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Arbitration Decision
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February 15, 2017

CASE NUMBER 2739

PLAINTIFF: **VALERO MARKETING AND SUPPLY COMPANY**
SAN ANTONIO, TX

DEFENDANT: **SUPERIOR JALI INTERNATIONAL, INC.**
MONTEREY PARK, CA

STATEMENT OF THE CASE

This arbitration case involved the sale of 15,000 short tons of Dried Distiller Grains with Solubles (DDGS) from Valero Marketing and Supply Company (Valero) to Superior Jali International, Inc. (Superior Jali). The DDGS were purchased under three separate contracts. Each of the three contracts provided for 5,000 short tons of DDGS at $260 per ton for delivery to Oakland, CA. Contract 40422956 provided for delivery to occur in January 2014; contract 40422958 provided for delivery in February 2014; and contract 40422962 provided for delivery in June 2014.

No deliveries occurred under the original terms of the first two contracts for shipment in January and February 2014. In March, the parties mutually agreed to roll the delivery periods for those two contracts to July and August 2014, respectively. This roll in March of the 10,000 tons of DDGS under the first two contracts was memorialized and amendments to the contracts were issued. Based upon a subsequent email exchange between the parties, the arbitrators determined these first two contracts (contracts 40422956 and 40422958) were later rolled to September, and the third contract (contract 40422962) was rolled to August.

Valero claims that after this sale of the 15,000 tons of DDGS and the subsequent agreements to changes in the shipment periods, Superior Jali failed to tender shipping instructions or take delivery under the contracts. According to Valero, it consequently cancelled the contracts and assessed damages pursuant to NGFA Feed Trade Rule 19(B)(3). Superior Jali claims its performance under the contracts was excused because of restrictions subsequently imposed by the Chinese government that followed the detection in shipments of DDGS from the U.S. of the biotechnology trait, MIR 162, which had not been approved by the Chinese government.

THE DECISION

The evidence indicates that both parties to the trade were aware that the DDGS were destined for resale in China through a U.S. west coast transloader. It also appears that both parties were aware of the issues surrounding the Chinese government's restrictions on DDGS that may contain MIR 162, and the potential impact of those restrictions on the shipments in this dispute. However, at no time did Superior

Jali seek – nor did Valero offer – any guarantees, assurances or other conditions related to the presence of MIR 162 in the DDGS to be shipped under these contracts.

The parties do not appear to dispute the specific terms of the contracts that apply in this case. Nor does there appear to be a question that Superior Jali ultimately failed to accept delivery of the DDGS under the contracts. Superior Jali raises several arguments in its defense for failure to perform under the contracts. Namely, Superior Jali argues that the Chinese government's changing of the rules for importing DDGS (1) "substantially frustrated" the "purpose" of the contracts; (2) rendered Superior Jali's performance under the contracts "commercially impracticable;" and (3) voided the contracts under "force of statute."

The arbitrators noted that the terms of the contracts provided for the laws of the state of South Dakota to apply. The arbitrators closely considered the extensive arguments and documentation presented by both parties with respect to Superior Jali's asserted defenses. The arbitrators determined that Superior Jali failed to meet the burden required when raising these defenses in this context.

The arbitrators concluded that the contracts were in conformity with NGFA Feed Trade Rule 1 and clearly defined the relevant points of this trade between the parties. The performance required by both parties under the express terms of the contracts was to take place in the U.S. There was no indication in the contract terms that the agreements were dependent upon policies of the Chinese government. Any other understandings or considerations that either party conceivably had an interest in incorporating as a component of the trade (such as the availability of the Chinese market) should have been written into the contracts. The arbitrators further determined that despite its clear contractual commitments, Superior Jali failed to sufficiently mitigate damages under the contracts. Superior Jali failed to adequately work toward alternatives, such as resale to other destinations, storage and other potential solutions after the issues arose with the Chinese market.

The arbitrators determined that the change in policy by the Chinese government did not negate the express purpose of these contracts or render them void. Superior Jali also failed to take appropriate steps to attempt to perform under the contracts or to establish that the contracts had become "commercially impracticable." The risks behind exporting the product rested with Superior Jali. Superior Jali was accountable for management and control of those risks. The presence of risks related to MIR162 were well known to both parties to the trade. The risk behind execution of the contracts was assumed by Superior Jali.

