

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA**

NOMACORC, LLC

Plaintiff,

v.

PACKAGING CORPORATION OF  
AMERICA

Defendant.

**COMPLAINT**

Plaintiff Nomacorc, LLC (“Nomacorc”), by and through undersigned counsel, complaining of the Defendant, alleges and says:

**PARTIES, JURISDICTION, AND VENUE**

1. Plaintiff Nomacorc, LLC is a limited liability company organized and existing under the laws of the State of North Carolina with its principal place of business in Zebulon, North Carolina.
2. Defendant Packaging Corporation of America (“PCA”) is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Lake Forest, Illinois.
3. This Court has personal jurisdiction over PCA pursuant to N.C. Gen. Stat. § 1-75.4, inasmuch as PCA is engaged in substantial activity within the State of North Carolina.
4. The amount in controversy in this action exceeds \$75,000, exclusive of interest and costs.

5. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332.

6. Venue is proper in this district pursuant to 28 U.S.C. § 1391.

### **FACTS**

#### **Nomacorc's Business**

7. Nomacorc manufactures top-quality co-extruded synthetic closures (i.e. corks, referred to herein as "corks") for the wine industry.

8. Nomacorc's headquarters and US manufacturing operations are based in Zebulon, North Carolina.

9. The materials and processes used to manufacture Nomacorc's corks result in a low density, low aroma product to avoid contamination of products bottled using the corks.

10. Corks that have absorbed odors pose a quality risk to bottled wine, in that odors can be transmitted from corks to the wine. Even where it is proven that a particular odor will not transmit to the wine, corks that have an unusual smell may be justifiably rejected by Nomacorc customers who refuse to take the risk of contaminating their wines.

11. Because of the quality risks posed by sensory issues, Nomacorc screens all corks for sensory problems, including off odors, prior to marketing them to customers.

#### **Nomacorc's Relationship with Defendant PCA**

12. PCA is a leading manufacturer of corrugated cardboard and other packaging products.

13. Nomacorc purchased corrugated cardboard boxes from PCA between 2005 and late 2008.

14. PCA is a “merchant” with respect to its sales of cardboard boxes and packaging materials, as that term is defined in Article 2 of the Uniform Commercial Code, N.C. Gen. Stat. § 25-2-101 *et seq.*

15. PCA’s sale of boxes to Nomacorc constituted one or more contracts for the sale of goods under Article 2 of the Uniform Commercial Code.

16. Nomacorc purchased approximately twelve different types of boxes from PCA and used them for a variety of purposes, including (a) shipping finished goods and customer samples worldwide, (b) shipping unfinished corcs to be printed and finished at Nomacorc facilities in Belgium and China, and (c) shipping in collapsed form to Belgium and China for use shipping corcs from those facilities to customers.

17. At issue here is one particular type of PCA box, Item No. CA0004346, which Nomacorc purchased from PCA for shipping unfinished corcs to the facility of its sister company, Nomacorc SA, in Thimister-Clermont, Belgium (the “WIP Boxes”).

18. Nomacorc packs each WIP Box with approximately 27,000 unfinished corcs in a single plastic bag and ships them to Nomacorc SA. Nomacorc SA finishes the corcs for sale and distribution to winemakers throughout Europe.

19. PCA was well aware of the unique nature of Nomacorc’s product, the sensitivity of the product to odors, and that contamination of the product by exposure to odors in shipping could render the product unusable. These concerns had been addressed with PCA on several occasions. By way of example, in February 2008, representatives of Nomacorc had evaluated a new warehouse for storage of PCA cardboard and rejected the location because it was not sensory neutral and thus posed a quality risk to Nomacorc’s corcs.

### **Problems Arise in the WIP Boxes**

20. During the first week of June 2008, employees of Nomacorc SA in Belgium detected a strong, unpleasant odor in a shipping container of unfinished corcs received from Nomacorc in Zebulon. The odor was described as “spicy” or “like cabbage,” and is now known to have been caused by paperboard used by PCA in WIP Boxes that PCA sold to Nomacorc.

21. Such an odor had not previously been detected in corcs received by Nomacorc SA in Belgium.

22. Due to the strong, unpleasant odor associated with the corcs, employees of Nomacorc and Nomacorc SA determined that it was not possible to use the contaminated corcs as wine enclosures.

