

Breach of Contract
Christmas Trees
International Sale of Goods

Siskiyou Evergreens, Inc., Case No. 602-66975-fra11

3/29/2004 FRA

Unpublished

Claimant Manuel Barroso contracted with Debtor to supply Christmas trees to be shipped to Mexico in 1999. The contract specified Plantation Cut #1 or Better grade. The Debtor was initially unable to supply the trees and obtained four truck loads of trees for the Barroso contract from another grower, Blue Heron Trees, which were graded as #3's. After delivery, Barroso rejected the trees as nonconforming. Thereafter, trees shipped to supply the Barroso contract were obtained from the Debtor's farm. Three loads of those trees, when inspected at the border by the USDA, were found to be on average 40% nonconforming and were rejected. Barroso filed a proof of claim for \$478,604 representing prepayments made on rejected trees and for shipping costs as well as lost profit for other trees which were rejected by buyers with whom Barroso had contracted to sell trees.

Controlling law for the sale of goods between parties whose places of business are in different countries is governed by the Convention on Contracts for the International Sale of Goods, to which both Mexico and the U.S. are signatories. At trial, Claimant reduced his claim for damages to amounts related to the seven loads described above. The court rejected the Debtor's assertion that the Blue Heron trees were wrongfully rejected because Blue Heron has more stringent grading than the USDA standards, and its #3's were as good as USDA #1's. If that argument were found to be valid, no buyer or seller could rely on the grade assigned to a Christmas tree or any other agricultural product, which would render the grading system meaningless.

Damages were calculated as the amount paid for the seven loads of nonconforming trees, incidental shipping costs, lost profit, less amounts received in salvage, plus interest to the petition date. That amount was reduced by the balance, plus interest, due from Barroso for trees sold to him in 1998. His net unsecured claim was determined to be \$122,969.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case No.
) 02-66975-fra11
SISKIYOU EVERGREENS, INC.,)
) MEMORANDUM OPINION
) Debtor.)

Siskiyou Evergreens, Inc. is the Debtor-in-Possession in this Chapter 11 case. Manuel Barroso, a customer, filed a proof of claim for \$478,604 as damages for breach of the parties' sale agreement. Siskiyou objects to the claim, alleging that the claim is unfounded, and that it is entitled to a setoff for amounts owed to it.

The matter was tried over the week of November 3, 2003. After considering the evidence, testimony, and arguments of the parties, the Court concludes that: (1) Siskiyou failed to deliver trees conforming to the contract; (2) Barroso failed to honor an agreement to pay for trees previously purchased; and (3) after allowing for his remaining debt to Siskiyou, Barroso is entitled to an allowed claim in the sum of \$122,969.

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I. BACKGROUND

Siskiyou Evergreens is in the business of growing and selling Christmas trees from its plantation in Josephine County, Oregon. Mr. Barroso is a merchant in Mexico City whose business includes Christmas tree sales. There is a considerable market for Christmas trees in Mexico. Most trees are grown in the United States, exported to Mexico, and sold at the wholesale level at large urban markets, such as the *Central de Abastos* in Mexico City.

The *Central de Abastos* is, in the words of one witness, "a tough place." It is certainly imposing. It is the largest general marketplace in the country, where a variety of goods, including agricultural products, are sold.¹ The site consists of several hundred individual *bodegas*, or stalls, each said to be "about the size of a courtroom."

The market community is both closely knit and highly competitive. Products shipped in from wherever they are grown are received early each morning. Merchants fan out to determine what their competitors have to sell, and then set the day's prices accordingly. It is especially important to sell goods quickly: there is a continual flow of new produce (including, in season, Christmas trees), and unsold merchandise is soon replaced by fresher goods. Buyers will avoid the older goods, or require severe price concessions. One witness gave as an example jalapeños, which had to be sold within four hours of arrival. The market requires

¹*Abastos* is Spanish for "provisions", especially food. Oxford Spanish Dictionary, 2d Ed.

1 sophisticated planning, especially respecting timing of shipments.
2 If more product arrives than can be sold promptly, the merchant will
3 be forced to make drastic cuts in price, or be stuck with unsold,
4 and sometimes unsaleable, goods. While not so delicate as
5 jalapeños, Christmas trees are perishable, and need to be sold
6 within a day or so of arrival.

7 Christmas tree sales are conducted in November and December
8 in several *bodegas*, including those maintained by Mr. Barroso and
9 other sellers he was associated with. Sales from the central
10 marketplace were generally to retailers or resellers.

