

04-1663-CD  
PRO\*ACT, LLC. vs. BACKUS USA, INC. et al.

Pro\*Act vs Backus USA et al  
2004-1663-CD

Date: 05/28/2005

## Clearfield County Court of Common Pleas

User: BILLSHAW

Time: 08:56 AM

ROA Report

Page 1 of 2

Case: 2004-01663-CD

Current Judge: Fredric Joseph Ammerman

Pro\*Act, LLC vs. Backus USA, Inc., Hepro Gmbh

## Civil Other

Date		Judge
10/22/2004	Filing: Civil Complaint Paid by: Tupi, Bradley S. (attorney for Pro*Act, LLC) Receipt number: 1888865 Dated: 10/22/2004 Amount: \$85.00 (Check) 1 CC to Shff.	No Judge
11/30/2004	Sheriff Return, NOW Nov. 2, 2004 served the within complaint on Backus USA Inc., Defendant. So Answers, Chester A. Hawkins, Sheriff, by s/ Marilyn Hamm.	No Judge
12/06/2004	Answer To Complaint and New matter, on behalf of Backus USA, Inc, filed by s/ David J. Hopkins, Esquire. No CC	No Judge
02/09/2005	Praecipe to File Certificate of Service, Filed by s/Neil J. Gregorio, Esq. No CC	Fredric Joseph Ammerman
03/14/2005	Preliminary Objections Of Defendant Hepro BMBH to Plaintiff's Complaint. Filed by s/ Wayne W. Ringeisen, Esq. no CC	No Judge
03/28/2005	Preliminary Objections of Defendant Hepro Gmbh to Defendant Backus USA, Inc.'s New Matter.	No Judge
03/31/2005	Amended Complaint, filed by s/ Bradley S. Tupi, Esquire. No CC	No Judge
04/27/2005	Preliminary Objections of Defendant HEPRO GmbH to Plaintiff's Amended Complaint, filed by Atty. Ringeisen no cert. copies.	No Judge
04/28/2005	Answer To Amended Complaint and New Matter and Crossclaim for Indemnification, filed by s/ David J. Hopkins, Esquire. 4CC Atty Hopkins	No Judge
05/05/2005	Reply To New Matter, filed by s/ Bradley S. Tupi, Esquire. No CC	No Judge
05/06/2005	Preliminary Objections of Defendant Hepro GmbH to Defendant Backus USA, Inc.'s New Matter to Plaintiff's Amended Complaint and Crossclaim, filed by s/Wayne W. Ringeisen, Esq. No CC	No Judge
	Preliminary Objections of Defendant Hepro GmbH to Plaintiff's Amended Complaint, filed by s/Wayne W. Ringeisen, Esq. No CC	No Judge
05/10/2005	Order, AND NOW, this 9th day of May, 2005, upon consideration of Attorney Ringeisen's Preliminary Objections of Defendant Hepro GmbH to Defendant Backus USA, Inc.'s New Matter to Plaintiff's Amended Complaint and Crossclaim filed in the above matter, it is the Order of the Court that argument has been scheduled for the 31st day of May, 2005 at 11:00 a.m. in Courtroom No. 1. BY THE COURT: /s/ Fredric J. Ammerman, President Judge. 3CC Atty. Ringeisen w/service memo	Fredric Joseph Ammerman
	Order, AND NOW, this 9th day of May, 2005, upon consideration of Attorney Ringeisen's Preliminary Objections of Defendant Hepro GmbH to Plaintiff's Amended Complaint filed in the above matter, it is the Order of the Court that argument has been scheduled for the 31st day of May, 2005 at 11:00 a.m. in Courtroom No. 1. BY THE COURT: /s/ Fredric J. Ammerman, President Judge. 3CC Atty. Ringeisen	Fredric Joseph Ammerman
05/16/2005	Affidavit of Service Of Service Of Court's May 9, 2005 Scheduling Orders, upon all counsel of record on May 12, 2005. Filed by s/ Wayne W. Ringelsen, Esquire. No CC	Fredric Joseph Ammerman
05/17/2005	Opposition to Preliminary Objections of Defendant HEPRO GMBH to Plaintiff's Amended Complaint, filed by s/Bradley S. Tupi, Esq. No CC	Fredric Joseph Ammerman
05/25/2005	Reply in Opposition to Preliminary Objections of Defendant Hepro GmbH to Defendant Backus USA, Inc.'s New Matter to Plaintiff's Amended Complaint and Crossclaim, filed by s/ David J. Hopkins, Esquire. No CC	Fredric Joseph Ammerman

Date: 06/28/2005

Clearfield County Court of Common Pleas

User: BILLSHAW

Time: 08:56 AM

ROA Report

Page 2 of 2

Case: 2004-01663-CD

Current Judge: Fredric Joseph Ammerman

Pro\*Act, LLC vs. Backus USA, Inc., Hepro GmbH

Civil Other

Date		Judge
05/25/2005	Reply in Opposition to Preliminary Objections of Defendant Hepro GmbH to Plaintiff's Amended Complaint, filed by s/ David J. Hopkins, Esquire. No CC	Fredric Joseph Ammerman
06/01/2005	Order, NOW, this 31st day of May, 2005, following argument relative Preliminary Objections filed on behalf of Def. Hepro, it is the ORDER of this Court that Def. Hepro is not required to answer any discovery requests related to issues which are not jurisdictional in nature until such time as the Court should rule on the Preliminary Objections. BY THE COURT: /s/ Fredric J. Ammerman, President Judge. 1CC Attys: Tupi, Hopkins, Ringeisen	Fredric Joseph Ammerman

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

PRO\*ACT, LLC,

Plaintiff,

v.

BACKUS USA, INC. AND HEPRO GmbH,

Defendants.

CIVIL DIVISION

NO. *04-1663-CD*

COMPLAINT IN CIVIL ACTION

CODE: 010

Filed on behalf of Plaintiff,

Pro\*Act, LLC

Counsel of record for this party:

Bradley S. Tupi, Esquire

PA Id. No. 28682

Beverly Weiss Manne, Esquire

PA Id. No. 34545

Neil J. Gregorio, Esquire

PA Id. No. 90859

TUCKER ARENSBERG, P.C.

1500 One PPG Place

Pittsburgh, PA 15222

Tel. (412) 594-5545

Fax (412) 594-5619

Email [btupi@tuckerlaw.com](mailto:btupi@tuckerlaw.com)

**FILED** *Atty pd.*  
*85.00*  
*m 12:12 PM*  
**OCT 22 2004** *ICC Sheriff*

William A. Shaw  
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

PRO\*ACT, LLC,

CIVIL DIVISION

Plaintiff,

NO.

v.

BACKUS USA, INC. and HEPRO Gmbh,

Defendants.

**NOTICE TO PLEAD**

You have been sued in Court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty days after this Complaint is served, by entering a written appearance personally or by attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you, and a judgment may be entered against you by the Court without further notice for any money claimed in the Complaint or for any claim or relief requested by Plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE  
IF YOU DO NOT HAVE OR KNOW A LAWYER,  
THEN YOU SHOULD GO TO OR TELEPHONE THE OFFICE  
SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Court Administrator  
Clearfield County Courthouse  
Clearfield, PA 16830  
814-765-2641 ext. 1303

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

PRO\*ACT, LLC,

CIVIL DIVISION

Plaintiff,

NO.

v.

BACKUS USA, INC. and HEPRO Gmbh,

Defendants.

**COMPLAINT**

Plaintiff, Pro\*Act, LLC, by its counsel, Tucker Arensberg, P.C., makes the following Complaint against Defendants:

1. Plaintiff, Pro\*Act, LLC, is a limited liability company organized and existing under the laws of the State of Delaware with its principal place of business at 22 Lower Ragsdale Drive, Monterey, California. 93940.

2. Defendant, Backus USA, Inc., is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 38 B North Brady Street, DuBois, Clearfield County, Pennsylvania 15801.

3. Defendant Hepro Gmbh is a corporation organized and existing under the laws of Germany with its principal place of business at Am Bauhof 9, D-33129, Delbruck, Germany.

4. Venue is proper in Clearfield County because Defendant Backus has its principal place of business in Clearfield County and regularly conducts business there, and because some of the events comprising the transaction at issue in this action took place there.

5. Defendant Hepro is a designer, manufacturer and merchant of mechanical equipment, including carrot peelers.

6. Defendant Backus is Hepro's exclusive reseller of carrot peelers in the United States and is a merchant with respect to such equipment.

7. Defendant Backus showcased Hepro's newest design, the Hepro KP-50 peeler, at a trade show in Los Angeles. The KP-50 was specifically designed to peel small/baby carrots with tops.

8. The KP-50 peeler at the trade show was offered to Plaintiff as a demo to determine the machine's commercial viability. Based on initial tests, the demo KP-50 was not commercially viable. However, Defendants Backus and Hepro represented to Plaintiff that design modifications necessary for commercial viability could be made. In reliance on this representation, Plaintiff agreed to proceed.

9. Defendant Backus observed Plaintiff's then existing carrot peeling operation, including the raw product used in the peeling process. In addition, Plaintiff shipped raw carrots to Defendant Hepro in Germany on several occasions.

10. Pro\*Act representatives traveled to Germany in 2002 to meet with Hepro engineers to observe and discuss the suitability of the KP-50 carrot peeler to peel small/baby carrots.

11. Hepro agreed to modify the KP-50 carrot peeler to ensure its commercial viability for peeling the type of small/baby carrots provided by Plaintiff.

12. The machine, as modified to peel small/baby carrots, was called the KP-50B.

13. Hepro is a merchant with respect to the KP-50B carrot peeler.

14. In designing the KP-50B, Hepro was fully aware of Pro\*Act's specific purpose, to peel small/baby carrots for commercial sale.

15. Hepro both expressly and impliedly warranted the KP-50B as suitable for this purpose.

16. In reliance upon Hepro's representations regarding the suitability of the KP-50B for Pro\*Act's particular purpose, Pro\*Act ordered two KP-50B carrot machines, together with related equipment.

17. Upon information and belief, Backus is Hepro's exclusive sales representative in the United States.

18. Backus is a merchant with respect to the KP-50B carrot peeler.

19. On October 29, 2002, Backus sent an order confirmation for one KP-50B to Pro\*Act. The order confirmation is attached to this Complaint as Exhibit A.

20. Backus' order confirmation specifically described the KP-50B as "for Baby Carrots," and referred to it as a "knife peeler for baby carrots." Raw product requirements were specifically described as "Carrots not less than 3.0 inches long and with a diameter not less than approximately 0.5 inches and not more than approximately 1 1/8 inches. There is not [sic] restrictions [sic] on the maximum length to be used."

21. Backus both expressly and impliedly warranted the suitability of the KP-50B for Plaintiff's particular purpose, namely, the peeling of small/baby carrots for commercial sale.

22. The first KP-50B carrot machine was delivered to Pro\*Act in November 2002. At this time, the second KP-50B was already in production.

23. The first KP-50B was installed in Pro\*Act's facility in December 2002. As soon as the machine was put into use, the machine jammed, making commercial use an impossibility.

24. Plaintiff immediately notified Defendants of the jamming and requested action to resolve the problem.

25. Anticipating that Defendants would resolve the problems with the first KP-50B, Plaintiff in good faith accepted delivery of the second KP-50B machine in the Spring of 2003.



26. Commercial viability of operating two KP-50B carrot peelers required purchase of a wash line system consisting of two parts: (1) a wash line; and (2) a chiller. Plaintiff ordered the wash line system from Defendant Backus.

27. After delivery, Plaintiff discovered that the wash line chiller unit had been omitted. Without the wash line chiller, the wash line system could not support two carrot peeling machines as designed and could not function as represented by Defendants.

28. Plaintiff immediately notified Defendants that the wash line chiller had been omitted from the shipment.

29. In August 2003, Defendants furnished the missing wash line chiller and the second KP-50B carrot machine was placed into operation. It experienced the same jamming problems and low production output that had been experienced with the first KP-50B machine. Both machines performed so poorly that their commercial utilization was simply not feasible.

30. On August 18, 2003, Plaintiff took both KP-50B machines out of service because of their unsatisfactory performance. Once again, Plaintiff notified Defendants of the problems Plaintiff was experiencing with the machines.

31. Defendant Hepro sent two of its engineers, Oliver Schipp and Christoph Protte, to Los Angeles to observe and videotape the production process to determine design modification requirements.

32. In October 2003, Plaintiff sent both KP-50B machines back to Hepro in Germany at Defendant Hepro's request. Representatives of Plaintiff traveled to Germany to work with Hepro engineers in an effort to resolve the problems.

33. In November 2003, Hepro returned one of the KP-50B machines to Plaintiff. As soon as it was placed into service, the same jamming problems recurred. The machine was taken out of service again in December 2003.

34. In February 2004, Defendants notified Plaintiff that the second KP-50B machine had been repaired and had performed satisfactorily during testing. Hepro shipped the machine to Plaintiff in February 2004. It was received and installed in April 2004.

35. During initial testing, the second KP-50B machine jammed frequently, yielding a production rate too low for commercial viability. Pro\*Act again took the machine out of service.

36. Plaintiff has requested a refund from Defendants for both KP-50B machines. Defendants have refused.

37. Plaintiff has incurred damages as follows:

- a. Over \$78,000 for two non-functional KP-50B carrot peeler machines;
- b. Over \$80,000 for related equipment;
- c. Approximately \$2,500 for shipping costs;
- d. Approximately \$4,600 for travel expenses;
- e. Approximately \$30,000 to upgrade electrical facilities to accommodate the carrot peelers;
- f. Extra costs associated with a five-year lease extension required by Plaintiff's landlord in exchange for permission to perform the electrical upgrade;
- g. Lost production and lost profits; and
- h. Other damages.

**COUNT I**

**BREACH OF EXPRESS WARRANTY**  
**(vs. Hepro)**

38. The allegations of paragraphs 1 through 37 are incorporated by reference.

39. Hepro expressly warranted that the KP-50B carrot machine would peel small/baby carrots in Plaintiff's commercial setting. This warranty was part of the basis of the bargain between Plaintiff and Hepro.

40. The KP-50B failed to conform to Hepro's warranty.

41. As a result of Hepro's breach of express warranties, Plaintiff has incurred damages.

WHEREFORE, Plaintiff demands judgment against Defendant in an amount to be determined at trial, together with costs, attorneys' fees and such other relief as the Court deems just.

**COUNT II**

**BREACH OF EXPRESS WARRANTY**  
**(vs. Backus)**

42. The allegations of paragraphs 1 through 41 are incorporated by reference.

43. Backus expressly warranted that the KP-50B carrot machine would peel small/baby carrots in Plaintiff's commercial setting. This warranty was part of the basis of the bargain between Plaintiff and Backus.

44. The KP-50B failed to conform to Backus' warranty.

45. As a result of Backus' breach of express warranties, Plaintiff has incurred damages.

WHEREFORE, Plaintiff demands judgment against Defendant in an amount to be determined at trial, together with costs, attorneys' fees and such other relief as the Court deems just.

### **COUNT III**

#### **BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY (vs. Hepro)**

46. The allegations of paragraphs 1 through 45 are incorporated by reference.

47. Hepro impliedly warranted to Plaintiff that the KP-50B would be fit for the ordinary purpose for which the machine was to be used, namely, peeling baby carrots.

48. The KP-50B was not of merchantable quality. It jammed so often that it could not be productively used in a commercial setting.

49. The KP-50B machines supplied by Defendant were not fit for their ordinary purpose.

50. As a result of Hepro's breach of warranty, Plaintiff has incurred damages.

WHEREFORE, Plaintiff demands judgment against Defendant in an amount to be determined at trial, together with costs, attorneys' fees and such other relief as the Court deems just.

### **COUNT IV**

#### **BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY (vs. Backus)**

51. The allegations of paragraphs 1 through 50 are incorporated by reference.

52. Backus impliedly warranted to Plaintiff that the KP-50B would be fit for the ordinary purpose for which the machine was to be used, namely, peeling small/baby carrots.