23. Nomacorc immediately undertook an extensive investigation into the potential causes of the odor contamination.

24. Because the source of the odor was not readily apparent upon initial inspection of the source packages, Nomacorc’s investigation was necessarily wide in scope at first, later narrowing to the WIP Boxes as the root cause of the contamination. Nomacorc investigated its raw materials, its production processes, as well as every product and point in the entire shipping process.

### **Nomacorc Investigates the Cause of the Odor Contamination**

25. Nomacorc contacted each of its raw materials suppliers and other vendors to try to determine the cause of the odor contamination. Anne Armen, a Nomacorc employee who dealt with PCA regularly, contacted PCA in mid-June to explain the odor problem and inquire as to whether any of their processes or materials had changed or may

be the source of the problem. As a result of this conversation, PCA sent a series of letters to Nomacorc, generally assuring Nomacorc that its boxes were safe for use in the context of shipping products that have contact with food. Meanwhile, more corcs were contaminated with the odor from the PCA boxes.

26. Nomacorc's investigation of the cause of the odor continued from June to September 2008. Samples were sent to external labs, which determined that the odor was caused by a sulfur compound, but precise identification of the compound was not possible through conventional analytical methods due to the low odor threshold of sulfur compounds. While many analytical methods exist to identify chemicals that are present at parts per million levels, it is much more difficult to measure chemicals at parts per trillion levels. Sulfur compounds can be smelled at such low levels, but specialized methods and equipment are required to detect and identify such chemicals.

27. Also, identifying the root cause of the odor was delayed by its on-again, off-again nature. Over the course of the summer, the odor was sometimes detected in 100% of unfinished corcs sent from Zebulon to Belgium, but other times the odor was less prevalent. There was no pattern of the odor's presence or absence related to production lines used, raw materials used, or shipping patterns.

28. Experiments conducted on raw materials and shipping practices demonstrated that the cause of the odor was not present in the corcs themselves, but was acquired at some point during shipping.

29. Because the onset of the odor problem coincided with a change in the ocean shipping company Nomacorc had used to ship the corcs to Belgium, Nomacorc switched to another ocean shipping company at an increased cost of \$1,000 per container.

30. However, corcs arriving in Belgium after the change in ocean shipping companies were found to be contaminated with the odor.

31. Nomacorc employed a variety of methods to research the source of the odor in the shipping process. Among the various methods Nomacorc used were:

- (a) Shipping corcs in barrier bags;
- (b) Shipping corcs in different types of boxes (including PCA boxes normally used for finished corcs);
- (c) Using container liners to protect the contents of an entire shipping container from contamination;
- (d) Shipping corcs in plastic totes rather than cardboard boxes;
- (e) Using temperature and humidity sensors in containers;
- (f) Heating corcs prior to shipment (in an effort to preemptively remediate odor issues);
- (g) Using double plastic liners to protect corcs within boxes; and
- (h) Incubating fresh corcs with suspect cardboard with added heat and humidity (in an effort to attempt to induce odor appearance).

32. The results of these and other experiments demonstrated that the odor issues were not caused by the corcs themselves and consistently pointed to the WIP Boxes as the common factor in contaminated corcs.

33. As other possible causes of the contamination were eliminated, the WIP Boxes used to transport the corcs became a focus of the investigation.

34. On or about August 14, 2008, a meeting between PCA and Nomacorc was held. Attending on behalf of PCA were Mark Chapman, Tim Gregg, Ben Frank, and

Russ Norment. Attending on behalf of Nomacorc were Anne Armen, Gary Strickland, Stuart Nicholson, and Sara Morrison-Rowe. Mr. Chapman typically met with Ms. Armen about three times a month to discuss routine business between PCA and Nomacorc. This meeting, however, was scheduled specifically to discuss the odor issue. The PCA attendees had been suggested by Mr. Chapman as appropriate to address the odor issue. In particular, Mr. Frank was involved as a technical resource on the papermaking process.

35. During this meeting, Mr. Frank acknowledged that some of the paperboard medium used to make PCA's boxes had an "eggy" aroma. Other PCA participants in this meeting indicated their agreement with these comments.