11 Siskiyou and Barroso first did business in 1998. The season
12 was, by his own account, a profitable one for Barroso.
13 Nevertheless, not all of the trees shipped by Siskiyou were paid
14 for.² The lack of payment created financial problems for Siskiyou,
15 and its principal lender eventually required it to limit future
16 shipments to cash sales. By this time the parties were well into
17 the 1999 season. On October 11, 1999 the parties made an agreement
18 providing for immediate payment of \$50,000, and fixing the balance
19 due for 1998 at \$47,076.17. In return, Siskiyou continued shipment
20 of trees under the 1999 contract. The \$50,000 payment was made by
21 check, which Siskiyou immediately deposited. The balance was paid
22 with a wire transfer on October 21. In January 2000, Siskiyou was
23 notified by its bank that the check had been dishonored. The record
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25 ²There was testimony to the effect that there were more urgent demands on Barroso's cash reserves at the time.
26 The reason for nonpayment, if unrelated to the contract, is not important.

1 does not reveal whether this was because of insufficient funds, or a
2 stop order.

3 At trial, Barroso testified that the wire transfer was
4 intended to replace the check, which he instructed Siskiyou to
5 return or destroy. The reason, he says, was that funds would become
6 available more quickly if delivered by wire. This does not explain
7 why the transfer was for less than the amount of the check. Barroso
8 also testified that the amount agreed to as the 1998 balance, and
9 set out in Ex. L, - \$47,076.17 - was the amount due before any
10 credit for the contemporaneous payment, and that the amount
11 eventually paid by wire was the entire balance. This does not
12 explain why a \$50,000 check was delivered to pay a \$47,000 balance.
13 In any event, Barroso's closing argument concedes that the \$50,000
14 represented by the dishonored check remains payable, at least as a
15 credit against the amount now claimed.

16 Buoyed by the success of the 1998 season, Barroso embarked on
17 a more ambitious program for 1999. His plan was to purchase
18 significantly more trees from Siskiyou and sell roughly half of
19 these trees at the *Central de Abastos* in Mexico City. He contracted
20 to sell the remaining trees to several private companies in Mexico.
21 The contract between Siskiyou and Barroso specified delivery of
22 plantation cut, USDA #1 or better trees. The grade refers to the
23 system for grading Christmas trees established by the U.S.
24 Department of Agriculture. 7 C.F.R. 51.3085 et seq. (1989).

1 Siskiyou was unable, at first, to deliver all of the trees
2 called for in the contract. To cover the contract, Siskiyou's owner
3 went to Blue Heron Trees, where he purchased for delivery to Barroso
4 four truckloads of trees graded as #3. After they were delivered,
5 the trees were rejected by Barroso as non-conforming. In addition,
6 about 40% of three loads subsequently sent from Siskiyou's
7 plantation were found by USDA inspectors at the border to be of a
8 lower grade than #1. At the same time, Barroso's contracts to sell
9 to the private companies in Mexico were all rejected by the buyers,
10 ostensibly because of the quality of the trees imported from
11 Siskiyou. The season ended badly for Barroso, with a number of
12 trees sold at extremely low prices, or not at all.

13 II. DISCUSSION

14 1. Controlling Law

15 Contracts for the sale of goods between parties whose places
16 of business are in different countries are governed by the
17 Convention on Contracts for the International Sale of Goods
18 ("Convention", or "CISG"). CISG Art. 1. Both Mexico and the United
19 States are signatories. Pertinent provisions of the convention
20 include:

21 Article 35

22 (1) The seller must deliver goods which are of the
23 quantity, quality and description required by the
24 contract and which are contained or packaged in the
manner required by the contract.

25 (2) Except where the parties have agreed otherwise,
26 the goods do not conform with the contract unless
they:

1 (a) are fit for the purposes for which goods of
2 the same description would ordinarily be used;

3 (b) are fit for any particular purpose expressly
4 or impliedly made known to the seller at the time
5 of the conclusion of the contract, except where
6 the circumstances show that the buyer did not
7 rely, or that it was unreasonable for him to
8 rely, on the seller's skill and judgment;

9 (c) possess the qualities of goods which the
10 seller has held out to the buyer as a sample or
11 model;

12 (d) are contained or packaged in the manner usual
13 for such goods, or, where there is no such
14 manner, in a manner adequate to preserve and
15 protect the goods.