53. The KP-50B was not of merchantable quality. It jammed so often that it could not be productively used in a commercial setting.

54. The KP-50B machines supplied by Defendant were not fit for their ordinary purpose.

55. As a result of Backus' breach of warranty, Plaintiff has incurred damages.

WHEREFORE, Plaintiff demands judgment against Defendant in an amount to be determined at trial, together with costs, attorneys' fees and such other relief as the Court deems just.

#### **COUNT V**

#### **BREACH OF IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE (vs. Hepro)**

56. The allegations of paragraphs 1 through 55 are incorporated by reference.

57. At the time Hepro agreed to sell and Plaintiff agreed to buy the two KP-50B machines, Hepro knew Plaintiff's particular purpose for the machines, namely, peeling small/baby carrots.

58. In purchasing the KP-50B machines, Plaintiff relied upon the skill and engineering judgment of Hepro to design and furnish suitable machines.

59. The machines furnished were not suitable for Plaintiff's particular purpose. To the contrary, they jammed so often that they had to be taken out of service.

60. As a result of Hepro's breach of warranty, Plaintiff has incurred damages.

WHEREFORE, Plaintiff demands judgment against Defendant in an amount to be determined at trial, together with costs, attorneys' fees and such other relief as the Court deems just.

#### **COUNT VI**

#### **BREACH OF IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE (vs. Backus)**

61. The allegations of paragraphs 1 through 60 are incorporated by reference.

62. At the time Backus agreed to sell and Plaintiff agreed to buy the two KP-50B machines, Backus knew Plaintiff's particular purpose for the machines, namely, peeling small/baby carrots.

63. In purchasing the KP-50B machines, Plaintiff relied upon the skill and knowledge of Backus to furnish suitable machines.

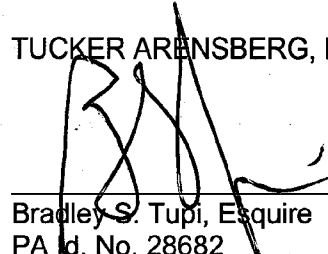
64. The machines furnished were not suitable for Plaintiff's particular purpose. To the contrary, they jammed so often that they had to be taken out of service.

65. As a result of Backus' breach of warranty, Plaintiff has incurred damages.

WHEREFORE, Plaintiff demands judgment against Defendant in an amount to be determined at trial, together with costs, attorneys' fees and such other relief as the Court deems just.

Respectfully submitted,

TUCKER ARENSBERG, P.C.



---

Bradley S. Tupi, Esquire  
PA Id. No. 28682  
Beverly Weiss Manne, Esquire  
PA Id. No. 34545  
Neil J. Gregorio, Esquire  
PA Id. No. 90859

1500 One PPG Place  
Pittsburgh, PA 15222  
Tel. (412) 594-5545  
Fax (412) 594-5619  
Email: [btupi@tuckerlaw.com](mailto:btupi@tuckerlaw.com)  
Attorneys for Plaintiff

LIT:337651-3 021894-120674

**VERIFICATION**

I, Dean Simon, state that I am Division President of Plaintiff, Pro\*Act, LLC, that I am authorized to make this Verification on its behalf, that the facts contained in the foregoing Complaint are true and correct to the best of my knowledge, information and belief, and that I make this Verification subject to the penalties of 18 Pa.C.S. §4904 relating to unsworn falsification to authorities.



---

Dean Simon

Dated: October 18, 2004



Pro-Act Specialties

Page 1

October 29, 2002

**Order Confirmation for KP-50 B for Baby Carrots.**

For the delivery of a knife peeler for baby carrots. Type KP-50 B as follows:

**Product requirements**

Carrots not less than 3.0 inches long and with a diameter not less than approximately 0.5 inches and not more than approximately 1 1/8 inches. There is no restrictions on the maximum length to be used.

**Capacity**

The machine is "hand-fed" and can peel approximately 90 pieces per minute (5,400 pieces per hour).

**Recovery**

Depends entirely on carrot size and quality.

**Function of the machine**

Product is transported horizontally through the machine via a series of 16 pairs of soft rollers, which rotate on a vertical axis. Six sets of (2) spring-loaded peeling knives is located between the rollers. There are (6) sets of knives which peel a total of (12) "sides" of the product.

The green ends need to be pre-trimmed prior to peeling the baby carrot, the length of the green ends need to be cut to 1" to 2". The carrot tail will remain on the product and will not be cut.

Product is placed on the infeed table and manually moved forward until the first set of soft transport rollers grip the end of the product and draw it into the machine. From then on, the product is moved automatically through each peeling station. Completely peeled product is automatically discharged from the machine. Peeling waste falls directly into crates placed below the chute.

The peeler is mounted separately on caster wheels.

Knives and rollers are easy and quickly removable for cleaning and thorough sanitation.

Includes small table for feeding carrots.

**Technical data**

Total installed electric motor power is 0.75 HP.  
120 volts one phase.

Air requirements - 0.15cf per minute clean and dry air at 116 psi.

Air supply system is not included with the machine.

No water required.

**Construction**

The carrot peeler is constructed of 304 stainless steel except for the motor drive, bearings, and electrical panel.







Pro-Act Specialities

Page 2

October 29, 2002

**Dimensions and weight**

71 inches long x 40 inches wide x 55.11 inches high, 375 lbs.

**Price:** for machine complete as described,

US \$ 35,500.00

Special table to load carrots with two hands into peeler

US \$ 525.00

Additional special table for first peeler shipped 11/02

US \$ 525.00

Spare knives; 12 pieces per machine, shipped 11/02

US \$ 222.00

Spare rollers, 32 pieces, shipped 11/02

US \$ 944.00**Total:****US \$37,716.00****Terms and conditions:**

**Delivery:** ex works Venlo, the Netherlands, unpacked, unloaded, excluding transport, insurance and customs clearance, as per INCOTERMS 1990.

**Delivery Time:** Ready for shipment of December 16th 2002.

**Prices:** Net excluding set-up, installation, customs fees, duties and commissioning costs.

**Terms:** 50% at time of order  
50% net 10 days

**Guarantee:** 1 year after delivery ex works on spare parts, material, and construction failures. Not including consumables e.g., rollers, knives, etc.

**Shipping Cost:** Approximate cost is \$ 1,700.00 USD door to door.

**Metaalunie Conditions:**

To all our offers and quotations, to all orders given to us and to all contracts concluded with us outside the Netherlands, and in the United States and Canada, the Metaalunie Conditions are applicable, deposited at the office of the District Court in Rotterdam, as they are according to the latest text. All orders are subject to cancellation fees.

**In The Court of Common Pleas of Clearfield County, Pennsylvania**

PRO\*ACT, LLC

VS.

BACKUS USA, INC. and HEPRO GmbH

COMPLAINT

Sheriff Docket #

16505

04-1663-CD

**SHERIFF RETURNS**

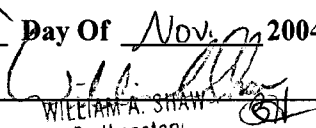
NOW NOVEMBER 2, 2004 AT 11:25 AM SERVED THE WITHIN COMPLAINT ON BACKUS USA INC., DEFENDANT BY SERVING DAVID HOPKINS, ATTORNEY FOR DEFENDANT AT EMPLOYMENT, 900 BEAVER DRIVE, DUBOIS, CLEARFIELD COUNTY, PENNSYLVANIA BY HANDING TO DAVID HOPKINS A TRUE AND ATTESTED COPY OF THE ORIGINAL COMPLAINT AND MADE KNOWN TO HIM THE CONTENTS THEREOF.  
SERVED BY: COUDRIET/DEHAVEN

**Return Costs**


Cost	Description
46.50	SHERIFF HAWKINS PAID BY: ATTY CK# 266424
10.00	SURCHARGE PAID BY: ATTY CK# 266425

Sworn to Before Me This

30<sup>th</sup> Day Of Nov. 2004

  
WILLIAM A. SHAW  
Prothonotary  
My Commission Expires  
1st Monday in Jan. 2006  
Clearfield Co., Clearfield, PA

So Answers,

  
Chester A. Hawkins  
Sheriff

FILED <sup>EGK</sup>  
0703061  
NOV 30 2004

William A. Shaw  
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA  
(CIVIL DIVISION)

PRO\*ACT, LLC,

Plaintiff,

v.

BACKUS USA, INC.  
and HEPRO GmbH,

Defendants.

No. 04-1663-CD

Type of Pleading: Answer to Complaint  
and New Matter

Filed on behalf of: Backus USA, Inc.,  
Defendant

Counsel of Record for this party:  
HOPKINS HELTZEL LLP

DAVID J. HOPKINS, Esquire  
Attorney at Law  
Supreme Court No. 42519

900 Beaver Drive  
DuBois, Pennsylvania 15801

(814) 375-0300

862  
**FILED**  
m/1:40 PM  
DEC 06 2004

William A. Shaw  
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA  
(CIVIL DIVISION)

PRO*ACT, LLC,	:	
Plaintiff,	:	
	:	
v.	:	No. 04-1663-CD
	:	
BACKUS USA, INC.	:	
and HEPRO Gmbh,	:	
Defendants.	:	

**ANSWER TO COMPLAINT AND NEW MATTER**

AND NOW, comes Defendant, Backus USA, Inc. ("Backus"), by and through its undersigned counsel, Hopkins Heltzel LLP, and answers the Complaint of Plaintiff as follows:

1. Admitted.
2. Admitted.
3. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment and proof is demanded at trial.
4. Neither admitted or denied. Said paragraph calls for a legal conclusion to which no response is necessary.
5. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment and proof is demanded at trial.
6. Denied. It is denied that Backus is Hepro's exclusive reseller of carrot peelers in the United States. Backus Sormac, B.V., a Netherlands corporation ("Backus Sormac"), and Hepro are parties to a contract for the resale of carrot peelers. Backus Sormac contacted Backus USA, Inc., and requested that Backus USA sell the KP-50 in

the U.S. Further, the averment in Paragraph 6 of the Complaint that Backus is a “merchant,” is a conclusion of law to which no response is necessary.

7. Admitted in part, denied in part. Defendant Backus did present the Hepro KP-50 peeler at a trade show in Los Angeles. It is denied that the KP-50 was “showcased”; rather, the KP-50 was among several items of food processing equipment displayed by Defendant Backus at the trade show. It is denied that the KP-50 was designed to peel small/baby carrots. The KP-50B was designed for small/baby carrots.

8. Admitted in part, denied in part. It is admitted that the peeler was offered to Plaintiff as a demo to determine whether the machine worked with Plaintiff’s carrots. Following Plaintiff’s trial usage, a representative of Plaintiff went to Germany and ran the new KP-50B, designed for baby carrots. Said machinery was approved by Plaintiff prior to its shipment. It is denied that following initial tests that the KP-50 was not “commercial viable.” While it may not have met Plaintiff’s specifications, the KP-50 is commercially viable for other food processors. Further, upon information and belief, following these trials, Hepro agreed to build Plaintiff a new machine that would fit Plaintiff’s specifications.

9. Denied. Defendant Backus did not observe “Plaintiff’s then existing carrot peeling operation, including the raw product used in the peeling process.” Rather, it is believed that a representative of Backus Sormac observed such operation. Further, Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment that “Plaintiff shipped raw carrots to Defendant Hepro in Germany on several occasions.”

10. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment and proof is demanded at trial.

11. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment and proof is demanded at trial. Defendant Backus was aware that after trying for several months to find a baby carrot that would fit the machine, Plaintiff decided to change to a bigger, straighter carrot in March or April of 2003. This amounted to a change in specifications such that the peeler had to be shipped back to Hepro in Germany so that it could be retrofitted according to the newer specifications.

12. Admitted.

13. Denied. The statement contained in paragraph 13 amounts to a legal conclusion to which no response is necessary.

14. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment and proof is demanded at trial.

15. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment and proof is demanded at trial.

16. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment and proof is demanded at trial.

17. Denied. As set forth above, Defendant Backus has no arrangement with Hepro such that Defendant Backus is Hepro's exclusive sales representative in the United States.

18. Denied. The statement contained in paragraph 18 amounts to a legal conclusion to which no response is necessary.

19. Admitted.

20. Admitted.

21. Denied. Defendant Backus made no warranties, either express or implied, regarding the fitness of the KP-50B for Plaintiff's particular purpose. Defendant Backus merely offered the Hepro machinery for resale, with no representations or warranties, whether express or implied.

22. Denied. While the first KP-50B was delivered to Plaintiff in November 2002, Defendant Backus has no information or knowledge sufficient to form a belief that the second KP-50B was already in production. However, Defendant Backus does know that Plaintiff placed an order for the second machine in December 2002.

23. Admitted in part, denied in part. It is admitted that the first KP-50B was installed in December 2002. However, it is denied that the machine jammed such that commercial use was impossibility. Defendant Backus is unaware of the exact jamming rate; however, carrot peelers often jam during use yet remain commercially usable. Moreover, upon information and belief, Plaintiff's representatives traveled to Germany and approved the design of the machinery prior to its shipment to Plaintiff's facility.

24. Admitted.

25. Denied. Plaintiff ordered the second machine in December 2002. While Plaintiff may have anticipated resolving the problems it was having in using the KP-50B, upon information and belief, this was not a condition of Plaintiff's acceptance of the second machine.

26. Admitted in part, denied in part. The KP-50B carrot peeler is a stand-alone machine that produces a finished product. The purchase of a wash-line system is

within the discretion of the customer, who may desire this additional component to meet its specific needs. It is admitted that Plaintiff ordered the wash-line system from Defendant Backus.

27. Admitted in part, denied in part. While the chiller unit was inadvertently omitted from the shipment, the wash line system could function with the two peeling machines without the chiller unit. The vegetables could be manually chilled, e.g., by using ice.

28. Admitted.

29. Admitted in part, denied in part. It is admitted that the omitted chiller was supplied in August 2003. Defendant Backus has no information as to accuracy of the averment as to when the second KP-50B was placed into operation, or whether the KP-50B experienced the same jamming problems or low production output as had been alleged by the first machine. The averment that the machines performed so poorly that their commercial utilization was not feasible is denied. It is common for carrot peelers to jam. However, it is denied that the jamming makes the use of such machinery commercially unfeasible.

30. Admitted.

31. Admitted.

32. Admitted.

33. Admitted in part, denied in part. Upon information and belief, Hepro returned the KP-50B machine to Plaintiff, incorporating certain changes, which had been approved by Plaintiff's own representatives. Defendant Backus has no knowledge or



information as to the truth of whether the machine was taken out of service in December 2003 and proof is demanded at trial.

34. Admitted.

35. Admitted in part, denied in part. It is admitted that Plaintiff found the jamming frequency to be unacceptable and decided to take the KP-50B out of service. However, while the machine jammed frequently, as stated above, jamming in carrot peelers is not an unusual occurrence and does not render the machinery commercially useless.

36. Admitted.

37. Denied. It is denied that the KP-50B carrot peeler machines are “non-functional.” Further, with respect to the averments of damages set forth in subsections (a) – (h), Defendant Backus notes that on the second page of the Order Confirmation attached as Exhibit A to the Complaint, all contracts executed with Backus USA, Inc. in the USA are subject to the Metaalunie Conditions, standard conditions of delivery and payment issued by the Metaalunie (Dutch Organization of Entrepreneurs in Small and Medium Sized Businesses in the Metalworking and Mechanical Engineering Industry). Metaalunie Conditions are attached hereto as Exhibit 1. The Metaalunie Conditions do not authorize the damages set forth in these paragraphs.

#### **COUNT I**

#### **BREACH OF EXPRESS WARRANTY (vs. Hepro)**

38. Defendant Backus incorporates herein by reference each and every answer set forth in Paragraphs 1-37 above as if the same were herein set forth at length.

39. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment and proof is demanded at trial.

40. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment and proof is demanded at trial.

41. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment and proof is demanded at trial.

42. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment and proof is demanded at trial.

WHEREFORE, Defendant Backus USA, Inc., respectfully requests that this Honorable Court dismiss Plaintiff's Complaint and enter judgment in favor of Defendant Backus.

