in Title VI (federal programs). The provisions' central purpose was "to promote vigorous enforcement" of the laws by private plaintiffs; although using the two-way term "prevailing party," Congress did not make fees available to plaintiffs and defendants on equal terms. *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 417, 421, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978) (under Title VII, prevailing plaintiff qualifies for fee award absent "special circumstances," but prevailing defendant may obtain fee award only if plaintiff's suit is "frivolous, unreasonable, or without foundation."[6]

In the case of reparation litigation, such as is allowed under the Perishable Agricultural Commodities Act, no such enforcement motive is present. Indeed, the legislative history shows that in regard to the fee-shifting statute under which we operate an entirely different motive was at work. Report No. 92-751 of the Committee on Agriculture (December 14, 1971) included a statement by Mr. Arthur E. Brown, Deputy Director, Fruit and Vegetable Division, which closely tracked the Department's Executive Communication on the fees and expenses legislation. That statement was, in relevant part, as follows:

> Section 2 of the proposed amendment would add a new feature to the Act since there is now no provision for the payment to the prevailing party of fees and expenses, in addition to the damages awarded, in reparation disputes formally adjudicated by the Department. The objective here is also to speed up the handling of reparation complaints through providing a degree of protection to aggrieved parties **by discouraging requests for oral hearings**[7] based on inadequately

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[5] *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598, at 620 (1999) (Scalia, J., concurring) "[In regard to] the fee-shifting statutes at issue here. . . Congress desired an *appropriate* level of enforcement . . . ."

[6] *Id.* at 635 (Ginsburg, J., dissenting).

[7] The fee-shifting provisions of section 7(a) apply only to oral hearing cases. In reparation cases either party may, by right, request an oral hearing where the amount in controversy exceeds $30,000. Otherwise the case is heard under the documentary procedure by affidavit or deposition evidence.

> founded defense allegations or counterclaims filed solely because of their nuisance value or to enhance one's bargaining position in the dispute. This section of the bill would provide for issuance of an order against the losing party to cover the prevailing party's reasonable fees and expenses in those reparation cases in which a hearing is requested and held. **An award of fees and expenses could be against any losing party, whether complainant or respondent**, provided such losing party is a commission merchant, dealer or broker within the meaning of the Act. The regulatory provisions of the Act apply only to such persons, and a reparation order may not issue against a person who is not a commission merchant, dealer or broker. **It is the intent of this section of the bill that the prevailing party may be awarded fees and expenses only, or he may be awarded fees and expenses in addition to an award of damages for violation of Section 2 of the Act.**
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> **Industry representatives have pointed out that the disputants in such cases would exercise a greater degree of responsibility in requesting an oral hearing if the party losing the case were required to pay reasonable fees and expenses incurred by the prevailing party**. The proposed amendment would provide a strong incentive to negotiate in good faith and reach an amicable settlement if at all possible. Even in the event of formal adjudication, there would be an incentive to use the less time-consuming shortened procedure instead of an oral hearing. (Emphasis supplied.)

In addition, the wording of the statute itself clearly shows an intent that attorney fees may be awarded to either party in a balanced fashion:

> If . . . the Secretary determines that the commission merchant, dealer, or broker has violated any provision of section 499b of this title, he shall, unless the offender has already made reparation to the person complaining, determine the amount of damage, if any, to which such person is entitled as a result of such violation and shall make an order directing the offender to pay to such person complaining such amount on or before the date fixed in the order. The Secretary shall order any commission merchant, dealer, or broker who is the losing party to pay the prevailing party, as **reparation or additional reparation**, reasonable fees and expenses incurred in connection with any such hearing. (7 U.S.C. 499g(a). (emphasis supplied).

"*Additional* reparation" for fees and expenses would be awarded to a party only if there had been success, and a monetary award, on the party's claim. However, "reparation" for fees and expenses, as an either/or proposition, could only be awarded where there was success, but no basic monetary award in the party's favor. There is no reason to suppose that there is any intent that such an award of reparation for fees and expenses to a party who received no basic monetary award was to be in any way restricted to instances where the opposing party's claim was "frivolous, unreasonable, or without foundation."

