

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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ECLIPSE BERRY FARMS, LLC,

Plaintiff,

- against -

Case No. _____

PROGRESO PRODUCE LIMITED I, L.P.
d/b/a PROGRESO PRODUCE COMPANY
and CURTIS HAROLD DEBERRY,

Defendants.
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COMPLAINT OF PLAINTIFF ECLIPSE BERRY FARMS, LLC

Plaintiff, Eclipse Berry Farms, LLC (“Plaintiff” or “Eclipse”), by its attorneys, McCarron & Diess and Sullivan Hazeltine Allinson LLC, as and for its complaint against defendants Progreso Produce Limited I, L.P. d/b/a Progreso Produce Company (“Progreso”) and Curtis Harold DeBerry (“DeBerry”) (collectively, “Defendants”), alleges as follows:

JURISDICTION AND VENUE

1. Jurisdiction is based on the diversity of the parties pursuant to 28 U.S.C. § 1332(a)(1). The matter in controversy exceeds, exclusive of interest and costs, the sum specified by 28 U.S.C. § 1332(a).
2. This Court also has subject matter jurisdiction pursuant to Section 5(b) of the Perishable Agricultural Commodities Act, 7 U.S.C. § 499e(b) (hereafter, “PACA”) and 28 U.S.C. § 1331.
3. This Court has personal jurisdiction over the Defendants pursuant to written agreement between the parties.
4. Venue in this district is based on 28 U.S.C. § 1391(b)(2) because a substantial part

of the events or omissions giving rise to the claim occurred in this district and pursuant to written agreement between the parties.

PARTIES

5. Plaintiff is a California limited liability company with its principal place of business in Los Angeles, California and was at all relevant times engaged in the business of buying and selling wholesale quantities of produce in interstate commerce and subject to and licensed under PACA.

6. Defendant Progreso is a Texas limited partnership with its principal place of business in Boerne, Texas and was at all relevant times engaged in the business of buying and selling wholesale quantities of produce in interstate commerce and subject to and licensed under PACA.

7. Defendant DeBerry is and was at all relevant times an officer, owner and manager of Progreso and was in a position to control the operations of Progreso.

GENERAL ALLEGATIONS

8. On or about August 31, 2011, Eclipse and Progreso entered into an operating agreement for the purpose of growing and selling strawberries. A copy of the operating agreement (the "Agreement") entered into between Eclipse and Progreso is annexed hereto as Exhibit A.

9. Eclipse and Progreso formed E-P Strawberry Farms LLC ("E-P"), a Delaware limited liability company, for the purpose of carrying out the terms of the Agreement. Eclipse and Progreso were the sole members of E-P.

10. Under the Agreement, Eclipse was to act as the Marketing Member of E-P, and as such was responsible for acting as the agent for the sale of the strawberries, conducting the marketing activities necessary for the sale of the strawberries, cooling and shipping the strawberries,

as necessary, and providing quality control and other expertise to assist the Farming Member in its growing and harvesting responsibilities.

11. Under the Agreement, Progreso was to act as the Farming Member of E-P, and as such was responsible for the growing, harvesting and packing of the strawberries, and, as necessary, the cooling and shipping of the strawberries.

12. As a material inducement for Eclipse to enter into the Agreement, Progreso warranted and represented that it had leased 500 hectares (approximately 1,235 acres) under 42 separate leases from 42 strawberry growers in Zamora, Mexico (the "Leases") who would grow the strawberries under the supervision of Progreso.

13. Each of the Leases ran from May 1, 2011, four months prior to the execution of the Agreement. Following execution of the Agreement, Progreso assigned the Leases to E-P. A copy of the assignment is made a part of the Agreement.

14. During negotiations leading up to the execution of the Agreement, DeBerry gave Eclipse copies of the Leases, all of which bear DeBerry's signature. DeBerry offered the Leases to Progreso as proof that he had secured sufficient land on which to grow approximately 1,800,000 trays of strawberries.

15. During negotiations, DeBerry also gave Eclipse invoices for strawberry plants (the "Plants") which DeBerry indicated would be supplied to the 42 growers who were to grow the strawberries on the land demised in the Leases. Each of the invoices bears a date prior to August 31, 2011.

16. As a material inducement for Eclipse to enter into the Agreement, Progreso, through DeBerry, warranted and represented that it had advanced \$966,000.00 for the land represented by the Leases and an additional \$1,764,520.00 for the Plants represented by the invoices. The

representations were incorporated into the Agreement as part of the Operating Budget.

17. Based on Progreso's warranties and representations concerning the Leases, the Plants and Progreso's advances therefor, Eclipse entered into the Agreement.

18. Pursuant to its obligations as Marketing Member under the Agreement, Eclipse delivered to Progreso, as Farming Member, the sum of \$8,112,155.00 for growing, production, packing and freight costs as well as for Preferred Distributions under the Agreement.

19. In November, 2011, at the start of the strawberry harvesting season in Zamora, Mexico, Eclipse sent its Quality Control personnel to Zamora to oversee the quality and condition of the strawberries to be shipped to Eclipse by Progreso.

20. While in Zamora, Eclipse's Quality Control personnel learned that Progreso had no leases with strawberry growers and no contractual right to purchase strawberries from any growers. Instead, Eclipse learned that Progreso's agents were purchasing strawberries for E-P from any growers that would accept as little as 55 pesos (approximately \$4.42) per tray, a very low price compared to what other dealers were paying.

21. Based on the reports returned by Eclipse's Quality Control personnel, Eclipse hired an independent auditor to investigate the legitimacy of the Leases, the invoices for the Plants and Progreso's purported advances therefor. The auditor discovered that the Leases and the invoices for the Plants were fraudulent.

22. Rather than procure the Leases or the Plants, Progreso used the \$8,112,155.00 advanced by Eclipse to purchase only 457,459 trays of strawberries at approximately \$5.00 per tray. Upon information and belief, Progreso kept the balance of \$5,824,860.00 for itself.

23. During the term of the Agreement, Progreso delivered only 457,459 trays of strawberries to E-P, approximately 25% of the 1,800,000 trays which Progreso and DeBerry represented would be delivered to Eclipse.

AS AND FOR A FIRST CAUSE OF ACTION AGAINST PROGRESO
(Breach of Contract)

24. Plaintiff incorporates each and every allegation set forth in paragraphs 1 through 23 above as if fully set forth herein.

25. The Agreement constitutes a valid and enforceable agreement between Eclipse and Progreso.

26. Progreso breached the Agreement by failing to grow, harvest, pack, cool and ship strawberries as contemplated by the Agreement.

27. Progreso breached the Agreement by failing to secure the Leases as contemplated by the Agreement.

28. Progreso breached the Agreement by failing to use all commercially reasonable efforts consistent with the goal of growing marketable strawberries and otherwise conducting itself in the best interest of E-P.

29. Progreso breached the Agreement by failing to carry out the duties of the Farming Member as specified in the Agreement.

30. Eclipse has performed all of the duties, obligations and conditions precedent on its part to be performed under the Agreement.

31. As a direct and proximate result of Progreso's breach of contract, Eclipse received only 457,459 trays of strawberries out of the 1,800,000 trays which Progreso and DeBerry represented would be delivered to Eclipse.

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