## **COUNT II**

### **BREACH OF EXPRESS WARRANTY vs. Backus**

43. Defendant Backus incorporates herein by reference each and every answer set forth in Paragraphs 1-42 above as if the same were herein set forth at length.

44. Denied. Defendant Backus is merely the reseller of the Hepro machinery purchased by Plaintiff, and made no express warranty to Plaintiff. Further, under the Metaluunie Conditions, Defendant Backus is only obligated to warrant the soundness of an item of goods during a period of six months after delivery. During that period, Defendant Backus as the contractor has the option of repairing the item, replacing the item or providing the customer with a credit note for a proportionate part of the invoiced amount. *See Metaluunie Conditions, Article 14: Warranty.* Moreover, under the

Metaluunie Conditions, no warranty is given for defects that are due to modification or repair by the customer. Other items of damage are not recoverable.

45. Denied. As stated above, Defendant Backus is merely the reseller of the Hepro machinery purchased by Plaintiff, and made no warranty to Plaintiff.

46. Denied. Defendant Backus is merely the reseller of the Hepro machinery purchased by Plaintiff, and made no warranty to Plaintiff.

WHEREFORE, Defendant Backus USA, Inc., respectfully requests that this Honorable Court dismiss Plaintiff's Complaint and enter judgment in favor of Defendant Backus.

### **COUNT III**

#### **BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY (vs. Hepro)**

47. Defendant Backus incorporates herein by reference each and every answer set forth in Paragraphs 1-45 above as if the same were herein set forth at length.

48. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment and proof is demanded at trial.

49. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment and proof is demanded at trial.

50. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment and proof is demanded at trial.

51. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment and proof is demanded at trial.

WHEREFORE, Defendant Backus USA, Inc., respectfully requests that this Honorable Court dismiss Plaintiff's Complaint and enter judgment in favor of Defendant Backus.

#### **COUNT IV**

##### **BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY (vs. Backus)**

52. Defendant Backus incorporates herein by reference each and every answer set forth in Paragraphs 1-51 above as if the same were herein set forth at length.

53. Denied. Defendant Backus is merely the reseller of the Hepro machinery purchased by Plaintiff, and no implied warranty of merchantability applies. Further, under the Metaluunie Conditions, Defendant Backus is only obligated to warrant the soundness of an item of goods during a period of six months after delivery. During that period, Defendant Backus as the contractor has the option of repairing the item, replacing the item or providing the customer with a credit note for a proportionate part of the invoiced amount. See *Metaluunie Conditions, Article 14: Warranty*. Moreover, under the Metaluunie Conditions, no warranty is given for defects that are due to modification or repair by the customer. Other items of damage are not recoverable.

54. Denied. As stated above, Defendant Backus is merely the reseller of the Hepro machinery purchased by Plaintiff, and as such the implied warranty of merchantability is inapplicable.

55. Denied. Defendant Backus is merely the reseller of the Hepro machinery purchased by Plaintiff, and such the implied warranty of merchantability is inapplicable.

56. Denied. Defendant Backus is merely the reseller of the Hepro machinery purchased by Plaintiff, and such the implied warranty of merchantability is inapplicable.

WHEREFORE, Defendant Backus USA, Inc., respectfully requests that this Honorable Court dismiss Plaintiff's Complaint and enter judgment in favor of Defendant Backus.

**COUNT IV**

**BREACH OF IMPLIED WARRANTY OF FITNESS FOR A  
PARTICULAR PURPOSE  
(vs. Hepro)**

57. Defendant Backus incorporates herein by reference each and every answer set forth in Paragraphs 1-56 above as if the same were herein set forth at length.

58. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment.

59. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment.

60. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment.

61. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment.

WHEREFORE, Defendant Backus USA, Inc., respectfully requests that this Honorable Court dismiss Plaintiff's Complaint and enter judgment in favor of Defendant Backus.

#### **COUNT IV**

#### **BREACH OF IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE (vs. Backus)**

62. Defendant Backus incorporates herein by reference each and every answer set forth in Paragraphs 1-61 above as if the same were herein set forth at length.

63. Denied. Defendant Backus is merely the reseller of the Hepro machinery purchased by Plaintiff, and no implied warranty of fitness for a particular purpose applies. Further, under the Metaluunie Conditions, Defendant Backus is only obligated to warrant the soundness of an item of goods during a period of six months after delivery. During that period, Defendant Backus as the contractor has the option of repairing the item, replacing the item or providing the customer with a credit note for a proportionate part of the invoiced amount. *See Metaluunie Conditions, Article 14: Warranty.* Moreover, under the Metaluunie Conditions, no warranty is given for defects that are due to modification or repair by the customer. Other items of damage are not recoverable.

64. Denied. As stated above, Defendant Backus is merely the reseller of the Hepro machinery purchased by Plaintiff, and as such the implied warranty of fitness for a particular purpose is inapplicable.

65. Denied. Defendant Backus is merely the reseller of the Hepro machinery purchased by Plaintiff, and such the implied warranty of fitness for a particular purpose is inapplicable.

66. Denied. Defendant Backus is merely the reseller of the Hepro machinery purchased by Plaintiff, and such the implied warranty of fitness for a particular purpose is inapplicable.

WHEREFORE, Defendant Backus USA, Inc., respectfully requests that this Honorable Court dismiss Plaintiff's Complaint and enter judgment in favor of Defendant.

**NEW MATTER**

67. Defendant Backus incorporates herein by reference each and every answer set forth in Paragraphs 1-66 above as if the same were herein set forth at length.

68. Defendant Backus, hereby asserts this New Matter, pursuant to Pa.R.C.P. 1030(a). If Plaintiff establishes that it suffered damages as alleged in its Complaint, which allegations answering Defendant denies, said damages were caused solely by Defendant Hepro's breaches of warranty with respect to the KP-50 series.

69. As a result of the aforesaid actions and/or omissions, Defendant, Hepro, is solely liable to Plaintiff for any alleged damages it may have suffered.

70. If, as a result of the matter alleged in Plaintiffs' Complaint, the Defendant, Backus USA, Inc., is held liable to Plaintiff for all or part of such damages as Plaintiff may have sustained, Defendant Hepro is the party primary liable for such damages, and is liable over to Defendant, Backus USA, Inc., by way of contribution and/or indemnification, for all such damages as may be required to pay to Plaintiff.

71. Further, Defendant Backus asserts that the "Order Confirmation for KP-50B for Baby Carrots" indicates that the Metaalunie Conditions are applicable.

72. The Metaalunie Conditions limit Defendant's liability for loss or damage, providing that a customer may not recover consequential loss or damages. *See* Metaalunie Conditions, Article 13.2.

73. Additionally, Article 14 of the Metaalunie Conditions provides that the only warranty applicable is a warranty for a period of six months from delivery, during

which the goods must be returned to the contractor free of charge. Thereafter, the contractor may choose to repair or replace the item or to provide the customer with a credit note for a proportionate part of the invoiced amount.

74. Article 14.9 of the Metaalunie Conditions provides that no warranty applies to defects resulting from normal wear and tear, injudicious use or modification by the customer or third parties.

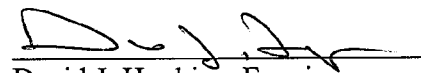
75. As such, pursuant to the agreed upon terms of the contract existing between Plaintiff and Defendant Backus, liability and warranty issues are governed by the terms of the Metaalunie Conditions.

76. The present Complaint seeks damages not authorized under the terms of the Metaalunie Conditions, and should be dismissed.

WHEREFORE, Defendant, Backus USA, Inc. demands:

- (a) Judgment in Defendant Backus USA, Inc.'s favor, together with costs;
- (b) Judgment that, if there is any liability to Plaintiff, Defendant Hepro GmbH is solely liable to Plaintiff; and
- (c) In the event that judgment is entered in Plaintiff's favor and against Defendant, Backus USA, Inc., that Defendant, Backus USA, Inc. may have judgment over and against Defendant, Hepro GmbH, by way of indemnification and/or contribution to the amount recovered by Plaintiff against Defendant, together with costs.

Respectfully submitted,

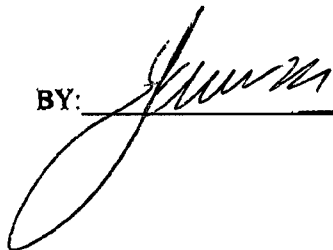
  
David J. Hopkins, Esquire  
Attorney for Defendant



VERIFICATION

I hereby verify that the statements made in this pleading are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. Section 4904, relating to Unsworn Falsification to Authorities.

BY: \_\_\_\_\_

A handwritten signature in black ink, appearing to be "J. M. M.", is written over a horizontal line that serves as a signature line.

# METAALUNIE CONDITIONS

Standard conditions of delivery and payment issued by the 'Metaalunie' (Dutch Organisation of Entrepreneurs in Small and Medium-Sized Businesses in the Metalworking and Mechanical Engineering Industry), referred to as the METAALUNIE CONDITIONS and previously as the SMECOMA CONDITIONS,

filed at the Registry of the District Court in Rotterdam on 1 January 2001.

Publication of the Metaalunie, P.O. Box 2600, 3430 GA Nieuwegein.

©Metaalunie

## Article 1: Applicability

- 1.1. These conditions apply to all offers made by members of the Metaalunie and to all agreements they conclude and to all agreements that may be the result thereof. The offeror/supplier is the Metaalunie member who uses these conditions. Such member is designated in these conditions as the contractor or seller. The other party is designated as the customer or buyer.
- 1.2. These conditions may be used only by members of the Metaalunie.
- 1.3. The standard conditions of the customer shall not apply and are expressly rejected.

## Article 2: Offers

- 2.1. All offers are made without engagement.
- 2.2. If the customer supplies data, drawings etc. to the contractor, the contractor may assume them to be correct and may base his offer upon them.
- 2.3. The prices referred to in the offer are based on delivery ex works in accordance with Incoterms 2000. The prices are exclusive of turnover tax and packaging.
- 2.4. If his offer is not accepted, the contractor has the right to charge the customer for all the costs which he has had to incur in order to make his offer.

## Article 3: Intellectual property rights

- 3.1. Unless agreed otherwise, the contractor retains the copyright and all industrial property rights in the offers made by him and in designs, illustrations, drawings, models, test models, software etc. supplied by him.
- 3.2. The rights to the data referred to in paragraph 1 shall remain the property of the contractor irrespective of whether costs are charged to the customer for their production. Such data may not be copied, used or shown to third parties without the express consent of the contractor. If this provision is infringed, the customer shall owe the contractor a penalty of EUR 25,000. This penalty may be claimed in addition to any compensation owed by law.
- 3.3. The customer must return the data supplied to him as referred to in paragraph 1 at the first request of the contractor within the period specified by the contractor. In the event of an infringement of this provision the customer shall owe the contractor a penalty of EUR 1,000 per day. This penalty may be claimed in addition to any compensation owed by law.

## Article 4: Advice, designs and materials

- 4.1. The customer cannot derive any rights from advice and information obtained from the contractor if they do not relate directly to the order.
- 4.2. The customer is responsible for the drawings and calculations made by him or on his behalf and for the functional suitability of the materials prescribed by him or on his behalf.
- 4.3. The customer shall indemnify the contractor against any claim by its third parties relating to the use of drawings, calculations, samples, models and so forth supplied by or on behalf of the customer.
- 4.4. The customer may, at his own expense, examine (or arrange for the examination of) the materials which the contractor wishes to use before they are processed. If the contractor suffers damage as a result, this shall be borne by the customer.

## Article 5: Delivery period

- 5.1. The delivery period quoted by the contractor is approximate.
- 5.2. In fixing the delivery period the contractor assumes that he can execute the order in the circumstances known to him at that time.
- 5.3. The delivery period starts when agreement has been reached on all technical details, all necessary data, final drawings etc. are in the possession of the contractor, the agreed payment or instalment has been received and the necessary conditions for execution of the order have been fulfilled.
- 5.4.
  - (a) If circumstances occur other than those known to the contractor when he fixed the delivery period, the contractor may extend the delivery period by the time necessary to execute the order in the circumstances. If the work cannot be fitted into the planning schedule of the contractor, it shall be completed as soon as his planning schedule permits this.
  - (b) If there is extra work, the delivery period shall be extended by the time that is necessary to supply (or arrange for the supply of) the materials and parts for this purpose and to carry out the additional work. If the extra work cannot be fitted into the planning schedule of the contractor it shall be completed as soon as his planning schedule permits this.
  - (c) If there is a suspension of obligations by the contractor, the delivery period shall be extended for the duration of the suspension. If continuation of the work cannot be fitted into the planning schedule of the contractor, the work shall be completed as soon as his planning schedule permits this.
  - (d) If work is impossible owing to weather conditions, the delivery period shall be extended for the term of the delay that has occurred as a result.

- 5.5 If the agreed delivery period is exceeded, this shall not under any circumstances confer entitlement to compensation unless this has been agreed in writing.

#### Article 6: Transmission of risk

- 6.1 In the case of delivery ex works, in accordance with Incoterms 2000, the risk in relation to the goods shall pass at the moment when the seller makes them available to the buyer.
- 6.2 Irrespective of the provisions of the previous paragraph, the customer and the contractor agree that the contractor shall arrange for the carriage. The risk of storage, loading, carriage and unloading shall be borne by the customer in this case too. The customer may insure himself against these risks.
- 6.3 Even if the seller installs and/or assembles the goods sold, the risk in relation to the goods shall pass at the moment when the seller makes them available to the buyer at the business premises of the seller or at another agreed place.
- 6.4 If a purchase involves a trade-in and the buyer continues to use the goods to be traded in pending delivery of the new goods, the risk in relation to the goods to be traded in shall continue to be borne by the buyer until the moment at which he transfers them to the possession of the seller.

#### Article 7: Price changes

- 7.1 If four months have passed since the date on which the agreement was concluded and its performance has not yet been completed by the contractor, an increase in the price-determinants may be passed on to the customer.
- 7.2 Payment of the price increase as referred to in paragraph 1 shall take place together with payment of the principal or the last instalment.
- 7.3 If goods are supplied by the customer and the contractor is prepared to use them, the contractor may then charge a maximum of 20 percent of the market price of the delivered goods.

#### Article 8: Impossibility of performance

- 8.1 The contractor shall be entitled to suspend performance of his obligations if he is temporarily prevented from performing them by circumstances that could not be foreseen at the time of the conclusion of the agreement and which are beyond his control.
- 8.2 Circumstances which could not be foreseen by the contractor and which are beyond his control are deemed to include failure of his suppliers and/or subcontractors to fulfil their obligations or to do so in good time, weather conditions, earthquakes, fire, loss or theft of tools, loss of processed materials, road blockades, strikes or work stoppages and import or trade restrictions.
- 8.3 The contractor shall not be entitled to suspend performance if performance is permanently impossible or if a temporary impossibility has lasted for longer than six months. The agreement may then be terminated in respect of such part of the obligations as have not yet been performed. In that case the parties shall not be entitled to compensation for damage suffered or yet to be suffered as a result of the termination.

#### Article 9: Scope of the work

- 9.1 The contractor shall ensure that all licences, exemptions and other decisions that are necessary in order to carry out the work are obtained in good time.
- 9.2 The price of the work does not include
- (a) the costs of groundwork, pile-driving, cutting, breaking, foundation work, bricklaying, woodwork, plastering, painting, wallpapering, repairs or other construction work;
  - (b) the costs of gas, water or electricity connections and other infrastructure facilities;
  - (c) the costs of preventing or mitigating damage to goods present at or near the work;
  - (d) the costs of removing materials, building materials or refuse;
  - (e) travelling and accommodation expenses.