In addition to the legislative history, and the express wording of section 7(a) of the Act, the nature of two other fee-shifting provisions in the Act lends credence to the proposition that the intent of Congress in passing the fee-shifting provision of section 7(a) was to establish the balanced two way fee-shifting of the English rule in place of the American rule as to fee-shifting, and not to establish a private attorney general type of fee-shifting. In the crafting of section 7(c) of the Act[8] Congress eschewed balance in favor of the effectuation of a definite policy:

> . . . Such appeal shall not be effective unless within thirty days from and after the date of the reparation order the appellant also files with the clerk a bond in double the amount of the reparation awarded against the appellant conditioned upon the payment of the judgment entered by the court, plus interest and costs, including a reasonable attorney's fee for the appellee, if the appellee shall prevail. . . . Appellee shall not be liable for costs in said court and if appellee prevails he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of his costs. . . .

Congress here singled out the prevailing appellee alone to be the recipient of attorney fees in order to discourage appeals. The lack of balance is overt, and serves a rational purpose. Congress was clearly not reluctant to expressly favor one party over another when there was reason to do so.

Again, in the bonding provision of section 6(e)[9] Congress favors one party over the other:

> In case a complaint is made by a nonresident of the United States, or by a resident of the United States to whom the claim of a nonresident of the

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[8]7 U.S.C. 499g(c).

[9]7 U.S.C. 499f(e).

> United States has been assigned, the complainant shall be required, before any formal action is taken on his complaint, to furnish a bond in double the amount of the claim conditioned upon the payment of costs, including a reasonable attorney's fee for the respondent if the respondent shall prevail, and any reparation award that may be issued by the Secretary of Agriculture against the complainant on any counter claim by respondent . . . .

The attorney's fees payable under this section are payable only to a prevailing respondent. Unlike the provision of section 7(a), such fees will be payable even in non-oral hearing cases, and in such cases there is no provision in the Act that would allow the payment of such fees to a prevailing foreign Complainant. Again, a definite policy is discernible as the rationale for the overt and clearly expressed lack of balance.

An underlying rationale is also discernable behind the balanced provisions of section 7(a). We have stated that "the basic substrata of law governing perishable transactions is the law of sales as established by statute, and under the common law, in applicable State jurisdictions."[10] Clearly, reparation cases constitute commercial litigation in which the interests of the parties are balanced. There is, therefore, no public policy reason to favor one domestic litigant over another in the award of attorney fees in administrative level reparation litigation. In those rare instances where the states have passed fee-shifting statutes that apply to commercial litigation they have recognized the need for balance by opting for the English type fee-shifting approach.

Not only is there no public policy reason to encourage the bringing of commercial complaints, but there is equally no reason to discourage commercial defendants. A commercial defendant can defend successfully against large claims, and still end up owing a relatively small amount due to the difficulties of accurately calculating beforehand the exact amount that should be due. In such cases the defendant will have effectively prevailed in the litigation, but will end up with a small award against it.

For example, in reparation cases a claimant will frequently bring suit on the theory that the defendant accepted purchased goods, and is therefore liable for the purchase price. However, the defendant will often admit acceptance, and consequent liability for the purchase price, but will defend on the basis of the allegation that the claimant breached the contract of sale by supplying inferior

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[10] *Salinas Lettuce Farmers Cooperative v. Ag-West Growers, Inc.*, 50 Agric. Dec. 984 (1991)

goods. The issue of whether accepted goods were indeed inferior is more frequently a hotly contested issue in the sale of perishables because perishables will often appear good at time of shipment, but will have deteriorated by the time of arrival. In f.o.b. sales the shipper of perishable goods warrants that the goods will arrive in sound condition if transportation services and conditions are normal. But, since perishable goods will always deteriorate over time, the judgment must be made as to whether the deterioration noted on arrival is a normal amount, or an abnormal amount in breach of contract. This issue is often paralleled by the issue of whether transit conditions were normal. Both parties may litigate in good faith over these issues, and it will frequently happen that a claimant will be found to have breached the contract of sale by shipping goods that did not possess sufficient carrying quality to arrive in sound condition. Such a claimant will therefore be liable for damages for its breach of contract. The determination of the amount of damages is itself often a difficult problem, and the purchase price owing by the defendant as result of acceptance of the goods (an issue not actually litigated) will often exceed the amount of damages owing by the claimant for its breach of contract (the only issue actually litigated). Thus as to the litigated issue the defendant will win, but because of the un-litigated and uncontested fact of the defendant's acceptance, and the consequent liability for the purchase price less damages, the claimant will be awarded a small balance of purchase price over damages. Of course, the Department's award in the claimant's favor will state that the defendant violated section 2 of the Act by failing to pay the amount awarded. But the failure to pay is recognized as a good faith failure to pay, and this is evident from the fact that such failure is never made the subject of a disciplinary complaint for "slow pay" against the defendant by the Department.