36. Mr. Norment stated that PCA had not and would not use the "eggy" paperboard in boxes sold to Nomacorc due to its known aroma problem.

37. In a subsequent e-mail, Mr. Frank confirmed that the "eggy" aroma did not result from paperboard medium made at PCA's plant. Mr. Chapman subsequently stated that the "eggy" aroma was present in paperboard medium received from an International Paper paper mill in Mansfield, Louisiana.

38. Very soon thereafter, on or about August 25, 2008, and again on or about August 27, 2008, Nomacorc asked PCA to provide information and/or production records to show what paperboard suppliers had provided materials that went into WIP Boxes provided by PCA to Nomacorc. Meanwhile, more corcs were contaminated with the subject odor.

39. On or about September 2, 2008, Nomacorc received a shipment of PCA WIP Boxes at its Zebulon facility. Nomacorc employees, who by this time were testing

boxes upon receipt in an effort to detect malodorous boxes, detected the “eggy” smell that had impacted corcs sent to Belgium.

40. By coincidence, Mr. Chapman happened to be at Nomacorc’s facility that day and was invited to smell the boxes. He immediately confirmed the problem, and referred to it as “eau de Mansfield.” Later that day, Mr. Chapman emailed Russ Norment with Ms. Armen copied and acknowledged a “cabbage” smell in this lot of boxes.

**PCA Admits That its Boxes Caused the Odor Problem**

41. On or about September 5, 2008, after weeks of delay, and contrary to prior representations, Mr. Chapman acknowledged that the contaminated International Paper paperboard medium had in fact been used in several of the previous runs of WIP Boxes PCA had produced for Nomacorc over the preceding three or four months.

42. Mr. Chapman subsequently clarified that International Paper paperboard medium had been used to produce PCA WIP Boxes for Nomacorc in April, June, July, and August of 2008. Mr. Chapman committed to provide production records back to March 2007 to prove that International Paper paperboard medium had not been used in any other production runs. Such records were never provided to Nomacorc.

43. PCA immediately canceled its pending orders with International Paper and promised (again) that no International Paper paperboard medium would be used to make boxes for Nomacorc.

44. Analytical testing by two independent laboratories in September-October 2008 confirmed the presence of dimethyltrisulfide (“DMTS”) in the WIP Boxes. DMTS is a compound that has an odor threshold of 10 parts per trillion and an odor consistent with the odor found in the WIP Boxes. Both labs confirmed that the source of the DMTS

was the PCA WIP Boxes, and that the DMTS in the PCA WIP Boxes was the cause of the contamination of the unfinished corcs shipped to Belgium.

45. Subsequent shipments of unfinished corcs from Zebulon to Belgium in WIP Boxes that were confirmed by Nomacorc and PCA not to have any International Paper paperboard medium in them have not caused any odor contamination. In October 2008, PCA confirmed that an additional lot of WIP Boxes then on hold in Zebulon was also made with contaminated paperboard, allowing Nomacorc to dispose of this lot of WIP Boxes before they could contaminate any corcs.

46. Subsequent shipments sent to Belgium in boxes provided by suppliers other than PCA have not resulted in odor contamination.

#### **Nomacorc Mitigates Its Damages**

47. Fortunately, through investigation and testing, employees discovered that oven heating could remove the odor from some of the contaminated corcs, allowing those corcs to be used and thus mitigating the damage caused by the noxious packaging materials supplied by PCA.

48. Some corcs, however, were not able to be successfully remediated and thus had to be discarded as unusable.

49. These remediation efforts, while necessary to restore as many contaminated corcs to usable quality as possible, greatly increased production costs by adding a production step and associated costs not normally incurred in the process of finishing the corcs.

**Nomacorc Suffers over One Million Dollars in Damages as a Result of PCA's  
Defective Boxes**

50. Unfortunately, the odor contamination caused by PCA's defective WIP Boxes cost Nomacorc a great deal of time and expense in investigating and remediating the problem.

51. The cost of remediating the contaminated corcs exceeded \$500,000, including extra labor, costs of heating, and necessary repackaging.

52. In addition, over 6.6 million corcs, worth in excess of \$220,000, were unusable even after remediation, due to the effects of the odor acquired from the PCA WIP Boxes.