#### Article 10: Alterations to the work

- 10.1 Alterations to the work shall result in any event in extra work or reduced work if:
- (a) there is an alteration to the design or the specifications;
  - (b) the information provided by the customer does not correspond with the reality;
  - (c) the quantities diverge by more than 10% from the estimates.
- 10.2 Extra work shall be calculated on the basis of the value of the price determinants applicable at the time when the extra work is carried out. Reduced work shall be calculated on the basis of the value of the price determinants applicable at the time when the agreement was concluded.
- 10.3 If the increase and decrease in the work results on balance in a decrease the contractor may charge the customer in the final invoice 10% of the difference in the balances. This provision does not apply in the case of a reduction in the work that is a result of a request of the contractor.

#### Article 11: Execution of the work

- 11.1 The customer shall ensure that the contractor can carry out his activities without interruption and at the agreed time and that in the execution of the work he has access to the requisite facilities such as:
- gas, water and electricity;
  - heating;
  - a lockable and dry storage room;
  - facilities prescribed under the Working Conditions Act and other health and safety regulations under that Act.
- 11.2 The customer shall be liable for all damage as a result of the loss, theft or burning of or damage to tools, materials and other property of the contractor located at the place where the work is performed.
- 11.3 If the customer fails to discharge his obligations as referred to in the previous paragraphs and the work is delayed as a result, the work shall be executed as soon as the contractor's planning schedule permits this. In addition, the customer shall be liable for all loss or damage suffered by the contractor as a result.

#### Article 12: Completion of the work

- 12.1. The work shall be deemed to have been completed when:
- (a) the customer has approved the work;
  - (b) the work has been used by the customer; if the customer uses only part of the work, such part shall be deemed to have been completed;
  - (c) the contractor gives written notice to the customer that the work has been completed and the customer does not indicate in writing within 14 days of the notice whether or not the work has been approved;
  - (d) the customer does not approve the work on account of minor defects or missing parts which can be repaired or supplied within 30 days and which do not prevent the use of the work.
- 12.2. If the customer does not approve the work, he shall be obliged to give written notice of this to the contractor specifying the reasons.
- 12.3. If the customer does not approve the work he shall give the contractor the opportunity to complete the work anew. The provisions of this article shall then apply once again.

#### Article 13: Liability

- 13.1. The contractor is liable for damage which the customer suffers and which is the direct and sole result of a failure attributable to the contractor. However, only loss or damage for which the contractor is insured or for which he should reasonably have been insured will be eligible for compensation.
- 13.2. The following are not eligible for compensation:
- (a) consequential loss or damage, including for example loss or damage due to business standstills and loss of profit;
  - (b) damage to goods which are being worked on or to goods which are in the vicinity of the place where the work is being carried out;
  - (c) damage caused by the intent or deliberate recklessness of auxiliaries.
- 13.3. The customer indemnifies the contractor against all claims of third parties on account of product liability due to a defect in a product which has been supplied by the customer to a third party and consisted wholly or partly in products and/or materials supplied by the contractor.

#### Article 14: Warranty

- 14.1. The contractor warrants the proper execution of the agreed performance for a period of six months after delivery or completion.
- 14.2. If the agreed performance consists in the carrying out of contracted work, the contractor warrants the soundness of the delivered construction and the materials used in the construction for the period referred to in paragraph 1, provided that he was free to choose such materials.

If it transpires that the delivered construction or the materials used are unsound, the contractor shall repair or replace them. The parts which the contractor is to repair or replace must be sent to him free of charge. The dismantling and assembly of these parts and any travelling and accommodation expenses incurred shall be borne by the customer.

- 14.3. If the agreed performance consists in the processing by the contractor of materials supplied by the customer, the contractor warrants the soundness of the processing for the period referred to in paragraph 1.

If it transpires that processing has not been carried out in a sound manner, the contractor shall choose whether:

- to carry out the processing anew, in which case the customer must supply new material at his own expense;
- to repair the defect, in which case the customer must return the material free of charge to the contractor;
- to provide the customer with a credit note for a proportionate part of the invoiced amount.

- 14.4. If the agreed performance consists in the delivery of an item of goods, the contractor shall warrant the soundness of the delivered item during the period referred to in paragraph 1.

If it transpires that the delivery has not been sound, the item of goods must be returned free of charge to the contractor. Thereafter the contractor shall choose whether:

- to repair the item of goods;
- to replace the item of goods;
- to provide the customer with a credit note for a proportionate part of the invoiced amount.

- 14.5. If the agreed performance consists in part or in whole of the installation and/or assembly of a delivered item of goods, the contractor warrants the soundness of the installation and/or assembly for the period referred to in paragraph 1.

If it transpires that the installation and/or assembly has not been carried out in a sound manner, the contractor shall repair it. Any travelling and accommodation expenses shall be borne by the customer.

- 14.6. The factory warranty shall apply to parts in respect of which this has been expressly agreed in writing by the customer and the contractor. If the customer has had the opportunity to take cognizance of the content of the factory warranty, this shall take the place of the warranty under this article.

- 14.7. The customer must in all cases offer the contractor the opportunity to repair the defect or to carry out the processing anew.

- 14.8. The customer may invoke the warranty only after he has complied with all his obligations to the contractor.

- 14.9. (a) No warranty is given for defects that are a result of:
- normal wear and tear;
  - injudicious use;
  - non-maintenance or defective maintenance;
  - installation, assembly, modification or repair by the customer or by third parties.
- (b) No warranty is given for delivered items of goods that were not new at the moment of delivery.

#### Article 15: Claims

The customer may no longer invoke an instance of non-performance if he does not lodge a written claim with the contractor within 14 days of the date on which he discovers the defect or could reasonably be expected to discover it.

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA  
(CIVIL DIVISION)

PRO\*ACT, LLC,

Plaintiff,

v.

BACKUS USA, INC.  
and HEPRO GmbH,

Defendants.

:  
:  
:  
:  
:  
:  
:  
:

No. 04-1663-CD

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that a true and correct copy of Defendant Backus USA, Inc.'s Answer to Complaint and New Matter, filed on behalf of Backus USA, Inc. was forwarded by first class mail, postage prepaid, on the 3<sup>rd</sup> day of December, 2004, to all counsel of record, addressed as follows:

Bradley S. Tupi, Esquire  
Tucker Arensberg, P.C.  
1500 One PPG Place  
Pittsburgh, PA 15222

Hopkins Heltzel LLP



David J. Hopkins, Esquire  
Attorney for Defendant Backus, USA, Inc.

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

PRO\*ACT, LLC,

Plaintiff,

v.

BACKUS USA, INC. AND HEPRO GmbH,

Defendants.

CIVIL DIVISION

No. 04-1663-CD

**PRAECIPE TO FILE CERTIFICATE  
OF SERVICE**

CODE: 010

Filed on behalf of Plaintiff,

Pro\*Act, LLC

Counsel of record for this party:

Bradley S. Tupi, Esquire  
PA Id. No. 28682  
Beverly Weiss Manne, Esquire  
PA Id. No. 34545  
Neil J. Gregorio, Esquire  
PA Id. No. 90859

TUCKER ARENSBERG, P.C.  
1500 One PPG Place  
Pittsburgh, PA 15222

Tel. (412) 594-5545  
Fax (412) 594-5619  
Email [btupi@tuckerlaw.com](mailto:btupi@tuckerlaw.com)

LIT:351092-1 021894-120674

**FILED** 614

M 2-26 11:11 NO LC

FEB 09 2005

William A. Shaw  
Prothonotary

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

PRO\*ACT, LLC,

CIVIL DIVISION

Plaintiff,

No. 04-1663-CD

v.

BACKUS USA, INC. and HEPRO GmbH,

Defendants.

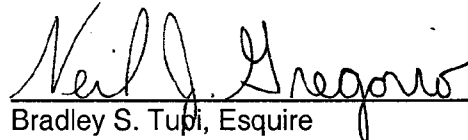
**PRAECIPE TO FILE CERTIFICATE OF SERVICE**

TO PROTHONOTARY:

Kindly file the attached Certificate of Service with respect to the above-captioned matter.

Respectfully submitted,

TUCKER ARENSBERG, P.C.



Bradley S. Tupi, Esquire

PA Id. No. 28682

Beverly Weiss Manne, Esquire

PA Id. No. 34545

Neil J. Gregorio, Esquire

PA Id. No. 90859

1500 One PPG Place

Pittsburgh, PA 15222

Tel. (412) 594-5545

Fax (412) 594-5619

Email: [btupi@tuckerlaw.com](mailto:btupi@tuckerlaw.com)

Attorneys for Plaintiff



JAN 31 2005

## Amtsgericht Delbrück

Amtsgericht Delbrück · Postfach 1161 33119 Delbrück

Bradley S. Tupi, Esq., Beverley Weiss Manne, Esq., and  
Neil J. Gregorio, Esq.

TUCKER ARENSBERG, P.C.

1500 One PPG Place

Pittsburgh, Pennsylvania 15222

**UNITED STATES OF AMERIKA**

Hausanschrift  
Lohmannstr. 28  
33129 Delbrück  
Telefon  
(05250) 9808-0  
Durchwahl  
(05250) 980828  
Telefax  
(05250) 9808-40  
Bearbeiter: Frau Hoffmann

Datum: 24.1.2005

Geschäfts-Nr:  
2 AR 4/05  
(Bitte bei allen Schreiben angeben)

### Internationaler Rechtshilfeverkehr in Zivilsachen

Betrifft: Ihr Zustellungsantrag vom 12/20/04

Anlage: Bescheinigung über die Zustellung nebst Empfangsbekanntnis und Anlagen

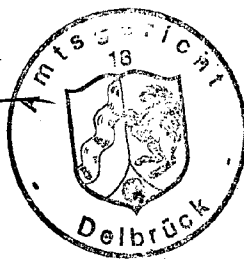
Sehr geehrte Damen und Herren,

in der Anlage wird Ihnen ein Zeugnis über die durchgeführte Zustellung nebst  
Empfangsbekanntnis und Anlagen übersandt.

Hochachtungsvoll



(Hoffmann)  
Rechtspflegerin





# ZUSTELLUNGSZEUGNIS

## CERTIFICATE

## ATTESTATION

Die unterzeichnete Behörde beeht sich, nach Artikel 6 des Übereinkommens zu bescheinigen,  
The undersigned authority has the honour to certify, in conformity with article 6 of the Convention,  
L'autorité soussignée a l'honneur d'attester conformément à l'article 6 de ladite Convention,

1. daß der Antrag erledigt worden ist \*)  
that the document has been served \*)  
que la demande a été exécutée \*)

- am (Datum) 24. Januar 2005  
the (date)  
le (date)

- in (Ort, Straße, Nummer) 33129 Delbrück, Lohmannstraße 28  
at (place, street, number)  
à (localité, rue, numéro)

- in einer der folgenden Formen nach Artikel 5:  
in one of the following methods authorised by article 5:  
dans une des formes suivantes prévues à l'article 5:

~~a) in einer der gesetzlichen Formen (Artikel 5 Absatz 1 Buchstabe a) \*),  
in accordance with the provisions of sub-paragraph a) of the first paragraph of article 5 of the Convention \*),  
selon les formes légales (article 5, alinéa premier, lettre a) \*).~~

b) in der folgenden besonderen Form \*):  
in accordance with the following particular method \*):  
selon la forme particulière suivante \*):

c) durch einfache Übergabe \*).  
by delivery to the addressee, who accepted it voluntarily \*).  
par remise simple \*).

Die in dem Antrag erwähnten Schriftstücke sind übergeben worden an:  
The documents referred to in the request have been delivered to:  
Les documents mentionnés dans la demande ont été remis à:

- (Name und Stellung der Person) Herrn Christoph Wilhelm Protte, Geschäftsführer  
(identity and description of person)  
(identité et qualité de la personne)

- Verwandtschafts-, Arbeits- oder sonstiges Verhältnis zum Zustellungsempfänger: alleinvertretungsberechtigter Geschäftsführer der HEPRO GmbH, Am Bauhof 9, 33129 Delbrück  
relationship to the addressee (family, business or other):  
liens de parenté, de subordination ou autres, avec le destinataire de l'acte:

2. daß der Antrag aus folgenden Gründen nicht erledigt werden konnte \*):  
that the document has not been served, by reason of the following facts \*):  
que la demande n'a pas été exécutée, en raison des faits suivants \*):

Nach Artikel 12 Absatz 2 des Übereinkommens wird die ersuchende Stelle gebeten, die Auslagen, die in der beiliegenden Aufstellung im einzelnen angegeben sind, zu zahlen oder zu erstatten \*).  
In conformity with the second paragraph of article 12 of the Convention, the applicant is requested to pay or reimburse the expenses detailed in the attached statement \*).  
Conformément à l'article 12, alinéa 2, de ladite Convention, le requérant est prié de payer ou de rembourser les frais dont le détail figure au mémoire ci-joint \*).

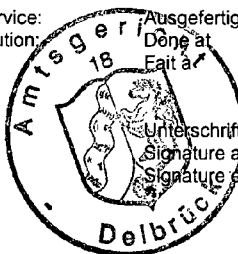
Anlagen  
Annexes  
Annexes

Zurückgesandte Schriftstücke: Empfangsbekanntnis nebst Anlagen  
Documents returned:  
Pièces renvoyées:

Gegebenenfalls Erledigungsstücke:  
In appropriate cases, documents establishing the service:  
Le cas échéant, les documents justificatifs de l'exécution:

Empfangsbekanntnis nebst Anlagen

\*) Unzutreffendes streichen.  
Delete if inappropriate.  
Rayer les mentions inutiles.



*[Handwritten signature]*

# REQUEST

## FOR SERVICE ABROAD OF JUDICIAL OR EXTRAJUDICIAL DOCUMENTS

### DEMANDE AUX FINS DE SIGNIFICATION OU DE NOTIFICATION A L'ÉTRANGER D'UN ACTE JUDICIAIRE OU EXTRAJUDICIAIRE

Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters, signed at The Hague, November 15, 1965.

Convention relative à la signification et à la notification à l'étranger des actes judiciaires ou extrajudiciaires en matière civile ou commerciale, signée à La Haye, le 15 Novembre 1965.

#### Identity and address of the applicant Identité et adresse du requérant

Bradley S. Tupi, Esq., Beverly Weiss Manne, Esq., and  
Neil J. Gregorio, Esq.  
TUCKER ARENSBERG, P.C.  
1500 One PPG Place  
Pittsburgh, Pennsylvania 15222  
UNITED STATES OF AMERICA  
Tel. 1.412.594.5545

#### Address of receiving authority Adresse de l'autorité destinataire

CENTRAL AUTHORITY FOR NORTH RHINE-WESTPHALIA  
Präsident des Oberlandesgerichts Düsseldorf  
Cecilienalle 3  
40474 Düsseldorf  
GERMANY

The undersigned applicant has the honour to transmit in duplicate the document listed below and, in conformity with article 5 of the above-mentioned Convention, requests prompt service of one copy thereof on the addressee, i.e.,

(identity and address)

Le requérant soussigné a l'honneur de faire parvenir—en double exemplaire—à l'autorité destinataire les documents ci-dessous énumérés, en la priant conformément à l'article 5 de la Convention précitée, d'en faire remettre sans retard un exemplaire au destinataire, savoir:

(identité et adresse) HEPRO GmbH (HRB 73922)

Am Bauhof 9, 33129 Delbrück, GERMANY



(a) in accordance with the provisions of sub-paragraph (a) of the first paragraph of article 5 of the Convention.\*

(a) selon les formes légales (article 5, alinéa premier, lettre a).



(b) in accordance with the following particular method (sub-paragraph (b) of the first paragraph of article 5)\*:

(b) selon la forme particulière suivante (article 5, alinéa premier, lettre b): Personal service in accordance with your internal

law for service of documents upon persons or entities in your territory.

Delivery in accordance with ZPO 177 & 178 requested.



(c) by delivery to the addressee, if he accepts it voluntarily (second paragraph of article 5)\*:

(c) le cas échéant, par remise simple (article 5, alinéa 2).

The authority is requested to return or to have returned to the applicant a copy of the documents—and of the annexes\*—with a certificate as provided on the reverse side.

Cette autorité est priée de renvoyer ou de faire renvoyer au requérant un exemplaire de l'acte—et de ses annexes—avec l'attestation figurant au verso.