16 (3) The seller is not liable under subparagraphs (a)
17 to (d) of the preceding paragraph for any lack of
18 conformity of the goods if at the time of the
19 conclusion of the contract the buyer knew or could not
20 have been unaware of such lack of conformity.

21 Article 36

22 (1) The seller is liable in accordance with the
23 contract and this Convention for any lack of
24 conformity which exists at the time when the risk
25 passes to the buyer, even though the lack of
26 conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of
conformity which occurs after the time indicated in
the preceding paragraph and which is due to a breach
of any of his obligations, including a breach of any
guarantee that for a period of time the goods will
remain fit for their ordinary purpose or for some
particular purpose or will retain specified qualities
or characteristics.

Article 38

(1) The buyer must examine the goods, or cause them to
be examined, within as short a period as is
practicable in the circumstances.

1 (2) If the contract involves carriage of the goods,
2 examination may be deferred until after the goods have
arrived at their destination.

3 (3) If the goods are redirected in transit or
4 redispached by the buyer without a reasonable
5 opportunity for examination by him and at the time of
6 the conclusion of the contract the seller knew or
ought to have known of the possibility of such
7 redirection or redispach, examination may be deferred
until after the goods have arrived at the new
8 destination.

9 Article 39

10 (1) The buyer loses the right to rely on a lack of
11 conformity of the goods if he does not give notice to
12 the seller specifying the nature of the lack of
13 conformity within a reasonable time after he has
14 discovered it or ought to have discovered it.

15 (2) In any event, the buyer loses the right to rely on
16 a lack of conformity of the goods if he does not give
17 the seller notice thereof at the latest within a
18 period of two years from the date on which the goods
19 were actually handed over to the buyer, unless this
20 time-limit is inconsistent with a contractual period
21 of guarantee.

22 Article 40

23 The seller is not entitled to rely on the provision of
24 articles 38 and 39 if the lack of conformity relates
25 to facts of which he knew or could not have been
26 unaware and which he did not disclose to the buyer.

Article 50

If the goods do not conform with the contract and
whether or not the price has already been paid, the
buyer may reduce the price in the same proportion as
the value that the goods actually delivered had at the
time of the delivery bears to the value that
conforming goods would have had at that time.
However, if the seller remedies any failure to perform
his obligations in accordance with article 37 or
article 48 or if the buyer refuses to accept
performance by the seller in accordance with those
articles, the buyer may not reduce the price.

1 Article 51

2 (1) If the seller delivers only a part of the goods or
3 if only a part of the goods delivered is in conformity
4 with the contract, articles 46 to 50 apply in respect
of the part which is missing or which does not
conform.

5 (2) The buyer may declare the contract avoided in its
6 entirety only if the failure to make delivery
7 completely or in conformity with the contract amounts
to a fundamental breach of contract.

8 2. 1998 Season

9 On October 11, 1991 the parties agreed that the balance owed
10 by Barroso to Siskiyou on account of the 1988 season was \$97,076.17
11 - or, more precisely, \$47,076.17 after application of the \$50,000
12 check tendered that day. Under Oregon law an account is stated when
13 the parties agree that a certain amount is owing and will be paid,
14 based on the previous monetary transactions of the parties. See
15 Hulse v. Ocwen Federal Bank, FSB, 195 F. Supp. 1188 (D. Or. 2002).
16 The October 1999 agreement fixes the balance due on the 1998 season,
17 and is binding on the parties. The sum of \$98,221 was paid,
18 \$50,000 by check and \$48,221 by wire.³ The check was subsequently
19 dishonored. The balance still due for 1998 is \$48,885, plus
20 interest at the contract rate of 18% per annum from October 21,
21 1999, the date of the wire transfer. Claimants claim should be
22 reduced by the principal balance plus interest to September 12, 2002
23 the date the petition in bankruptcy was filed.

24 3. 1999 Season: Blue Heron Trees

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26 ³ It is not clear why the amount transferred was somewhat larger than the amount agreed to.

1 Four truckloads of trees Blue Heron Farms were delivered to
2 Barroso at Siskiyou's directions. Since they were not graded "USDA
3 #1 or better" they did not conform to the contract.

4 The U. S. Department of Agriculture's Agricultural Marketing
5 Service establishes uniform standards for evaluating the quality of
6 agricultural goods, including Christmas trees. Trees are assigned
7 grades of Premium, #1 and #2. Trees below #2 are variously referred
8 to as #3 or "culls." The grades are based on an elaborate system
9 taking into account a number of characteristics, including absence
10 of gaps, fullness of foliage, shape, overall health, and freshness.
11 See U. S. Standards for Grading Christmas Trees, 7 C.F.R. 51.3086 et
12 seq. (1989).