53. Nomacorc expended over \$35,000 for internal and external testing to discover the root cause of the odor contamination.

54. Nomacorc incurred additional shipping costs of over \$100,000 in its efforts to avoid the contaminating odor.

55. Finally, Nomacorc personnel invested numerous man-hours researching the odor issue. Lost employee time plus travel costs related to the investigation totaled over \$200,000.

56. Nomacorc incurred other costs and losses to be proved at trial.

**FIRST CLAIM FOR RELIEF**  
(Breach of Implied Warranty of Merchantability)

57. Nomacorc realleges the allegations in the foregoing paragraphs as if fully set forth in this paragraph.

58. As a merchant, PCA impliedly warranted and represented to Nomacorc that the boxes sold by PCA were of merchantable quality.

59. This implied warranty of merchantability was not limited, excluded, or modified in any way.

60. Nomacorc reasonably relied upon PCA's implied warranty of merchantability.

61. Some of the WIP Boxes supplied by PCA to Nomacorc were not of merchantable quality, but instead were defective.

62. This defective condition constituted a breach of the implied warranty of merchantability.

63. As a direct and proximate result of PCA's breaches of the implied warranty of merchantability, Nomacorc has suffered damages and is entitled to judgment in an amount in excess of \$75,000 to be proven at trial.

**SECOND CLAIM FOR RELIEF**  
(Breach of Implied Warranty of Fitness)

64. Nomacorc realleges the allegations in the foregoing paragraphs as if fully set forth in this paragraph.

65. At the time of Nomacorc's purchase of the offending WIP boxes, PCA knew or had reason to know of the particular purpose for which Nomacorc was purchasing the boxes, i.e., to store and transport unfinished corcs.

66. PCA was aware of the sensitivity of Nomacorc's corcs to sensory factors.

67. Nomacorc reasonably relied upon PCA's knowledge and skill in selecting appropriate shipping products for Nomacorc's use. PCA knew or had reason to know that Nomacorc was so relying on PCA's knowledge and skill in selecting appropriate shipping products for Nomacorc's use.

68. As such, PCA impliedly warranted and represented to Nomacorc that the WIP Boxes sold by PCA were reasonably fit for the purposes for which they were intended, i.e., to store and transport unfinished cores.

69. This implied warranty of fitness was not limited, excluded, or modified in any way.

70. Some of the WIP Boxes supplied by PCA to Nomacorc were not fit for the purpose for which they were purchased.

71. This unfitness constituted a breach of the implied warranty of fitness.

72. As a direct and proximate result of PCA's breaches of the implied warranty of fitness, Nomacorc has suffered damages and is entitled to judgment in an amount in excess of \$75,000 to be proven at trial.

**THIRD CLAIM FOR RELIEF**  
(Breach of Express Warranty)

73. Nomacorc realleges the allegations in the foregoing paragraphs as if fully set forth in this paragraph.

74. As described above, employees of PCA, acting on PCA's behalf, made express representations to Nomacorc that WIP Boxes supplied to Nomacorc did not and would not contain contaminated paperboard medium.

75. Such representations related to the goods purchased by Nomacorc from PCA and became part of the basis of the bargain underlying the transactions between Nomacorc and PCA.

76. Such representations thus constitute an express warranty pursuant to N.C. Gen. Stat. § 25-2-213.

77. In fact, as PCA's employees later admitted, PCA had provided WIP Boxes to Nomacorc that included contaminated paperboard material, and continued to provide such contaminated WIP Boxes even after PCA's representations.

78. The continued provision of such defective goods constituted a breach of PCA's express warranty.

79. As a direct and proximate result of PCA's breaches of its express warranty, Nomacorc has suffered damages and is entitled to judgment in an amount in excess of \$75,000 to be proven at trial.

**FOURTH CLAIM FOR RELIEF**

(Fraud)

80. Nomacorc realleges the allegations in the foregoing paragraphs as if fully set forth in this paragraph.

81. On or about August 14, 2008, Russ Norment of PCA told various employees of Nomacorc in a meeting that PCA had not and would not use paperboard medium known to have an "eggy" aroma from International Paper in making WIP Boxes that were supplied to Nomacorc.