The Supreme Court of Alaska dealt with a similar case under its English type fee-shifting statute. In *Owen Jones & Sons, Inc. v. C. R. Lewis Company, Inc.*, 497 P.2d 312 (Alaska 1972), Jones, a contractor, entered into a contract with Lewis, a subcontractor, under which Lewis was to furnish the labor and materials necessary to complete the plumbing and other systems for an apartment building to be built in Anchorage. The total agreed price was $178,449.19. The contract also provided for progress payments, not to exceed 90% of the contract price. When the building was partially completed it was destroyed in an earthquake. The contract contained a clause that called for indemnification of the contractor by the subcontractor for all damages caused "by reason of the elements . . . ." Under this clause Jones brought an action against Lewis to recover $119,663.12 that Jones had disbursed to Lewis as progress payments, and Lewis counter-claimed for $46,620.92 for services rendered and materials furnished before the collapse.

The trial court held that there could be no indemnification under the contract

to supply plumbing because the building, the subject matter of the contract, had been destroyed, thus discharging any obligation on the subcontractor's part to furnish further performance. The trial court also found that Lewis was entitled to recover the cost of its performance from Jones on a *quantum meruit* basis.

The trial court then decided that the subcontractor's services and materials supplied should be reasonably valued at approximately $142,300. From this figure a computation was made which took into account the amount of progress payments ($119,663.12) and the value of materials belonging to Jones which were salvaged by Lewis ($30,000), representing a total value received by Lewis of $149,663.12. From this total was subtracted the amount due to Jones under the *quantum meruit* theory employed by the court, which left an excess of $7,363.12, the amount of judgment for Jones. The trial court then found that Lewis was the prevailing party, and awarded Lewis $10,000 in attorney fees.

The Alaska Supreme Court stated that "under AS 09.60.010[11] and Rule 54(d)[12], Rules of Civil Procedure, it is clear that the prevailing party is entitled to costs." After saying that: "[i]t is the contention of the appellants that only they could be considered the prevailing parties in light of their affirmative recovery of $7,363.12 at the conclusion of the trial," the Court said:

> With this contention we cannot agree; it is not an immutable rule that the party who obtains an affirmative recovery must be considered the prevailing party. The decision of the trial court that appellee was the prevailing party did not involve an erroneous construction of either AS 09.60.010 or Rule 54(d). (footnote omitted.)
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> It was clear that the main issue had been resolved against appellants when the court found that appellee had no obligation to refund its progress payments under the contract, the obligation having been discharged by destruction of the subject matter.

The court characterized the recovery of the $7,363.12 by the losing party as an

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[11]AS 09.60.010 provides: "Costs allowed prevailing party. Except as otherwise provided by statute, the supreme court shall determine by rule or order what costs, if any, including attorney fees, shall be allowed the prevailing party in any case."

[12]Rule 54(d) provides: "Costs. Except when express provision therefor is made either in a statute of the state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs. The procedure for the taxing of costs by the clerk and review of his action by the court shall be governed by Rule 79."

incidental recovery[13]. The Court then went on to decide that the amount of the fee award was proper:

> It is clear from the record in this case that the court considered the efforts of appellee's counsel in defeating the appellants' claim for $119,663.12 and the value of that effort in determining the amount of the attorney's fee awarded. The trial judge also considered the potential liability that threatened appellee. Finally, it is clear that the amount of attorney's fee was within the sound discretion of the trial court and such an award will not be disturbed unless the court has exceeded that discretion. We find no reason to disturb the award in this case. (footnotes omitted.)

