

U.S. DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN

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HEEREN BROS., INC. d/b/a RIDGEEKING  
APPLE PACKAGING AND STORAGE, a  
Michigan Corporation,

Docket No. 1:15-cv-00047

Plaintiff,

HON.

v.

**PLAINTIFF'S COMPLAINT**

CHERRY GROWERS, INC., a Michigan  
Corporation,

Defendant.

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Plaintiff Heeren Bros., Inc. states as follows in support its Complaint against Defendant Cherry Growers, Inc.:

**PARTIES**

1. Plaintiff Heeren Bros., Inc. doing business as Ridgeking Apple Packaging and Storage (“Heeren”) is a Michigan corporation with offices located at 1055 7 Mile Rd., N.W., Comstock Park, Michigan 49321.

2. Defendant Cherry Growers, Inc. (“Cherry Growers”) is a Michigan corporation with offices located at 6331 U.S. 31 South, Grawn, Michigan 49637.

**JURISDICTION AND VENUE**

3. This Court has jurisdiction over the federal questions raised in this action pursuant to 28 U.S.C. § 1331 and 7 U.S.C. § 499e. This Court has supplemental jurisdiction over the remaining claims pursuant to 28 U.S.C. § 1367.

4. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 in that the cause of action arose in this District.

**ALLEGATIONS OF COMMON FACTS**

5. Paragraphs 1 through 4 are re-alleged as if fully set forth herein.

6. Heeren is in the business of selling and shipping perishable agricultural commodities such as fruits and vegetables to purchasers such as Cherry Growers.

7. Heeren is, and was at all relevant times, licensed under the Perishable Agricultural Commodities Act, 7 U.S.C. § 499a, *et seq.* (“PACA”). **Exhibit 1.**

8. Cherry Growers, among other things, purchases perishable agricultural commodities, including apples, for processing into juice and related products.

9. At all relevant times, Cherry Growers held PACA License No. 19063955. **Exhibit 2.**

10. Consistent with its business, Heeren sold apples to Cherry Growers on account.

11. Heeren provides a bill of lading at the time of delivery, which is the ordinary and usual billing method used by the parties.

12. The following language is included on all of the bills of lading provided to Cherry Growers:

The perishable agricultural commodities listed on the invoice are sold subject to the statutory trust authorized by Section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499e(c)). The seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received. Buyer agrees that interest shall accrue on past due balances at 1.5% per month (18% per annum). Buyer agrees to pay all costs of collections including attorney fees.

13. Copies of the relevant bills of lading are attached hereto as **Exhibit 3.**

14. As of January 13, 2015, Cherry Growers is indebted to Heeren in the amount as follows:

Sales:	\$120,903.21
Interest:	\$28,163.68
Legal Fees (Estimate):	\$3,500.00
<b>TOTAL:</b>	<b>\$152,566.89</b>

15. Interest will continue to accrue at the daily rate of \$59.62, and Heeren will continue to incur legal fees and collection costs.

16. Cherry Growers' own statement confirms that the base sales amount of \$120,903.21 is due by it to Heeren. **Exhibit 4.**

17. The PACA requires Cherry Growers to make prompt payment to Heeren for all perishable agricultural commodities delivered. 7 U.S.C. § 499b(4).

18. Until payment is made, the PACA imposes a trust for the benefit of sellers, such as Heeren, on certain assets of the buyer of perishable agricultural commodities, such as Cherry Growers.

19. The PACA trust is imposed on all of Cherry Grower's inventories of food derived from perishable agricultural commodities, the commodities themselves, and any receivables or proceeds from the sale of such commodities or products. 7 U.S.C. § 499e(c).

20. The PACA provides that trust assets are preserved as a "nonsegregated floating trust." Commingling of trust assets with the buyer's other assets is contemplated such that any asset purchased or paid for by the buyer of perishable agricultural commodities while the trust is in existence is assumed to be purchased or paid for with trust assets and will, therefore, become part of the trust *res* available to satisfy the seller's claims.. 7 C.F.R. § 46.46(b).