82. In making this statement, Mr. Norment was acting as an employee of, and on behalf of, PCA.

83. PCA's representations to Nomacorc were false, and PCA knew them to be false.

84. PCA's representations were made with an intent to deceive Nomacorc so that Nomacorc would continue to purchase WIP Boxes from PCA.

85. PCA's representations did in fact deceive Nomacorc.

86. Nomacorc reasonably relied on PCA's representations. If not for PCA's representations, Nomacorc would have stopped buying boxes from PCA in August 2004.

87. Nomacorc has been damaged as a result of PCA's false representations as described herein and is entitled to judgment in an amount in excess of \$75,000 to be proved at trial.

88. In addition, Nomacorc is entitled to recover punitive damages as a result of PCA's fraud.

**FIFTH CLAIM FOR RELIEF**

(Negligent Misrepresentation)

89. Nomacorc realleges the allegations in the foregoing paragraphs as if fully set forth in this paragraph.

90. On or about August 14, 2008, Russ Norment told various employees of Nomacorc in a meeting that PCA had not and would not use paperboard medium known to have an "eggy" aroma from International Paper in making WIP Boxes for Nomacorc.

91. In making this representation, Mr. Norment was acting as an employee of, and on behalf of, PCA.

92. In making this representation, PCA knew or should have known that Nomacorc would rely on its representation in determining whether to continue to use PCA boxes to ship corcs and in determining whether to continue the business relationship between PCA and Nomacorc.

93. PCA's representations to Nomacorc were false, and PCA knew or should have known them to be false.

94. PCA failed to exercise reasonable care in ensuring that its representations were true and in communicating this false information to Nomacorc.

95. Nomacorc reasonably relied on PCA's representations.

96. Nomacorc has been damaged as a direct and proximate result PCA's actions as described herein and is entitled to judgment in an amount in excess of \$75,000 to be proved at trial.

**SIXTH CLAIM FOR RELIEF**  
(Negligence)

97. Nomacorc realleges the allegations in the foregoing paragraphs as if fully set forth in this paragraph.

98. PCA had a duty to exercise reasonable care to supply Nomacorc with cardboard boxes that were suitable for the storage and transport of synthetic wine corcs.

99. PCA breached its duty of care by supplying boxes that were not fit for the storage and transport of synthetic wine corcs.

100. PCA breached its duty of care by failing to timely investigate and communicate to Nomacorc whether its boxes were the source of the odor, failing to timely investigate and communicate to Nomacorc whether paperboard from International Paper's Mansfield plant had been incorporated into boxes sold to Nomacorc, and by supplying Nomacorc with boxes that were not fit for the storage and transport of synthetic wine corcs.

101. Nomacorc has been damaged as a direct and proximate result PCA's negligence as described herein and is entitled to judgment in an amount in excess of \$75,000 to be proved at trial.

**SEVENTH CLAIM FOR RELIEF**  
(Unfair and Deceptive Trade Practice)

102. Nomacorc realleges the allegations in the foregoing paragraphs as if fully set forth in this paragraph.

103. PCA's conduct as described herein constitutes acts in or affecting commerce.

104. The acts of PCA as alleged above were unfair, deceptive, immoral, unethical, oppressive, unscrupulous, and/or substantially injurious to Nomacorc and therefore constitute a violation of the Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1, *et seq.*

105. Nomacorc has been damaged as a consequence of PCA's conduct in an amount to be proved at trial.

106. Nomacorc is entitled to recover treble damages and attorneys' fees pursuant to N.C. Gen. Stat. § 75-1.1, *et seq.*, as a consequence of Defendants' conduct in violation of the Unfair and Deceptive Trade Practices Act.

**DEMAND FOR JURY TRIAL**

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Nomacorc demands a jury trial on all issues so triable.

**PRAYER FOR RELIEF**

WHEREFORE, Nomacorc prays to the Court as follows:

1. That it have and recover from PCA its damages as proven at trial;
2. That it recover punitive damages from PCA;

3. That it recover treble damages, attorneys' fees and costs from PCA pursuant to the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1, *et seq.*;

4. That it be awarded its costs and attorneys' fees as allowed provided by law; and

5. For such other relief as the Court deems just and proper.

Respectfully submitted, this the 26th day of February, 2009.

/s/ Daniel J. Palmieri

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