SERVICE IS REQUESTED PURSUANT TO PUBLIC LAW 97-462 OF FEB. 26, 1983 WHICH AMENDED RULE 4(c)(2)(a) OF THE U.S. FEDERAL RULES OF CIVIL PROCEDURE and RULES 402, 404 & 424 of the PENNSYLVANIA RULES OF CIVIL PROCEDURE.

#### List of documents

#### Énumération des pièces

Executed "Request," in English and German, in duplicate

"Certificate" (unexecuted), in English and German, in duplicate

"Summary" with Attachment "A," in English and German, in duplicate

"Notice," in English and German, in duplicate

Notice to Plead, in English and German, in duplicate

Complaint with Exhibit "A," in English and German, in duplicate

Done at Pittsburgh, Pennsylvania, U.S.A., the 12/20/04

Fait à \_\_\_\_\_, le \_\_\_\_\_

Signature and/or stamp.

Signature et/ou cachet.

Neil J. Gregorio

\*Delete if inappropriate  
Rayer les mentions inutiles.

(Formerly OBD-116 which was formerly LAA-116,  
both of which may still be used)

USM-94  
(Est. 11/22/77)

2 AR 4/05

### Empfangsbekenntnis

Das im Zustellungsantrag der Bradley S. Tupi, Esq., Beverly Weiss Manne, Esq., and Neil J. Gregorio, Esq., TUCKER ARENSBERG; P.C., 1500 One PPG Place, Pittsburgh, Pennsylvania 15222, UNITED STATES OF AMERIKA vom 12/20/04 bezeichneten Schriftstücke (in Englisch nebst deutscher Übersetzung), die diesem Empfangsbekenntnis in Durchschrift angeheftet sind, sind mir heute übergeben worden.

Delbrück, den 24. Januar 2005



Vorstehende eigenhändige Unterschrift des Geschäftsführers

Herrn Christoph Wilhelm Protte, geb. am 16.05.1967, Johann-Wegener-Str. 17 B, 33129

Delbrück,

alleinvertretungsberechtigt handelnd für die HEPRO GmbH, Am Bauhof 9, 33129 Delbrück

- ausgewiesen durch gültigen ~~Bundespersonalausweis~~ -

wird hiermit beglaubigt.

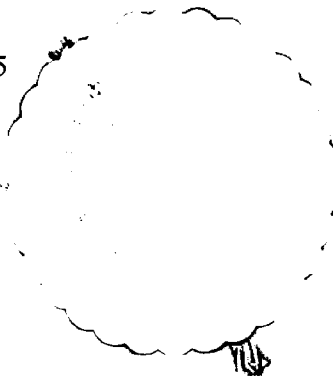
Delbrück, den 24. Januar 2005

Amtsgericht



(Hoffmann)

Rechtspflegerin



REQUEST  
FOR SERVICE ABROAD OF JUDICIAL OR EXTRAJUDICIAL DOCUMENTS

DEMANDE  
AUX FINS DE SIGNIFICATION OU DE NOTIFICATION A L'ÉTRANGER  
D'UN ACTE JUDICIAIRE OU EXTRAJUDICIAIRE

Convention on the service abroad of judicial and extrajudicial documents in civil or  
commercial matters, signed at The Hague, November 15, 1965.

*Convention relative à la signification et à la notification à l'étranger des actes judiciaires ou extrajudiciaires en matière civile  
ou commerciale, signée à La Haye, le 15 Novembre 1965.*

**Identity and address of the applicant**  
*Identité et adresse du requérant*

Bradley S. Tupi, Esq., Beverly Weiss Manne, Esq., and  
Neil J. Gregorio, Esq.  
TUCKER ARENSBERG, P.C.  
1500 One PPG Place  
Pittsburgh, Pennsylvania 15222  
UNITED STATES OF AMERICA  
Tel. 1.412.594.5545

**Address of receiving authority**  
*Adresse de l'autorité destinataire*

CENTRAL AUTHORITY FOR NORTH RHINE-WESTPHALIA  
Präsident des Oberlandesgerichts Düsseldorf  
Cecilienalle 3  
40474 Düsseldorf  
GERMANY

The undersigned applicant has the honour to transmit in duplicate the document listed below and, in conformity with article 5 of the  
above-mentioned Convention, requests prompt service of one copy thereof on the addressee, i.e.,  
(identity and address)

*Le requérant soussigné a l'honneur de faire parvenir en double exemplaire à l'autorité destinataire les documents ci-dessous énumérés,  
en la priant conformément à l'article 5 de la Convention précitée, d'en faire remettre sans retard un exemplaire au destinataire, savoir:*  
(identité et adresse) HEPRO GmbH (HRB 73922)

Am Bauhof 9, 33129 Delbrück, GERMANY

☐ (a) in accordance with the provisions of sub-paragraph (a) of the first paragraph of article 5 of the Convention.\*  
*(a) selon les formes légales (article 5, alinéa premier, lettre a):*

☒ (b) in accordance with the following particular method (sub-paragraph (b) of the first paragraph of article 5)\*:  
*(b) selon la forme particulière suivante (article 5, alinéa premier, lettre b):* Personal service in accordance with your internal  
law for service of documents upon persons or entities in your territory.

Delivery in accordance with ZPO 177 & 178 requested.

☐ (c) by delivery to the addressee, if he accepts it voluntarily (second paragraph of article 5)\*:  
*(c) le cas échéant, par remise simple (article 5, alinéa 2):*

The authority is requested to return or to have returned to the applicant a copy of the documents—and of the annexes\*—with a certificate  
as provided on the reverse side.

*Cette autorité est priée de renvoyer ou de faire renvoyer au requérant un exemplaire de l'acte et de ses annexes avec  
l'attestation figurant au verso.*

SERVICE IS REQUESTED PURSUANT TO PUBLIC LAW 97-462 OF FEB. 26, 1983 WHICH AMENDED RULE 4(c)(2)(a) OF THE U.S.  
FEDERAL RULES OF CIVIL PROCEDURE and RULES 402, 404 & 424 of the PENNSYLVANIA RULES OF CIVIL  
PROCEDURE.

**List of documents**  
*Énumération des pièces*

Executed "Request," in English and German, in duplicate

"Certificate" (unexecuted), in English and German, in duplicate

"Summary" with Attachment "A," in English and German, in duplicate

"Notice," in English and German, in duplicate

Notice to Plead, in English and German, in duplicate

Complaint with Exhibit "A," in English and German, in duplicate

Done at Pittsburgh, Pennsylvania, U.S.A., the 12/20/04

Fait à \_\_\_\_\_, le \_\_\_\_\_

Signature and/or stamp.

Signature et/ou cachet.

Neil J. Gregorio

\*Delete if inappropriate  
*Rayer les mentions inutiles.*

<sup>1</sup> (Formerly OBD-116 which was formerly LAA-116,  
both of which may still be used)

USM-94  
(Est. 11/22/77)

**CERTIFICATE  
ATTESTATION**

The undersigned authority has the honour to certify, in conformity with article 6 of the Convention,  
*L'autorité soussignée a l'honneur d'attester conformément à l'article 6 de ladite Convention,*

1) that the document has been served \*

*1. que la demande a été exécutée*

- the (date)

- le (date)

- at (place, street, number)

- à (localité, rue numéro)

- in one of the following methods authorised by article 5-

*- dans une des formes suivantes prévues à l'article 5:*

☐ (a) in accordance with the provisions of sub-paragraph (a) of the first paragraph of article 5 of the Convention\*.

*a) selon les formes légales (article 5, alinéa premier, lettre a).*

☐ (b) in accordance with the following particular method\*:

*b) selon la forme particulière suivante :*

☐ (c) by delivery to the addressee, who accepted it voluntarily. \*

*c) par remise simple*

The documents referred to in the request have been delivered to:

*Les documents mentionnés dans la demande ont été remis à:*

*-(identity and description of person)*

*-(identité et qualité de la personne)*

*-relationship to the addressee (family, business, or other):*

*-liens de parenté, de subordination ou autres, avec le destinataire de l'acte:*

2) that the document has not been served, by reason of the following facts\*:

*2. que la demande n'a pas été exécutée, en raison des faits suivants:*

In conformity with the second paragraph of article 12 of the Convention, the applicant is requested to pay or reimburse the expenses detailed in the attached statement\*.

*Conformément à l'article 12, alinéa 2, de ladite Convention, le requérant est prié de payer ou de rembourser les frais dont le détail figure au mémoire ci-joint.*

Annexes

*Annexes*

Documents returned:

*Pièces renvoyées:*

Done at \_\_\_\_\_, the \_\_\_\_\_

Fait à \_\_\_\_\_, le \_\_\_\_\_

In appropriate cases, documents establishing the service:

*Le cas échéant, les documents justificatifs de l'exécution:*

Signature and / or stamp.

*Signature et / ou cachet.*

\*Delete if inappropriate.

*Rayer les mentions inutiles.*

**SUMMARY OF THE DOCUMENT TO BE SERVED**  
**ELEMENTS ESSENTIELS DE L'ACTE**

Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters, signed at The Hague, November 15, 1965.

*Convention relative à la signification et à la notification à l'étranger des actes judiciaires et extrajudiciaires en matière civile ou commerciale, signée à La Haye, le 15 Novembre 1965.*  
(article 5, fourth paragraph)  
(article 5, alinéa 4)

Name and address of the requesting authority: Bradley S. Tupi, Esq., Beverly Weiss Manne, Esq., and Neil J. Gregorio, Esq.  
*Nom et adresse de l'autorité requérante :* TUCKER ARENSBERG, P.C.  
1500 One PPG Place, Pittsburgh, Pennsylvania 15222, U.S.A.  
Tel. 1.412.594.5545

**Particulars of the parties\*:**

*Identité des parties :* PRO\*ACT, LLC, Plaintiff  
BACKUS USA, INC. and HEPRO GmbH, Defendants

**JUDICIAL DOCUMENT\*\***  
**ACTE JUDICIAIRE**

**Nature and purpose of the document:**

*Nature et objet de l'acte :* To give notice to the Defendant of the commencement of a civil claim against it and to summon it to answer or otherwise respond.

**Nature and purpose of the proceedings and, where appropriate, the amount in dispute:**

*Nature et objet de l'instance, le cas échéant, le montant du litige :* See Attachment "A."

**Date and place for entering appearance\*\*:**

*Date et lieu de la comparution :* Within twenty (20) days after service of the Complaint, Defendant is required to enter its written appearance personally or by attorney and file its defenses or objections to the claims set forth against it with the Court of Common Pleas of Clearfield County, Pennsylvania, 1 North Second Street, Clearfield, Pennsylvania 16830, U.S.A.

**Court which has given judgment\*\*:**

*Jurisdiction qui a rendu la décision :* N/A

**Date of judgment\*\*:**

*Date de la décision :* N/A

**Time limits stated in the document\*\*:**

*Indication des délais figurant dans l'acte :* Defendant must take action within twenty (20) days after the Complaint is served by entering a written appearance personally or by attorney and filing in writing with the Court its defenses or objections to the claims set forth against it. If Defendant fails to do so the case may proceed without it, and a judgment may be entered against it by the Court without further notice for any money claimed in the Complaint or for any claim or relief requested by Plaintiff.

**EXTRAJUDICIAL DOCUMENT\*\***  
**ACTE EXTRAJUDICIAIRE**

**Nature and purpose of the document:**

*Nature et objet de l'acte :* N/A

**Time limits stated in the document\*\*:**

*Indication des délais figurant dans l'acte :* N/A

\* If appropriate, identity and address of the person interested in the transmission of the document.  
*S'il y a lieu, identité et adresse de la personne intéressée à la transmission de l'acte.*

\*\* Delete if inappropriate.  
*Rayer les mentions inutiles.*

---

**Attachment "A"**  
**to "Summary of the Document to be Served"**

Defendant Hepro is a designer, manufacturer and merchant of mechanical equipment, including carrot peelers. Defendant Backus is Defendant Hepro's exclusive reseller of carrot peelers. Defendant Backus showcased Defendant Hepro's newest carrot peeler at a trade show. The peeler was offered to the Plaintiff as a demo to determine its commercial viability. Defendants Hepro and Backus represented to Plaintiff that design modifications could be made and Plaintiff agreed to proceed. In December, 2002 the modified carrot machine was installed in Plaintiff's facility and as soon as it was put into use, the machine jammed. Numerous adjustments were made but the machine jammed frequently and in 2004, Plaintiff took the machine out of service.

Plaintiff alleges breach of warranty, breach of implied warranty of merchantability and breach of implied warranty of fitness for a particular purpose.

Plaintiff seeks relief as follows: judgment against Defendants in an amount to be determined at trial, costs, attorneys' fees and such other relief as the Court deems just.

---

**NOTICE**  
*(recommended by the Fourteenth Session of  
Hague Conference of October, 1980)*

**identité et adresse du destinataire**  
*identity and address of the addressee*

HEPRO GmbH (HRB 73922)  
Am Bauhof 9  
33129 Delbrück  
GERMANY

**TRÈS IMPORTANT**

LE DOCUMENT CI-JOINT EST DE NATURE JURIDIQUE ET PEUT AFFECTER VOS DROITS ET OBLIGATIONS. LES "ÉLÉMENTS ESSENTIELS DE L'ACTE" VOUS DONNENT QUELQUES INFORMATIONS SUR SA NATURE ET SON OBJET. IL EST TOUTEFOIS INDISPENSABLE DE LIRE ATTENTIVEMENT LE TEXTE MÊME DU DOCUMENT. IL PEUT ÊTRE NÉCESSAIRE DE DEMANDER UN AVIS JURIDIQUE.

SI VOS RESSOURCES SONT INSUFFISANTES, RENSEIGNEZ-VOUS SUR LA POSSIBILITÉ D'OBTENIR L'ASSISTANCE JUDICIAIRE ET LA CONSULTATION JURIDIQUE SOIT DANS VOTRE PAYS SOIT DANS LE PAYS D'ORIGINE DU DOCUMENT.

LES DEMANDES DE RENSEIGNEMENTS SUR LES POSSIBILITÉS D'OBTENIR L'ASSISTANCE JUDICIAIRE OU LA CONSULTATION JURIDIQUE DANS LE PAYS D'ORIGINE DU DOCUMENT PEUVENT ÊTRE ADRESSÉES :

MidPenn Legal Services, Inc.  
213-A North Front Street  
Harrisburg, Pennsylvania 17101  
U.S.A.  
Tel. 1.717.232.0581

**IMPORTANT**

THE ENCLOSED DOCUMENT IS OF A LEGAL NATURE AND MAY AFFECT YOUR RIGHTS AND OBLIGATIONS. THE "SUMMARY OF THE DOCUMENT TO BE SERVED" WILL GIVE YOU SOME INFORMATION ABOUT ITS NATURE AND PURPOSE. YOU SHOULD, HOWEVER, READ THE DOCUMENT ITSELF CAREFULLY. IT MAY BE NECESSARY TO SEEK LEGAL ADVICE.

IF YOUR FINANCIAL RESOURCES ARE INSUFFICIENT YOU SHOULD SEEK INFORMATION ON THE POSSIBILITY OF OBTAINING LEGAL AID OR ADVICE EITHER IN THE COUNTRY WHERE YOU LIVE OR IN THE COUNTRY WHERE THE DOCUMENT WAS ISSUED.