21. Heeren, as a PACA licensee, has at all relevant times complied with the PACA notice requirements by supplying a statutorily compliant PACA notice on each of its bills of lading to Cherry Growers. 7 U.S.C. § 499(c)(4). See **Exhibit 3.**

22. Having provided the appropriate notices, Heeren remains a trust beneficiary until Cherry Growers pays Heeren in full. 7 C.F.R. § 46.46(c)(1).

23. Cherry Growers is required to maintain trust assets so as to be able to satisfy all of its outstanding obligations to Heeren. 7 C.F.R. § 46.46(d)(1).

24. Any act or omission inconsistent with maintaining trust assets in such a freely available manner, including dissipation of trust assets, is unlawful and in violation of the PACA. 7 U.S.C. § 499b; 7 C.F.R. § 46.46(d)(1).

25. On information and belief, Cherry Growers currently holds accounts receivable subject to Heeren's PACA trust claim.

26. On information and belief, Cherry Growers has deposited proceeds from the sale of perishable agricultural commodities supplied by Heeren into one or more of its bank accounts so that those accounts are also subject to Heeren's PACA trust claim.

27. On information and belief, Cherry Growers has purchased and/or paid for inventory, equipment, real property holdings and other assets during the time Heeren's trust rights existed thereby commingling those assets with Heeren's PACA trust proceeds.

28. Cherry Growers has indicated to Heeren that it is in financial distress.

29. Cherry Growers also informed Heeren that it intends to use proceeds subject to Heeren's PACA trust rights to satisfy non-trust beneficiary creditors.

**COUNT I – Violation of PACA Trust**

30. Paragraphs 1 through 29 are re-alleged as though fully set forth herein.

31. By failing to pay Heeren promptly, Cherry Growers has violated its PACA obligations.

32. Heeren has a valid PACA trust in all of Cherry Growers' bank accounts, real property, and other assets purchased or paid for during the existence of Heeren's PACA trust.

33. The value of Heeren's trust claim against Cherry Growers is at least \$152,566.89, and that amount will continue to increase due to interest, attorney's fees and collection costs.

34. Heeren's PACA trust claim in Cherry Growers' assets is superior to any of Cherry Growers' other non-PACA creditors' rights, whether such creditors are secured by a particular asset or not.

WHEREFORE, Heeren requests that this Court grant the following relief:

A. Determine that the following are subject to a PACA trust in favor of Heeren:

1. All perishable agricultural commodities supplied by Heeren to Cherry Growers that have not yet been sold and/or Cherry Growers' inventory of products made by commodities supplied by Heeren;

2. All proceeds from the sale by Cherry Growers of perishable agricultural commodities supplied by Heeren and/or of products made by commodities supplied by Heeren, and all accounts into which such proceeds have been deposited;

3. All Cherry Growers' account receivables generated by the sale of perishable agricultural commodities supplied by Heeren and/or by the sale of products made by commodities supplied by Heeren;

4. All real and personal property assets purchased or paid for by Cherry Growers during the existence of the PACA trust in favor of Heeren.

B. Enter a Judgment in favor of Heeren directing Cherry Growers to pay to Heeren the entire PACA trust amount then due, together with pre- and post-filing interest, costs and attorney's fees as permitted by contract and law; and

C. Grant such further or different legal or equitable relief this Court deems just.

**COUNT II – Breach of Contract**

35. Paragraphs 1 through 34 are re-alleged as if fully set forth herein.

36. Heeren sold perishable agricultural commodities to Cherry Growers on account.

37. Cherry Growers has failed to pay for those products and is indebted to Heeren in the amount of \$152,566.89 as of the date of this Complaint.

38. Cherry Growers' failure to pay constitutes a breach of the agreements between the parties.

WHEREFORE, Heeren requests that this Court enter a Judgment against Cherry Growers in the amount of \$152,566.89, plus pre- and post-filing interest, costs and attorney's fees as permitted by contract and law, together with such further or different legal or equitable relief this Court deems just.

Dated: January 19, 2015

RHOADES McKEE P.C.  
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By: /s/ David E. Bevins

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