An adjudication (when final) that a commercial complainant has breached the contract of sale upon which it sued, or sought reparation, has a claim preclusive effect. So does the determination of the amount of damages resulting from that breach. In other words, these rulings are *res judicata* of the issues, and binding on all other forums. This effect is present even though the defendant receives no net monetary award. We stated earlier that the fundamental distinction in *Buckhannon* was between litigation ending in a judgment, and litigation not ending in a judgment. *Buckhannon*, as well as other fee-shifting cases under the various civil rights statutes, recognize the potential that in certain cases attorney fees may be awarded to a defendant where the complaint is dismissed. In those cases there is an adjudication – a judgment – in the defendant's favor. The lack of such a judgment in the complainant's favor, or at least a judicial consent decree, was the determinative factor in the majority's ruling in *Buckhannon*. In *Buckhannon*, Justice Rehnquist quoted the 1999 7th edition of Black's Law Dictionary which defines prevailing party as: "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded <in certain cases, the court will award attorney's fees to the prevailing party>.--Also termed *successful party*." This 7th edition definition is relegated to a small segment of the Dictionary's treatment of the subject "party," and constitutes the only thing said concerning "prevailing party." The 1990 6th edition of Black's Law Dictionary gives a much more lengthy treatment of "prevailing party" under a separate heading rather than under the heading "party." The first definition given is as follows: "The party

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[13] *Owen Jones & Sons, Inc. v. C. R. Lewis Company, Inc*., 497 P.2d 312, at 314 n.5 (Alaska 1972) "This recovery based on the accounting can be classified as an incidental recovery which will not be a sufficient recovery to bar a party who has defended a large claim from being considered a prevailing party."

to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention." This does not conflict with the definition cited in Buckhannon, but it does give some additional insight into the meaning of the phrase. We believe that when the Alaska Supreme Court in *Owen Jones & Sons, Inc.* adjudicated that the defendant was entitled to the sum of $142,300, that defendant became "[a] party in whose favor a judgment [was] rendered . . ." The less abbreviated definition of prevailing party in the 1990 edition of Black's Law Dictionary also is inclusive of this type adjudication when it, perhaps less ambiguously, speaks of one who ". . . successfully defends against [an action], prevailing on the main issue, even though not necessarily to the extent of his original contention."

In his concurring opinion in *Buckhannon* Justice Scalia refers to the Court's "ill-considered dicta" as misleading the Circuits to follow the catalyst theory. While the Court's reasoning in *Buckhannon* may be impeccable in regard to the question of whether a change of position by a litigant in a suit in which there is no adjudication can cause the opposing claimant to be considered a prevailing party under a private attorney general fee-shifting statute, we would also be misled by dicta if we applied the Court's language in *Buckhannon* to a reparation case where no catalyst theory is remotely in view, where there were final adjudications of multiple litigated issues, and where the fee-shifting statute under consideration clearly aims at balance between commercial litigants. We cannot believe that the majority in *Buckhannon* intended any such application of their words. We conclude that it was not the intent of the *Buckhannon* Court to disturb the English type fee-shifting required by Congress under the Act as evinced in *Newbern Groves* and the cases which have followed it.

As we have concluded that *Buckhannon* has not overruled *Newbern* Groves, we must now decide whether the November 28, 2001, Ruling correctly awarded fees and expenses to Complainant in the amount of $93,485.70 based solely on the fact that Complainant was determined to have prevailed on 36%[14] of the amount of its original claim ($186,971.40 of the total damages claimed of $524,814.72), which exceeds the 25% figure in *Newbern Groves*. Respondent argues that other factors should be considered. In support of this argument, Respondent asserts that the complaint consisted of four claims: (1) failure to remit cooling revenues (on the Sugraone grapes); (2) overcharges for services and supplies; (3) failure to notify of significant price adjustments; and (4)

[14] *See* footnote 1.

negligent handling of grapes. Respondent contends that the majority of testimony and evidence submitted at the hearing concerned the two of Complainant's claims, 1 and 4, in which Respondent prevailed, that Complainant submitted no evidence supporting claim 2, relying solely on work done by the Department, and prevailed on only 40% of its claim regarding claim 3. Complainant rejects Respondent's effort to "compartmentalize" its conduct towards Complainant, arguing that Respondent's breach of its fiduciary duty as a grower's agent was part of an overall business relationship involving related events.