13 The mission of the USDA's marketing service, and the purpose
14 of the grading system, is to facilitate commerce by providing buyers
15 and sellers with a uniform standard used for identifying the quality
16 of trees bought and sold. Use of the standards assures the parties
17 to a contract, and any subsequent buyers, of the nature and quality
18 of the goods, without the need for elaborate or expensive
19 reinspection. A buyer contracting for a particular grade is
20 entitled to receive trees conforming to the standard defined for
21 such grade by the USDA, and nothing less. Siskiyou argues that Blue
22 Heron's standards are more rigorous than those of most growers, and
23 that their #3 trees are, in fact, as good or better than #1 trees
24 grown and sold by others. The evidence supporting this contention
25 is weak. Siskiyou points to Blue Heron's reputation for high
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1 quality (which is undisputed) and to two witnesses' evaluation of
2 photographs of two dozen trees grown (actually, still growing) at
3 the same plantation from which the trees shipped to Baroso were
4 harvested. As both witnesses observed, it is not possible to grade
5 a tree from a photograph, since grading necessarily requires
6 evaluation of the entire circumference. Even with that proviso, the
7 witnesses said that a considerable number of the trees they were
8 shown were of a lower grade than USDA #1.

9 The Congress and the USDA have established a uniform and
10 objective standard for grading trees, and the contract called for
11 trees conforming to that standard. The buyer was entitled to
12 delivery of trees graded as conforming to that standard,
13 particularly where he intended to sell them to others with the
14 representation that they conform. That some of the goods in
15 question may *in fact* be of a higher quality than the grade assigned
16 is irrelevant. Without the assurance provided by the desired grade,
17 the goods will not move through the marketplace, at least not
18 without reinspection and regrading. The result is that the buyer is
19 deprived of what he has bargained for, which are goods readily
20 saleable as having the prescribed quality. The subjective rule
21 contemplated by Siskiyou would undermine the grading system by
22 holding that a tree's grade is determined not in light of objective
23 standards, but the practices of its grower. This would render the
24 grading system meaningless. Moreover, an overseas buyer cannot be
25 assured of his ability to sell the lower-grade trees to his
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1 customers by relying on the reputation or practices of a remote
2 grower.

3 In short, delivery of trees assigned a lower grade than that
4 contracted for constituted a material breach of the agreement,
5 notwithstanding the actual quality of the trees.

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7 4. 1999: Siskiyou Trees

8 Inspection of three loads of trees at the border by the USDA
9 revealed that roughly 40% of the loads were not #1 or better. For
10 the reasons discussed in the preceding section, these trees did not
11 conform to the contract, and their delivery constituted a material
12 breach of the agreement.

13 5. Notice to Seller of Nonconformity

14 Siskiyou points to Art. 39 of the Convention, claiming that
15 Barroso never notified it of the nonconformity, and is therefore not
16 entitled to damages. The argument fails with respect to the Blue
17 Heron trees because Art. 40 of the Convention relieves the buyer of
18 a duty to notify when the seller knew, or should have known, of the
19 nonconformity. The evidence is unequivocal that Siskiyou knew the
20 Blue Heron trees were #3 grade.⁴

21 As for the remaining trees, the evidence shows that Barroso
22 made several complaints regarding the number and quality of the
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24 ⁴In fact, testimony revealed that Siskiyou's owner went the Blue Heron plantation *looking for #3 trees*. Blue
25 Heron's prices for #3s were less than the amount Siskiyou quoted to Barroso for #1 trees; its #1 trees were more costly.
26 Covering the order with Blue Heron #3 trees increased Siskiyou's potential profit; using #1 trees would have diminished
it.

1 trees. Siskiyou does not deny that there were a number of
2 complaints, but believed they were limited in scope to minor
3 shortages in the number of trees delivered. In any case, Siskiyou
4 maintains that the notice was insufficiently detailed to satisfy the
5 convention.