ENQUIRIES ABOUT THE AVAILABILITY OF LEGAL AID OR ADVICE IN THE COUNTRY WHERE THE DOCUMENT WAS ISSUED MAY BE DIRECTED TO:

MidPenn Legal Services, Inc.  
213-A North Front Street  
Harrisburg, Pennsylvania 17101  
U.S.A.  
Tel. 1.717.232.0581



**LEGAL LANGUAGE SERVICES**



International Litigation Support  
8014 State Line Road  
Suite 110  
Leawood, KS 66208-3712

Telephone (913) 341-3167  
Toll Free (800) 755-5775  
Telefax (913) 341-3168  
www.legallanguage.com

December 29, 2004

29. Dezember 2004

**Certification:**

*Bestätigung:*

This is to certify that the attached translation from English into German is an accurate representation of the document received by this office. This document is designated as:

*Hiermit wird bestätigt, daß die beigelegte Übersetzung aus der englischen in die deutsche Sprache eine genaue Wiedergabe des von diesem Büro erhaltenen Schriftstücks ist. Das Schriftstück ist wie folgt bezeichnet:*

**Notice to Plead**

*Vorladung*

I, Maria Victoria Portuguez, General Manager of this company, hereby certify that Joachim Eichhorn, who translated this document, is fluent in German and standard North American English and qualified to translate. I attest to the following:

*Ich, Maria Victoria Portuguez, Hauptgeschäftsführer/Hauptgeschäftsführerin von dieser Gesellschaft, hiermit bescheinige dass Joachim Eichhorn, der/die dieses Schriftstück übersetzt hat, ist fließend in den deutschen und englischen Sprachen und qualifiziert für Übersetzungen. Ich attestiere das Folgende:*

"To the best of my knowledge, the accompanying text is a true, full and accurate translation of the specified document."

*"Nach meinem besten Wissen ist der beiliegende Text eine wahre, vollständige und genaue Übersetzung des angeführten Schriftstücks."*

Signature of Maria Victoria Portuguez

*Unterschrift von Maria Victoria Portuguez*

Subscribed and sworn to before me this December 29, 2004.

*Vor mir unterzeichnet und beeidigt am 29. Dezember 2004.*

ChloeAnn Petty

Notary Public, State of Kansas

Qualified in Johnson County

Commission Expires October 2, 2007

ChloeAnn Petty

Öffentlicher Notar des Staates Kansas

Qualifiziert in Bezirk Johnson

Ermächtigung läuft am 2. Oktober 2007 ab

Sincerely,

*Hochachtungsvoll,*

Victor J. Hertz

President/Präsident

IM AMTSGERICHT DES BEZIRKS CLEARFIELD, PENNSYLVANIA

PRO\*ACT, LLC,

ZIVILKAMMER

Kläger,

NR.

gg.

BACKUS USA, INC. UND HEPRO GmbH,

Beklagte.

**VORLADUNG**

Gegen Sie wurde bei Gericht Klage eingereicht. Falls Sie wünschen, sich gegen die auf den folgenden Seiten dargestellten Forderungen zu verteidigen, müssen Sie innerhalb von zwanzig Tagen nach Zustellung dieser Klageschrift tätig werden, indem Sie Ihr Erscheinen persönlich oder durch einen Rechtsanwalt schriftlich anzeigen und indem Sie Ihr Verteidigungsvorbringen oder Ihre Einwände gegen die gegen Sie erhobenen Forderungen schriftlich bei Gericht einreichen. Sie werden gewarnt, dass, falls Sie dies nicht tun, der Fall ohne Sie fortgesetzt werden kann und dass das Gericht ohne weitere Mitteilung ein Urteil gegen Sie erlassen kann, in dem allen Geldforderungen der Klageschrift oder allen vom Kläger beantragten Forderungen oder Rechtsmitteln stattgegeben wird. Sie können Geld oder Vermögen oder andere für Sie wichtige Rechte verlieren.

SIE SOLLTEN MIT DIESEM SCHREIBEN SOFORT ZU IHREM RECHTSANWALT GEHEN. FALLS SIE KEINEN RECHTSANWALT HABEN ODER KEINEN KENNEN, SOLLTEN SIE DAS UNTEN ANGEGEBENE BÜRO AUFSUCHEN ODER ES ANRUFEN, UM HERAUSZUFINDEN, WO SIE JURISTISCHEN BEISTAND ERHALTEN KÖNNEN.

Court Administrator  
Clearfield County Courthouse  
Clearfield, PA 16830  
814-765-2641 Durchwahl 1303

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

PRO\*ACT, LLC,

CIVIL DIVISION

Plaintiff,

NO.

v.

BACKUS USA, INC. and HEPRO GmbH,

Defendants.

**NOTICE TO PLEAD**

You have been sued in Court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty days after this Complaint is served, by entering a written appearance personally or by attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you, and a judgment may be entered against you by the Court without further notice for any money claimed in the Complaint or for any claim or relief requested by Plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE  
IF YOU DO NOT HAVE OR KNOW A LAWYER,  
THEN YOU SHOULD GO TO OR TELEPHONE THE OFFICE  
SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Court Administrator  
Clearfield County Courthouse  
Clearfield, PA 16830  
814-765-2641 ext. 1303

**LEGAL LANGUAGE SERVICES**



International Litigation Support  
8014 State Line Road  
Suite 110  
Leawood, KS 66208-3712

Telephone (913) 341-3167  
Toll Free (800) 755-5775  
Telefax (913) 341-3168  
www.legallanguage.com

**December 29, 2004**

*29. Dezember 2004*

**Certification:**

*Bestätigung:*

This is to certify that the attached translation from English into German is an accurate representation of the document received by this office. This document is designated as:

*Hiermit wird bestätigt, daß die beigelegte Übersetzung aus der englischen in die deutsche Sprache eine genaue Wiedergabe des von diesem Büro erhaltenen Schriftstücks ist. Das Schriftstück ist wie folgt bezeichnet:*

**Complaint with Exhibit "A"**

*Klageschrift mit Anlage „A“*

I, Maria Victoria Portuguese, General Manager of this company, hereby certify that Joachim Eichhorn, who translated this document, is fluent in German and standard North American English and qualified to translate. I attest to the following:

*Ich, Maria Victoria Portuguese, Hauptgeschäftsführer/Hauptgeschäftsführerin von dieser Gesellschaft, hiermit bescheinige dass Joachim Eichhorn, der/die dieses Schriftstück übersetzt hat, ist fließend in den deutschen und englischen Sprachen und qualifiziert für Übersetzungen. Ich attestiere das Folgende:*

"To the best of my knowledge, the accompanying text is a true, full and accurate translation of the specified document."

*"Nach meinem besten Wissen ist der beiliegende Text eine wahre, vollständige und genaue Übersetzung des angeführten Schriftstücks."*

**Signature of Maria Victoria Portuguese**

*Unterschrift von Maria Victoria Portuguese*

**Subscribed and sworn to before me this December 29, 2004.**

*Vor mir unterzeichnet und beeidigt am 29. Dezember 2004.*

**ChloeAnn Petty**  
Notary Public, State of Kansas  
Qualified in Johnson County  
Commission Expires October 2, 2007

*ChloeAnn Petty*  
*Öffentlicher Notar des Staates Kansas*  
*Qualifiziert in Bezirk Johnson*  
*Ermächtigung läuft am 2. Oktober 2007 ab*

Sincerely,  
*Hochachtungsvoll,*

**Victor J. Hertz**  
President/Präsident

IM AMTSGERICHT DES BEZIRKS CLEARFIELD, PENNSYLVANIA

PRO\*ACT, LLC,

Kläger,

gg.

BACKUS USA, INC. UND HEPRO GmbH,

Beklagte.

ZIVILKAMMER

NR. 04-1663-CS

KLAGESCHRIFT IM ZIVILVERFAHREN

CODE: 010

Eingereicht im Namen des Klägers,

Pro\*Act, LLC

Prozeßführender Anwalt für diese Partei:

RA Bradley S. Tupi

PA-Identnr. 28682

RA Beverly Weiss Manne

PA-Identnr. 34545

RA Neil J. Gregorio

PA-Identnr. 90859

TUCKER ARENSBERG, P.C.

1500 One PPG Place

Pittsburgh, PA 15222

Tel. (412) 594-5545

Fax (412) 594-5619

E-Mail [btupi@tuckerlaw.com](mailto:btupi@tuckerlaw.com)

LIT:337651-3 021894-120674

EINGEREICHT

KOPIE

14.12 Uhr

22. OKT 2004-12-23

William A. Shaw

Notar/Justizbeamter des Gerichts

IM AMTSGERICHT DES BEZIRKS CLEARFIELD, PENNSYLVANIA

PRO\*ACT, LLC,

ZIVILKAMMER

Kläger,

NR.

gg.

BACKUS USA, INC. UND HEPRO GmbH,

Beklagte.

**KLAGESCHRIFT**

Der Kläger Pro\*Act, LLC trägt durch seinen Rechtsbeistand, Tucker Arensberg, P.C., die folgende Klage gegen die Beklagten vor:

1. Der Kläger Pro\*Act, LLC ist eine Gesellschaft mit beschränkter Haftung, die nach dem Recht des Bundesstaates Delaware gegründet wurde und besteht, mit Hauptgeschäftssitz in 22 Lower Ragsdale Drive, Monterey, Kalifornien 93940.
2. Der Beklagte Backus USA, Inc., ist ein nach dem Recht des Bundesstaates Delaware gegründetes und bestehendes Unternehmen mit Hauptgeschäftssitz in 38 B North Brady Street, DuBois, Bezirk Clearfield, Pennsylvania 15801.
3. Der Beklagte Hepro GmbH ist ein nach deutschem Recht gegründetes und bestehendes Unternehmen mit Hauptgeschäftssitz in Am Bauhof 9, D-33129 Delbrück, Deutschland.
4. Der Gerichtsstand ist ordnungsgemäß im Bezirk Clearfield, da der Beklagte Backus seinen Hauptgeschäftssitz im Bezirk Clearfield hat und dort regelmäßig geschäftlich tätig ist und da sich einige der Ereignisse, aus denen die Transaktion besteht, die Gegenstand dieser Klage ist, dort zugetragen haben.
5. Der Beklagte Hepro ist Konstrukteur, Hersteller und Händler von Maschinen einschließlich Karottenschälern.

6. Der Beklagte Backus ist Hepros Exklusivhändler für Karottenschäler in den Vereinigten Staaten und ist hinsichtlich dieser Geräte Kaufmann.
7. Der Beklagte Backus stellte Hepros neueste Konstruktion, den Hepro-Schäler KP-50 auf einer Messe in Los Angeles aus. Die KP-50 war besonders zu dem Zweck konstruiert, kleine/Minikarotten mit Oberteil zu schälen.
8. Der KP-50-Schäler wurde auf der Messe dem Kläger als Muster angeboten, um die kommerzielle Tauglichkeit der Maschine festzustellen. Nach ersten Tests stellte sich heraus, dass die KP-50 nicht kommerziell tauglich war. Die Beklagten Backus und Hepro erklärten jedoch dem Kläger gegenüber, dass für eine kommerzielle Tauglichkeit nötige Konstruktionsänderungen durchführbar wären. Im Vertrauen auf diese Darstellung willigte der Kläger ein, weiter zu machen.
9. Der Beklagte Backus beobachtete den damals bestehenden Karottenschälbetrieb des Klägers einschließlich des im Schälverfahren verwendeten Ausgangsmaterials. Darüber hinaus lieferte der Kläger dem Beklagten Hepro in Deutschland mehrmals rohe Karotten.
10. Im Jahre 2002 reisten Vertreter von Pro\*Act nach Deutschland, um sich mit Hepro-Ingenieuren zu treffen und die Eignung des KP-50-Karottenschälers für kleine/Minikarotten zu beobachten und zu diskutieren.
11. Hepro erklärte sich einverstanden, den KP-50-Karottenschäler zu modifizieren, um die kommerzielle Tauglichkeit zum Schälen der vom Kläger bereit gestellten kleinen/Minikarotten sicherzustellen.
12. Die für das Schälen von kleinen/Minikarotten modifizierte Maschine wurde KP-50B genannt.
13. Hepro ist hinsichtlich des KP-50B-Karottenschälers Kaufmann.
14. Bei der Konstruktion der KP-50B war Hepro Pro\*Acts besonderer Verwendungszweck, das Schälen von kleinen/Minikarotten für den kommerziellen Verkauf, vollständig bekannt.
15. Hepro sicherte sowohl ausdrücklich als auch implizit zu, dass der KP-50B für diesen Zweck geeignet sei.

16. Im Vertrauen auf Hepros Darstellungen hinsichtlich der Eignung der KP-50B für Pro\*Acts besonderen Verwendungszweck bestellte Pro\*Act zwei KP-50B-Karottenmaschinen sowie dazu gehörige Ausrüstung.

17. Nach Informationen und Glauben ist Backus Hepros Exklusiv-Vertriebsrepräsentant in den Vereinigten Staaten.

18. Backus ist hinsichtlich des KP-50B-Karottenschälers Kaufmann.

19. Am 29. Oktober 2002 schickte Backus Pro\*Act eine Auftragsbestätigung für eine KP-50B. Die Auftragsbestätigung ist dieser Klageschrift als Anlage A beigelegt.

20. Backus' Auftragsbestätigung beschreibt den KP-50B insbesondere als „für Minikarotten“ und bezeichnete ihn als einen „Messerschäler für Minikarotten“. Die Anforderungen an das Ausgangsmaterial sahen insbesondere „Karotten mit einer Länge von nicht weniger als 3 Zoll und mit einem Durchmesser von nicht weniger als 0,5 Zoll und nicht mehr als etwa 1,125 Zoll. Es bestehen keine [buchstabengetreue Wiedergabe] Beschränkungen hinsichtlich [buchstabengetreue Wiedergabe] der zu verwendenden Maximallänge.“

21. Backus sicherte sowohl ausdrücklich als auch implizit zu, dass der KP-50B für den besonderen Verwendungszweck des Klägers geeignet sei, nämlich das Schälen von kleinen/Minikarotten für den kommerziellen Verkauf.

22. Die erste KP-50B-Karottenmaschine wurde Pro\*Act im November 2002 geliefert. Zu dieser Zeit wurde die zweite KP-50B bereits gefertigt.

23. Die erste KP-50B wurde im Dezember 2002 in Pro\*Acts Werk aufgestellt. Von der ersten Benutzung an verstopfte die Maschine, wodurch eine kommerzielle Verwendung unmöglich wurde.

24. Der Kläger informierte die Beklagten unverzüglich über die Verstopfungen und verlangte, dass diese Schritte unternehmen sollten, um das Problem zu lösen.

25. In der Annahme, dass die Beklagten die Probleme mit der ersten KP-50B beheben würden, nahm der Kläger im Frühjahr 2003 die Lieferung der zweiten KP-50B-Maschine in gutem Glauben an.



26. Für den kommerziellen Betrieb zweier KP-50B-Karottenschäler mußte ein Waschsystem gekauft werden, das aus zwei Bestandteilen besteht: (1) einem Wäscher und (2) einem Kühler. Der Kläger bestellte das Waschsystem beim Beklagten Backus.

27. Nach Lieferung entdeckte der Kläger, dass der Kühler des Wäschers nicht mit geliefert wurde. Ohne Kühler konnte das Waschsystem nicht zwei Karottenschälmaschinen wie vorgesehen versorgen und konnte nicht so funktionieren, wie von den Beklagten dargestellt.

28. Der Kläger teilte den Beklagten unverzüglich mit, dass der Kühler für den Wäscher nicht mitgeliefert worden war.

29. Im August 2003 lieferten die Beklagten den fehlenden Kühler für den Wäscher nach und die zweite KP-50B-Karottenmaschine wurde in Betrieb genommen. Sie hatte die gleichen Verstopfungsprobleme und die gleiche schlechte Schälleistung wie die erste KP-50B-Maschine. Beide Maschinen arbeiteten so schlecht, dass ihr kommerzieller Einsatz einfach unmöglich war.

30. Am 18. August 2003 legte der Kläger beide KP-50B-Maschinen wegen ihrer unbefriedigenden Leistung still. Der Kläger informierte die Beklagten nochmals über die Probleme, die der Kläger mit den Maschinen hatte.

31. Der Beklagte Hepro sandte zwei seiner Ingenieure, Oliver Schipp und Christoph Protte, nach Los Angeles, um das Produktionsverfahren zu beobachten und auf Video aufzuzeichnen, um nötige Konstruktionsänderungen zu bestimmen.

32. Im Oktober 2003 schickte der Kläger auf Bitten des Beklagten Hepro beide KP-50B-Maschinen zurück an Hepro in Deutschland. Vertreter des Klägers reisten nach Deutschland, um mit den Ingenieuren von Hepro an einer Lösung der Probleme zusammen zu arbeiten.