Respondent is correct that, in determining the identity of the prevailing party, other factors should be considered in addition to the percentage of the original claim which is awarded as damages, and that the amount of effort put forth at the hearing in support of certain allegations is a significant factor.[15] We do not agree with Respondent's contention that the majority of testimony at the hearing concerned Complainant's claims for Respondent's alleged failure to remit cooling revenues on the Sugraone grapes and for Respondent's alleged negligent handling of grapes, as the record indicates that both parties' witnesses spent most of their time addressing the issue of notice of price adjustments, on which we awarded Complainant a total of $159,454.75, or 42% of the $377,645.87 claimed. However, Respondent is correct that, on the issues of Respondent's alleged failure to remit cooling revenues on the Sugraone grapes, for which Complainant claimed $78,921.04, and the alleged negligent handling of grapes, for which Complainant claimed $108,703.01[16], Respondent completely prevailed. A substantial time was spent on these issues at the hearing. With respect to Complainant's claim of Respondent's alleged overcharges for supplies and services, Complainant was awarded its entire claim of $27,516.65, but no time was devoted to this issue at the hearing. Therefore, the total awarded Complainant as a result of evidence presented at the hearing was $159,454.75 out of the $497,298.07 remaining at issue after deducting Complainant's claim for alleged overcharges ($524,814.72 less $27,516.65), or 32%.

As Respondent prevailed on two of the three issues presented at the hearing,

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[15]We reject Respondent's suggestion that the amount of documentary evidence submitted is, in an of itself, an important factor to consider in the determination of who is the prevailing party and entitled to an award of fees and expenses.

[16]Complainant states in its brief (Complainant's brief, at 65) that $40,055.20 of the amount claimed for negligent handling is also part of Complainant's claim of $50,091.70 for alleged improper adjustments which Complainant contends should have be allowed by the Department's auditors.

and limited Complainant's recovery to 32% of the amount actually litigated at the hearing, we conclude, as we did in the February 7, 2001, Decision and Order, that Respondent is the prevailing party. Therefore, we will restate our conclusions made in the Decision and Order with respect to Respondent's recovery of fees and expenses, with certain changes.

Respondent filed a claim for fees and expenses in the amount of $73,463.63. Complainant objected to the amount paid by Respondent's attorney for round-trip airfare between Washington, D.C. to Bakersfield, California, for depositions on September 29, 1998, and October 26, 1998, in the amounts of $1,775.87 and $1,876.00, respectively, and for the hearing on September 16, 1999, in the amount of $1,972.00. Complainant claimed Respondent's attorney could have obtained less expensive flights if he had left from Baltimore rather than Washington, D.C. or purchased tickets earlier. Respondent replied that purchasing tickets earlier would not have saved any money, as Respondent's attorney was not staying over a Saturday night. Complainant's objections are not well taken. Respondent's attorney, whose office is located in Washington, D.C., was entitled to use an airport in the Washington, D.C. area. Complainant offered no evidence that Respondent's attorney could have obtained a less expensive flight if he had purchased tickets earlier.

Complainant also objected to charges for charter flights from Coachella, California, to Bakersfield, California, taken by Respondent's officers Michael Aiton and David Marguleas. The flights were on October 29, 1998, to take depositions, in the amount of $1,637.72, and on September 24, 1999, to testify at the hearing, in the amount of $1,463.84. A search on the American Airlines website made at approximately the time the Decision and Order was issued, revealed that a round-trip unrestricted fare to Bakersfield from Palm Springs, California, which is the closest large airport to Coachella, was $337.00. Respondent never provided any justification for the use of charter flights rather than the readily available commercial flights. Therefore, we allow $337.00 for each person for each trip, resulting in a total of $1,348.00 for both persons on both trips. This reduces Respondent's eligible fees and expenses by $1,753.56, from $73,463.63 to $71,710.07.

As stated, Complainant's efforts at the hearing resulted in a recovery of about 32% of the amount claimed as damages and litigated at the hearing. All of the issues litigated at the hearing were hotly contested. As a result of Complainant's partial recovery, we will reduce Respondent's $71,710.07 claim by 32%, or $22,947.22, which leaves $48,762.85 to be awarded Respondent as fees and expenses.

Order

The reparation awarded in the November 28, 2001, Ruling on Reconsideration, $186,971.40, with interest thereon at the rate of 10% per annum from September 1, 1996, until paid, plus the amount of $300.00, shall be paid by Respondent to Complainant within 30 days from the date of this Order.

Within 30 days from the date of this Order, Complainant shall pay to Respondent, as reparation for fees and expenses, $48,762.85, with interest thereon at the rate of 10% per annum from the date of this Order, until paid.

Copies of this Order shall be served upon the parties.

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