6 Under the Uniform Commercial Code, notice of nonconformity is
7 required to afford the seller an opportunity to correct the breach.
8 No particular form is required, and notice is sufficient if it is
9 enough to alert the seller to the fact that there is a problem with
10 the contract. See UCC §§ 2-602 and 1-201(26). UCC § 2-605,
11 however, provides that, where a buyer does not particularize defects
12 upon which a rejection is premised, he may not rely on those defects
13 to justify rejection "where the seller could have cured it if stated
14 seasonably." European cases construing the convention have required
15 the notice to describe the claimed non-conformity with enough detail
16 to allow the seller to identify and correct the problem without
17 further investigation. A more practical interpretation would hold
18 that the notice must given in time, and in sufficient detail, to
19 allow the seller to cure the defect in a manner allowing the buyer
20 the benefit of his bargain.

21 The Convention relieves the buyer of the duty to give notice
22 if the seller "could not have been unaware" of the nonconformity.
23 CISG Art. 40. Arguably, this language sets a lower standard of
24 awareness than the phrase "his reason to know" usually found in
25 American law. See UCC § 1-201(25)(c). However, the Debtor is
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1 chargeable with an understanding of the uniform standards for
2 Christmas trees established by the USDA, and could not have been
3 unaware that the quality of nearly half the trees its own employees
4 harvested and shipped failed to meet those standards.

5 Another factor in the equation is whether there was time to
6 cure. Here, the selling season in Mexico had run its course by the
7 time the defects were discovered, and little or no time remained to
8 remedy the nonconformity by delivery of new trees. The purpose of
9 the notice provision could not have been served in any event.

10 The evidence is sufficient to establish that Barroso called
11 Siskiyou many times to complain about the quality of the trees. It
12 is not necessary, as Siskiyou suggests, that the notice be in
13 writing, or any particular form. The seller could not have, as the
14 Convention put it, been unaware of the nature of the nonconformity,
15 both as to the grade of the Blue Heron trees or the grade or quality
16 of the Siskiyou trees. Finally, notice, especially respecting the
17 last shipments, was futile in any case, given the lateness of the
18 season. It follows that Siskiyou cannot successfully defend on the
19 basis of lack of notice.

20 6. Damages

21 Barroso is entitled to recover the amount paid for each
22 nonconforming load. CISG Art. 50. This means the entire amount
23 paid for the nonconforming loads. In addition, he is entitled to
24 recover money expended for shipping and handling.

1 A buyer is also entitled to recover an amount equal to the
2 profit he would have made had the goods conformed to the contract,
3 to the extent such losses are reasonably foreseeable. CISG Art. 74.
4 At trial, Barroso conceded that the rejection of the several
5 contracts he had with customers in Mexico was wrongful. It follows
6 that the events could not have been foreseen by the seller. He does
7 not, therefore, seek damages relating to these contracts.⁵ In
8 addition, Claimant's damages are reduced by the amount received for
9 trees actually sold.

10 Claimant seeks over \$21,000 in attorney's fees incurred pre-
11 petition. The original invoice provides that, in the event of a
12 breach, buyer shall pay seller's reasonable expenses, including
13 attorney's fees. Oregon law makes such clauses reciprocal. ORS
14 20.096(1).

15 Claimant's original claim was greatly inflated, to be reduced
16 to realistic levels only at the eve of trial. Testimony at trial,
17 including discovery, reveals that significant time and effort - and
18 legal fees - were expended on both sides dealing with the abandoned
19 claims. Moreover, claimant himself was in breach of the 1998
20 contract, having failed to make good on the \$50,000 check.

21 Under the circumstances, the claim for attorneys fees is
22 unreasonable, and none will be awarded here.

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25 ⁵These damages might have been considerable, since Barroso had contracted to sell the trees to the companies
26 for a huge profit. This might have had something to do with why the companies refused to honor the contracts, as well
as their claims that the trees were of poor quality.

1 Based on this analysis, the claim may be calculated as
2 follows:

3	Blue Heron trees:	\$64,849
4	Siskiyou Trees:	\$42,444
5	Lost profit:	\$52,176
6	Less: Credit for Salvage	(\$26,620)
7	Subtotal:	\$132,849
8	Interest at contract rate (18%) from 1/1/2000 to 9/12/02[985 days]	\$64,540
9	Total due to Barroso for 1999:	<u>\$197,389</u>
10	less: amount due for 1998	(\$74,420) (\$48,885 principal 11 plus \$25,534 interest @ 18% 12 from 10/21/99 to 9/12/02-1057 days)
13	Total allowed claim:	<u>\$122,969</u>

14 This memorandum opinion constitutes the Court's findings of
15 fact and conclusions of law. An order will be entered allowing
16 Barosso a general unsecured claim in the amount of \$122,969.

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FRANK R. ALLEY, III
Bankruptcy Judge