33. Im November 2003 schickte Hepro eine der KP-50B-Maschinen an den Kläger zurück. Sobald sie erneut in Betrieb genommen wurde, traten die gleichen Verstopfungsprobleme auf. Die Maschine wurde im Dezember 2003 erneut außer Dienst gestellt.

34. Im Februar 2004 teilten die Beklagten dem Kläger mit, dass die zweite KP-50B-Maschine repariert worden sei und während der Tests eine befriedigende Leistung gezeigt habe. Im Februar 2004 schickte Hepro die Maschine dem Kläger. Im April 2004 ging sie dort ein und wurde aufgestellt.

35. Während der ersten Tests verstopfte die zweite KP-50B-Maschine häufig und hatte einen Produktionsausstoß, der für eine rentable Nutzung zu gering war. Pro\*Act stellte die Maschine erneut außer Dienst.

36. Der Kläger hat von den Beklagten eine Rückerstattung für beide KP-50B Maschinen verlangt. Die Beklagten haben dies abgelehnt.

37. Der Kläger wurde wie folgt geschädigt:

- a. Mehr als USD 78.000 für zwei nicht funktionstüchtige KP-50B-Karottenschälmaschinen;
- b. Mehr als USD 80.000 für damit verbundene Ausrüstung;
- c. Transportkosten in Höhe von etwa USD 2.500;
- d. Reisekosten in Höhe von etwa USD 4.600;
- e. Etwa USD 30.000 für die Erweiterung der elektrischen Installationen zur Versorgung der Karottenschäler;
- f. Extrakosten in Verbindung mit einer Verlängerung des fünfjährigen Mietvertrags, die vom Vermieter im Gegenzug für die Erlaubnis zur Durchführung der elektrischen Erweiterung verlangt wurde;
- g. Produktionsverlust und entgangener Gewinn und
- h. Sonstige Schäden.

## KLAGEGRUND I

### BRUCH AUSDRÜCKLICHER ZUSICHERUNGEN (gegen Hepro)

38. Die Behauptungen der Absätze 1 bis 37 werden durch Bezugnahme aufgenommen.

39. Hepro sicherte ausdrücklich zu, dass die KP-50B-Karottenschälmaschine im kommerziellen Umfeld des Klägers kleine/Minikarotten schälen würde. Diese Zusicherung war Teil der Grundlage des Geschäfts zwischen dem Kläger und Hepro.

40. Die KP-50B entsprach nicht Hepros Zusicherung.

41. Als Folge des Bruchs ausdrücklicher Zusicherungen durch Hepro wurde der Kläger geschädigt.

DAHER beantragt der Kläger ein Urteil gegen den Beklagten in Höhe eines Betrags, der während der Verhandlung zu bestimmen sein wird, zuzüglich der Kosten, Anwaltshonorare sowie solcher sonstigen Rechtsmittel, die das Gericht für gerecht hält.

## KLAGEGRUND II

### BRUCH AUSDRÜCKLICHER ZUSICHERUNGEN (gegen Backus)

42. Die Behauptungen der Absätze 1 bis 41 werden durch Bezugnahme aufgenommen.

43. Backus sicherte ausdrücklich zu, dass die KP-50B-Karottenschälmaschine im kommerziellen Umfeld des Klägers kleine/Minikarotten schälen würde. Diese Zusicherung war Teil der Grundlage des Geschäfts zwischen dem Kläger und Backus.

44. Die KP-50B entsprach nicht Backus' Zusicherung.

45. Als Folge des Bruchs ausdrücklicher Zusicherungen durch Backus wurde der Kläger geschädigt.

DAHER beantragt der Kläger ein Urteil gegen den Beklagten in Höhe eines Betrags, der während der Verhandlung zu bestimmen sein wird, zuzüglich der Kosten, Anwaltshonorare sowie solcher sonstigen Rechtsmittel, die das Gericht für gerecht hält.

### **KLAGEGRUND III**

#### **BRUCH DER IMPLIZITEN ZUSICHERUNG DER HANDELBARKEIT** **(gegen Hepro)**

46. Die Behauptungen der Absätze 1 bis 45 werden durch Bezugnahme aufgenommen.

47. Hepro sicherte dem Kläger implizit zu, dass die KP-50B für den gewöhnlichen Zweck geeignet wäre, für den die Maschine verwendet werden sollte, nämlich das Schälen kleiner/Minikarotten.

48. Die KP-50B war nicht von handelbarer Beschaffenheit. Sie verstopfte so häufig, dass sie in einem kommerziellen Umfeld nicht produktiv eingesetzt werden konnte.

49. Die vom Beklagten gelieferten KP-50B-Maschinen waren für ihren gewöhnlichen Zweck nicht geeignet.

50. Als eine Folge des Bruchs der Zusicherung durch Hepro wurde der Kläger geschädigt.

DAHER beantragt der Kläger ein Urteil gegen den Beklagten in Höhe eines Betrags, der während der Verhandlung zu bestimmen sein wird, zuzüglich der Kosten, Anwaltshonorare sowie solcher sonstigen Rechtsmittel, die das Gericht für gerecht hält.

### **KLAGEGRUND IV**

#### **BRUCH DER IMPLIZITEN ZUSICHERUNG DER HANDELBARKEIT** **(gegen Backus)**

51. Die Behauptungen der Absätze 1 bis 50 werden durch Bezugnahme aufgenommen.

52. Backus sicherte dem Kläger implizit zu, dass die KP-50B für den gewöhnlichen Zweck geeignet wäre, für den die Maschine verwendet werden sollte, nämlich das Schälen kleiner/Minikarotten.

53. Die KP-50B war nicht von handelbarer Beschaffenheit. Sie verstopfte so häufig, dass sie in einem kommerziellen Umfeld nicht produktiv eingesetzt werden konnte.

54. Die vom Beklagten gelieferten KP-50B-Maschinen waren für ihren gewöhnlichen Zweck nicht geeignet.

55. Als Folge des Bruchs der Zusicherung durch Backus wurde der Kläger geschädigt.

DAHER beantragt der Kläger ein Urteil gegen den Beklagten in Höhe eines Betrags, der während der Verhandlung zu bestimmen sein wird, zuzüglich der Kosten, Anwaltshonorare sowie solcher sonstigen Rechtsmittel, die das Gericht für gerecht hält.

#### **KLAGEGRUND V**

##### **BRUCH DER IMPLIZITEN ZUSICHERUNG DER EIGNUNG FÜR EINEN BESTIMMTEN VERWENDUNGSZWECK (gegen Hepro)**

56. Die Behauptungen der Absätze 1 bis 55 werden durch Bezugnahme aufgenommen.

57. Als Hepro einwilligte, die beiden KP-50B-Maschinen zu verkaufen und der Kläger einwilligte, diese zu kaufen, war Hepro der bestimmte Verwendungszweck bekannt, nämlich das Schälen kleiner/Minikarotten.

58. Beim Kauf der KP-50B-Maschinen vertraute der Kläger auf die Fähigkeiten und das ingenieurmäßige Urteilsvermögen von Hepro hinsichtlich der Konstruktion und Lieferung geeigneter Maschinen.

59. Die gelieferten Maschinen waren nicht für den besonderen Verwendungszweck des Klägers geeignet. Im Gegenteil, sie verstopften so häufig, dass sie außer Dienst gestellt werden mußten.

60. Als Folge des Bruchs der Zusicherung durch Hepro wurde der Kläger geschädigt. DAHER beantragt der Kläger ein Urteil gegen den Beklagten in Höhe eines Betrags, der während der Verhandlung zu bestimmen sein wird, zuzüglich der Kosten, Anwaltshonorare sowie solcher sonstigen Rechtsmittel, die das Gericht für gerecht hält.

#### **KLAGEGRUND VI**

##### **BRUCH DER IMPLIZITEN ZUSICHERUNG DER EIGNUNG FÜR EINEN BESTIMMTEN VERWENDUNGSZWECK (gegen Backus)**

61. Die Behauptungen der Absätze 1 bis 60 werden durch Bezugnahme aufgenommen.

62. Als Backus einwilligte, die beiden KP-50B-Maschinen zu verkaufen und der Kläger einwilligte, diese zu kaufen, war Backus der bestimmte Verwendungszweck bekannt, nämlich das Schälen kleiner/Minikarotten.

63. Beim Kauf der KP-50B-Maschinen vertraute der Kläger auf die Fähigkeiten und Kenntnisse von Backus hinsichtlich der Lieferung geeigneter Maschinen.

64. Die gelieferten Maschinen waren nicht für den besonderen Verwendungszweck des Klägers geeignet. Im Gegenteil, sie verstopften so häufig, dass sie außer Dienst gestellt werden mußten.

65. Als Folge des Bruchs der Zusicherung durch Backus wurde der Kläger geschädigt.

DAHER beantragt der Kläger ein Urteil gegen den Beklagten in Höhe eines Betrags, der während der Verhandlung zu bestimmen sein wird, zuzüglich der Kosten, Anwaltshonorare sowie solcher sonstigen Rechtsmittel, die das Gericht für gerecht hält.

Respektvoll eingereicht

TUCKER ARENSBERG, P.C.

[unleserliche Unterschrift]

RA Bradley S. Tupi  
PA-Identnr. 28682  
RA Beverly Weiss Manne  
PA-Identnr. 34545  
RA Neil J. Gregorio  
PA-Identnr. 90859

1500 One PPG Place  
Pittsburgh, PA 15222  
Tel. (412) 594-5545  
Fax (412) 594-5619  
E-Mail [btupi@tuckerlaw.com](mailto:btupi@tuckerlaw.com)  
Anwälte des Klägers

LIT:337651-3 021894-120674

**BESTÄTIGUNG**

Ich, Dean Simon, erkläre, dass ich der Geschäftsbereichsleiter des Klägers Pro\*Act, LLC, bin, dass ich bevollmächtigt bin, diese Bestätigung in seinem Namen abzugeben, dass die in der vorstehenden Klageschrift enthaltenen Tatsachen nach meinem besten Wissen, Informationen und Glauben der Wahrheit entsprechen und dass ich diese Erklärung unter Androhung der Strafen des 18 Pa.C.S. § 4904 bezüglich uneidlichen Falschaussagen gegenüber Behörden mache.

[unleserliche Unterschrift]  
Dean Simon

Datum: 18. Oktober 2004

Auftragsbestätigung für KP-50B für Minikarotten

Über die Lieferung eines Messerschälers für Minikarotten. Typ KP-50B wie folgt:

Produktspezifikation

Karotten mit einer Länge von nicht weniger als 3,0 Zoll und mit einem Durchmesser von nicht weniger als etwa 0,5 Zoll und nicht mehr als etwa 1,125 Zoll. Hinsichtlich der maximalen zu verwendenden Länge bestehen keine Beschränkungen.

Kapazität

Die Maschine wird „von Hand beschickt“ und kann etwa 90 Stück pro Minute schälen (5.400 Stück pro Stunde).

Ausbeute

Hängt völlig von der Größe und Qualität der Karotten ab.

Funktion der Maschine

Das Produkt wird mittels einer Reihe von 16 Paar weicher Rollen, die sich um eine vertikale Achse drehen, horizontal durch die Maschine transportiert. Sechs Sätze bestehend aus (2) gefederten Schälmessern befinden sich zwischen den Rollen. Es gibt (6) Messersätze, die insgesamt (12) „Seiten“ des Produkts schälen.

Die Blattansätze müssen vor dem Schälen der Minikarotten vorentfernt werden, bevor die Minikarotten geschält werden können; die Blattansätze müssen auf 1 bis 2 Zoll gekürzt werden. Die Karottenspitze verbleibt am Produkt und wird nicht abgeschnitten.

Das Produkt wird auf den Beschickungstisch gelegt und manuell vorgeschoben, bis das Ende des Produkts vom ersten Satz der weichen Transportrollen erfaßt und in die Maschine eingezogen wird. Von da an wird das Produkt automatisch durch jede der Schälstationen transportiert. Das vollständig geschälte Produkt wird automatisch aus der Maschine ausgestoßen. Die Schalen fallen direkt in Kisten, die sich unterhalb der Rutsche befinden.

Der Schäler ist separat auf Schwenkrollen montiert.

Die Messer und Rollen können zur Reinigung und gründlichen Desinfektion leicht demontiert werden.

Ein kleiner Tisch zum Beschicken mit Karotten ist enthalten.

Technische Daten

Die installierte elektrische Gesamtmotorleistung beträgt 0,75 PS.  
120 Volt pro Phase.

Druckluftspezifikation – 0,15 Kubikfuß pro Minute saubere und trockene Luft bei 116 psi.

Das Druckluftsystem ist nicht in der Maschine enthalten.

Wasser ist nicht erforderlich.

Ausführung

Der Karottenschäler ist in 304er rostfreiem Stahl ausgeführt, mit Ausnahme des Motorantriebs, der Lager und der elektrischen Schalttafel.

Weltweite Zentrale  
P.O. Box 419  
5900 AK Venlo  
Niederlande

Tabellen®

Anlage A



backususainc.  
Pro-Act Specialities

S  
Seite 2

P.O. Box 585, DuBois, PA 15801  
29. Oktober 2002

Abmessungen und Gewicht

71 Zoll Länge x 40 Zoll Breite x 55,11 Zoll Höhe, 375 Pfund

Preis: für komplette Maschine wie beschrieben:

USD 35.500,00

Spezialtisch zur beidhändigen Beschickung des Schälers mit Karotten  
Zusätzlicher Spezialtisch für den ersten am 2. November gelieferten Schäler  
Ersatzmesser; 12 Stück pro Maschine, geliefert am 2. November

USD 525,00

USD 525,00

USD 222,00

Ersatzrollen, 32 Stück, geliefert am 2. November

USD 944,00

Gesamt:

USD 37.716,00

Kommerzielle Bedingungen:

Lieferung:

Ab Werk Venlo, Niederlande, unverpackt, unbeladen, ohne Transport,  
Versicherung und Verzollung, gemäß Incoterms 1990.

Lieferzeit:

Versandbereit 16. Dezember 2002.

Preis:

Netto ohne Aufstellung, Installation, Zoll, Gebühren, und  
Inbetriebnahmekosten.

Zahlungsbedingungen:

50% bei Auftragserteilung  
50% 10 Tage netto

Garantie:

1 Jahr nach Lieferung ab Werk auf Ersatzteile, Material und  
Ausführungsfehler. Beinhaltet keine Verbrauchsmaterialien wie Rollen, Messer  
etc.

Transportkosten:

Ungefähre Kosten betragen USD 1.700,00 von Haustür zu Haustür

Metaalunie-Bedingungen:

Für alle unsere Angebote und alle an uns erteilten Aufträge und alle mit uns geschlossenen Verträge  
außerhalb der Niederlande und in den Vereinigten Staaten und Kanada gelten die Metaalunie-Bedingungen,  
die im Büro des Amtsgerichts in Rotterdam niedergelegt sind, in ihrer jeweils gültigen Fassung. Alle  
Aufträge unterliegen Stornogeühren.

Weltweite Zentrale  
P.O. Box 419  
5900 AK Venlo  
Niederlande

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

PRO\*ACT, LLC,

Plaintiff,

v.

BACKUS USA, INC. AND HEPRO GmbH,

Defendants.

CIVIL DIVISION

NO. 04-1663-CD

COMPLAINT IN CIVIL ACTION

CODE: 010

Filed on behalf of Plaintiff,

Pro\*Act, LLC

Counsel of record for this party:

Bradley S. Tupi, Esquire

PA Id. No. 28682

Beverly Weiss Manne, Esquire

PA Id. No. 34545

Neil J. Gregorio, Esquire

PA Id. No. 90859

TUCKER ARENSBERG, P.C.

1500 One PPG Place

Pittsburgh, PA 15222

Tel. (412) 594-5545

Fax (412) 594-5619

Email [btupi@tuckerlaw.com](mailto:btupi@tuckerlaw.com)

FILED  
212  
OCT 22 2004

William A. Shaw  
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

PRO\*ACT, LLC,

CIVIL DIVISION

Plaintiff,

NO.

v.