Therefore, the arbitrators rejected Superior Jali's defenses for nonperformance of the contracts and ruled in favor of Valero.

The arbitrators then turned to the question of damages to which Valero was entitled. The arbitrators noted that Superior Jali did not present any argument or evidence related to the amount of damages to which Valero would be potentially entitled if an award were issued in its favor. Thus, the arbitrators had only Valero's calculations of damages to consider.

The arbitrators determined that Valero correctly applied dates of cancellation for the contracts in its assessment of damages pursuant to NGFA Feed Trade Rule 19(B)(3), except in one respect. Based upon NGFA Feed Trade Rule 5 ("An exchange of communications between the parties by electronic means constitutes acknowledgement of that means as a viable method of contractual communication"), the arbitrators concluded that an email exchange between the parties had occurred that reflected changes to the shipment periods. Based upon this email exchange in July, the arbitrators determined the first two contracts (contracts 40422956 and 40422958) were again rolled to September, and the third contract (contract 40422962), which originally provided for June delivery, was rolled to August. These changes to the shipment periods conflict with Valero's request for damages and result in a reduction in the amount of damages to which Valero is entitled (as depicted in the charts below).

Also, the arbitrators considered that Valero's request for damages was based upon a claimed total quantity of 15,105 short tons (or 5,035 tons per contract) of DDGS. The arbitrators noted that the exact terms of the contracts stated as follows:

> ***QUANTITY:***
> *5,000.00 Short Ton*
> *SHIP 53 CARS – CARS TO GOVERN.*

Valero argued that it ships DDGS in 53-car shipments, with each car capable of carrying 95 tons of DDGS. Valero also argued that the terms, "*CARS TO GOVERN*," meant the number of railcars would govern the ultimate quantity called for under the contracts, which in these cases amounted to 53 cars and 95 tons per car or 5,035 tons per contract. The arbitrators recognize that had the railcars actually been shipped and accepted, the actual tonnage shipped would have been the determining factor in execution of the contracts. Some railcars would have potentially fallen short of or even exceeded the 95-ton estimate offered by Valero. However, in this case, the arbitrators relied upon the exact quantity figure of 5,000 tons provided in the contract as the appropriate measure for purposes of cancelling the contracts. This is in conformity with industry standards. Had the parties intended a different figure for these purposes, they should have provided it in the contracts.

The damages claimed by Valero were as follows:

Contract Number	Quantity (Tons)	Cancellation Date	Contract Price (Per Ton)	Market Price at Cancellation	Equity Claimed
40422962	5,035	8/6/14	$260	$150	$553,850
40422956	5,035	8/6/14	$260	$150	$553,850
40422958	5,035	9/2/14	$260	$181	$397,765
Totals:	15,105				$1,505,465

The damages awarded by the arbitrators are as follows:

Contract Number	Quantity (Tons)	Cancellation Date	Contract Price (Per Ton)	Market Price at Cancellation	Equity Awarded
40422962	5,000	8/6/14	$260	$150	$550,000
40422956	5,000	9/2/14	$260	$181	$395,000
40422958	5,000	9/2/14	$260	$181	$395,000
Totals:	15,000				$1,340,000

The arbitrators also awarded interest to Valero in this case given Superior Jali's failure to adequately attempt to mitigate damages under these contracts and work toward alternative solutions after the issues developed with the Chinese market.

THE AWARD

Therefore, the arbitrators awarded $1,340,000 to Valero Marketing and Supply Company, plus interest at the rate of 3.25% per annum (pursuant to the NGFA Arbitration Rules) from October 13, 2014 (the date the case was filed) until the judgment is paid in full.

Decided: December 2, 2016

SUBMITTED WITH THE UNANIMOUS CONSENT OF THE ARBITRATORS, WHOSE NAMES APPEAR BELOW:

Mike Meyers, *Chair*
Director of Wheat By-Products
APEX LLC
Hamburg, NY

Edmund Hall
President
Harris-Crane Inc.
Charlotte, NC

John Augspurger
Director of Organizational Development
Livestock Nutrition Center
Overland Park, KS