BACKUS USA, INC. and HEPRO GmbH,

Defendants.

COMPLAINT

Plaintiff, Pro\*Act, LLC, by its counsel, Tucker Arensberg, P.C., makes the following Complaint against Defendants:

1. Plaintiff, Pro\*Act, LLC, is a limited liability company organized and existing under the laws of the State of Delaware with its principal place of business at 22 Lower Ragsdale Drive, Monterey, California 93940.
2. Defendant, Backus USA, Inc., is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 38 B North Brady Street, DuBois, Clearfield County, Pennsylvania 15801.
3. Defendant Hepro GmbH is a corporation organized and existing under the laws of Germany with its principal place of business at Am Bauhof 9, D-33129, Delbrück, Germany.
4. Venue is proper in Clearfield County because Defendant Backus has its principal place of business in Clearfield County and regularly conducts business there, and because some of the events comprising the transaction at issue in this action took place there.
5. Defendant Hepro is a designer, manufacturer and merchant of mechanical equipment, including carrot peelers.

6. Defendant Backus is Hepro's exclusive reseller of carrot peelers in the United States and is a merchant with respect to such equipment.
7. Defendant Backus showcased Hepro's newest design, the Hepro KP-50 peeler, at a trade show in Los Angeles. The KP-50 was specifically designed to peel small/baby carrots with tops.
8. The KP-50 peeler at the trade show was offered to Plaintiff as a demo to determine the machine's commercial viability. Based on initial tests, the demo KP-50 was not commercially viable. However, Defendants Backus and Hepro represented to Plaintiff that design modifications necessary for commercial viability could be made. In reliance on this representation, Plaintiff agreed to proceed.
9. Defendant Backus observed Plaintiff's then existing carrot peeling operation, including the raw product used in the peeling process. In addition, Plaintiff shipped raw carrots to Defendant Hepro in Germany on several occasions.
10. Pro\*Act representatives traveled to Germany in 2002 to meet with Hepro engineers to observe and discuss the suitability of the KP-50 carrot peeler to peel small/baby carrots.
11. Hepro agreed to modify the KP-50 carrot peeler to ensure its commercial viability for peeling the type of small/baby carrots provided by Plaintiff.
12. The machine, as modified to peel small/baby carrots, was called the KP-50B.
13. Hepro is a merchant with respect to the KP-50B carrot peeler.
14. In designing the KP-50B, Hepro was fully aware of Pro\*Act's specific purpose, to peel small/baby carrots for commercial sale.
15. Hepro both expressly and impliedly warranted the KP-50B as suitable for this purpose.

16. In reliance upon Hepro's representations regarding the suitability of the KP-50B for Pro\*Act's particular purpose, Pro\*Act ordered two KP-50B carrot machines, together with related equipment.
17. Upon information and belief, Backus is Hepro's exclusive sales representative in the United States.
18. Backus is a merchant with respect to the KP-50B carrot peeler.
19. On October 29, 2002, Backus sent an order confirmation for one KP-50B to Pro\*Act. The order confirmation is attached to this Complaint as Exhibit A.
20. Backus' order confirmation specifically described the KP-50B as "for Baby Carrots," and referred to it as a "knife peeler for baby carrots." Raw product requirements were specifically described as "Carrots not less than 3.0 inches long and with a diameter not less than approximately 0.5 inches and not more than approximately 1 1/8 inches. There is not [sic] restrictions [sic] on the maximum length to be used."
21. Backus both expressly and impliedly warranted the suitability of the KP-50B for Plaintiff's particular purpose, namely, the peeling of small/baby carrots for commercial sale.
22. The first KP-50B carrot machine was delivered to Pro\*Act in November 2002. At this time, the second KP-50B was already in production.
23. The first KP-50B was installed in Pro\*Act's facility in December 2002. As soon as the machine was put into use, the machine jammed, making commercial use an impossibility.
24. Plaintiff immediately notified Defendants of the jamming and requested action to resolve the problem.
25. Anticipating that Defendants would resolve the problems with the first KP-50B, Plaintiff in good faith accepted delivery of the second KP-50B machine in the Spring of 2003.

26. Commercial viability of operating two KP-50B carrot peelers required purchase of a wash line system consisting of two parts: (1) a wash line; and (2) a chiller. Plaintiff ordered the wash line system from Defendant Backus.

27. After delivery, Plaintiff discovered that the wash line chiller unit had been omitted. Without the wash line chiller, the wash line system could not support two carrot peeling machines as designed and could not function as represented by Defendants.

28. Plaintiff immediately notified Defendants that the wash line chiller had been omitted from the shipment.

29. In August 2003, Defendants furnished the missing wash line chiller and the second KP-50B carrot machine was placed into operation. It experienced the same jamming problems and low production output that had been experienced with the first KP-50B machine. Both machines performed so poorly that their commercial utilization was simply not feasible.

30. On August 18, 2003, Plaintiff took both KP-50B machines out of service because of their unsatisfactory performance. Once again, Plaintiff notified Defendants of the problems Plaintiff was experiencing with the machines.

31. Defendant Hepro sent two of its engineers, Oliver Schipp and Christoph Protte, to Los Angeles to observe and videotape the production process to determine design modification requirements.

32. In October 2003, Plaintiff sent both KP-50B machines back to Hepro in Germany at Defendant Hepro's request. Representatives of Plaintiff traveled to Germany to work with Hepro engineers in an effort to resolve the problems.

33. In November 2003, Hepro returned one of the KP-50B machines to Plaintiff. As soon as it was placed into service, the same jamming problems recurred. The machine was taken out of service again in December 2003.

34. In February 2004, Defendants notified Plaintiff that the second KP-50B machine had been repaired and had performed satisfactorily during testing. Hepro shipped the machine to Plaintiff in February 2004. It was received and installed in April 2004.

35. During initial testing, the second KP-50B machine jammed frequently, yielding a production rate too low for commercial viability. Pro\*Act again took the machine out of service.

36. Plaintiff has requested a refund from Defendants for both KP-50B machines. Defendants have refused.

37. Plaintiff has incurred damages as follows:

- a. Over \$78,000 for two non-functional KP-50B carrot peeler machines;
- b. Over \$80,000 for related equipment;
- c. Approximately \$2,500 for shipping costs;
- d. Approximately \$4,600 for travel expenses;
- e. Approximately \$30,000 to upgrade electrical facilities to accommodate the carrot peelers;
- f. Extra costs associated with a five-year lease extension required by Plaintiff's landlord in exchange for permission to perform the electrical upgrade;
- g. Lost production and lost profits; and
- h. Other damages.

**COUNT I**

**BREACH OF EXPRESS WARRANTY**  
**(vs. Hepro)**

38. The allegations of paragraphs 1 through 37 are incorporated by reference.

39. Hepro expressly warranted that the KP-50B carrot machine would peel small/baby carrots in Plaintiff's commercial setting. This warranty was part of the basis of the bargain between Plaintiff and Hepro.

40. The KP-50B failed to conform to Hepro's warranty.

41. As a result of Hepro's breach of express warranties, Plaintiff has incurred damages.

WHEREFORE, Plaintiff demands judgment against Defendant in an amount to be determined at trial, together with costs, attorneys' fees and such other relief as the Court deems just.

**COUNT II**

**BREACH OF EXPRESS WARRANTY**  
**(vs. Backus)**

42. The allegations of paragraphs 1 through 41 are incorporated by reference.

43. Backus expressly warranted that the KP-50B carrot machine would peel small/baby carrots in Plaintiff's commercial setting. This warranty was part of the basis of the bargain between Plaintiff and Backus.

44. The KP-50B failed to conform to Backus' warranty.

45. As a result of Backus' breach of express warranties, Plaintiff has incurred damages.



WHEREFORE, Plaintiff demands judgment against Defendant in an amount to be determined at trial, together with costs, attorneys' fees and such other relief as the Court deems just.

**COUNT III**

**BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY  
(vs. Hepro)**

46. The allegations of paragraphs 1 through 45 are incorporated by reference.
47. Hepro impliedly warranted to Plaintiff that the KP-50B would be fit for the ordinary purpose for which the machine was to be used, namely, peeling baby carrots.
48. The KP-50B was not of merchantable quality. It jammed so often that it could not be productively used in a commercial setting.
49. The KP-50B machines supplied by Defendant were not fit for their ordinary purpose.
50. As a result of Hepro's breach of warranty, Plaintiff has incurred damages.

WHEREFORE, Plaintiff demands judgment against Defendant in an amount to be determined at trial, together with costs, attorneys' fees and such other relief as the Court deems just.

**COUNT IV**

**BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY  
(vs. Backus)**

51. The allegations of paragraphs 1 through 50 are incorporated by reference.
52. Backus impliedly warranted to Plaintiff that the KP-50B would be fit for the ordinary purpose for which the machine was to be used, namely, peeling small/baby carrots.
53. The KP-50B was not of merchantable quality. It jammed so often that it could not be productively used in a commercial setting.

54. The KP-50B machines supplied by Defendant were not fit for their ordinary purpose.

55. As a result of Backus' breach of warranty, Plaintiff has incurred damages.

WHEREFORE, Plaintiff demands judgment against Defendant in an amount to be determined at trial, together with costs, attorneys' fees and such other relief as the Court deems just.

**COUNT V**

**BREACH OF IMPLIED WARRANTY OF FITNESS  
FOR A PARTICULAR PURPOSE  
(vs. Hepro)**

56. The allegations of paragraphs 1 through 55 are incorporated by reference.

57. At the time Hepro agreed to sell and Plaintiff agreed to buy the two KP-50B machines, Hepro knew Plaintiff's particular purpose for the machines, namely, peeling small/baby carrots.

58. In purchasing the KP-50B machines, Plaintiff relied upon the skill and engineering judgment of Hepro to design and furnish suitable machines.

59. The machines furnished were not suitable for Plaintiff's particular purpose. To the contrary, they jammed so often that they had to be taken out of service.

60. As a result of Hepro's breach of warranty, Plaintiff has incurred damages.

WHEREFORE, Plaintiff demands judgment against Defendant in an amount to be determined at trial, together with costs, attorneys' fees and such other relief as the Court deems just.

**COUNT VI**

**BREACH OF IMPLIED WARRANTY OF FITNESS  
FOR A PARTICULAR PURPOSE  
(vs. Backus)**

61. The allegations of paragraphs 1 through 60 are incorporated by reference.

62. At the time Backus agreed to sell and Plaintiff agreed to buy the two KP-50B machines, Backus knew Plaintiff's particular purpose for the machines, namely, peeling small/baby carrots.

63. In purchasing the KP-50B machines, Plaintiff relied upon the skill and knowledge of Backus to furnish suitable machines.

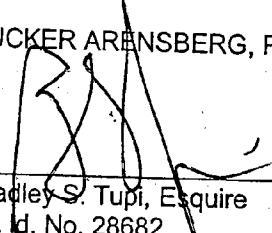
64. The machines furnished were not suitable for Plaintiff's particular purpose. To the contrary, they jammed so often that they had to be taken out of service.

65. As a result of Backus' breach of warranty, Plaintiff has incurred damages.

WHEREFORE, Plaintiff demands judgment against Defendant in an amount to be determined at trial, together with costs, attorneys' fees and such other relief as the Court deems just.

Respectfully submitted,

TUCKER ARENSBERG, P.C.



Bradley S. Tupi, Esquire  
PA Id. No. 28682  
Beverly Weiss Manne, Esquire  
PA Id. No. 34545  
Neil J. Gregorio, Esquire  
PA Id. No. 90859

1500 One PPG Place  
Pittsburgh, PA 15222  
Tel. (412) 594-5545  
Fax (412) 594-5619  
Email: [btupi@tuckerlaw.com](mailto:btupi@tuckerlaw.com)  
Attorneys for Plaintiff

LIT:337651-3 021894-120674

VERIFICATION

I, Dean Simon, state that I am Division President of Plaintiff, Pro\*Act, LLC, that I am authorized to make this Verification on its behalf, that the facts contained in the foregoing Complaint are true and correct to the best of my knowledge, information and belief, and that I make this Verification subject to the penalties of 18 Pa.C.S. §4904 relating to unsworn falsification to authorities.



\_\_\_\_\_  
Dean Simon

Dated: October 18, 2004

**backusUSAinc.**



P.O. Box 585, DuBois, PA 15801

Pro-Act Specialties

Page 1

October 29, 2002

**Order Confirmation for KP-50-B for Baby Carrots**

For the delivery of a knife peeler for baby carrots, Type KP-50-B as follows:

**Product requirements**

Carrots not less than 3.0 inches long and with a diameter not less than approximately 0.5 inches and not more than approximately 1 1/8 inches. There is no restrictions on the maximum length to be used.

**Capacity**

The machine is "hand-fed" and can peel approximately 90 pieces per minute (5,400 pieces per hour).

**Recovery**

Depends entirely on carrot size and quality.

**Function of the machine**

Product is transported horizontally through the machine via a series of 16 pairs of soft rollers, which rotate on a vertical axis. Six sets of (2) spring-loaded peeling knives is located between the rollers. There are (6) sets of knives which peel a total of (12) "sides" of the product.

The green ends need to be pre-trimmed prior to peeling the baby carrot, the length of the green ends need to be cut to 1" to 2". The carrot tail will remain on the product and will not be cut.

Product is placed on the in-feed table and manually moved forward until the first set of soft transport rollers grip the end of the product and draw it into the machine. From then on, the product is moved automatically through each peeling station. Completely peeled product is automatically discharged from the machine. Peeling waste falls directly into crates placed below the chute.

The peeler is mounted separately on caster wheels.

Knives and rollers are easy and quickly removable for cleaning and thorough sanitation.

Includes small table for feeding carrots.

**Technical data**

Total installed electric motor power is 0.75 HP.  
120 volts one phase.

Air requirements - 0.15cf per minute clean and dry air at 116 psi.

Air supply system is not included with the machine.

No water required.

**Construction**

The carrot peeler is constructed of 304 stainless steel except for the motor drive, bearings, and electrical panel.

Worldwide Headquarters  
P.O. Box 419  
5900 AK Venlo  
the Netherlands

EXHIBIT

A

tabbles

**backusUSAinc.**



P.O. Box 585, DuBois, PA 15801

Pro-Aid Specialities

Page 2

October 29, 2002

Dimensions and weight

71 inches long x 40 inches wide x 55.11 inches high, 375 lbs.

Price for machine complete as described:

US \$ 35,500.00

Special table to load carrots with two hands into peeler

US \$ 525.00

Additional special table for first peeler shipped 11/02

US \$ 525.00

Spare knives; 12 pieces per machine, shipped 11/02

US \$ 222.00

Spare rollers, 32 pieces, shipped 11/02

US \$ 944.00

Total:

US \$37,716.00

Terms and conditions:

Delivery: ex works Venlo, the Netherlands, unpacked, unloaded, excluding transport, insurance and customs clearance, as per INCOTERMS 1990.

Delivery Time: Ready for shipment of December 16th 2002.

Prices: Net excluding set-up, installation, customs fees, duties and commissioning costs.

Terms: 50% at time of order  
50% net 10 days

Guarantee: 1 year after delivery ex works on spare parts, material, and construction failures. Not including consumables e.g., rollers, knives, etc.

Shipping Cost: Approximate cost is \$ 1,700.00 USD door to door.

Metaalunie Conditions:

To all our offers and quotations, to all orders given to us and to all contracts concluded with us outside the Netherlands, and in the United States and Canada, the Metaalunie Conditions are applicable, deposited at the office of the District Court in Rotterdam, as they are according to the latest text. All orders are subject to cancellation fees.

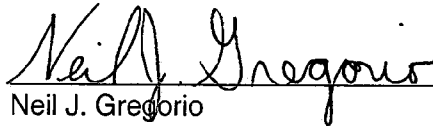
Worldwide Headquarters  
P.O. Box 419  
5900 AK Venlo  
the Netherlands

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Praeipie to File  
Certificate of Service was served via first class U.S. Mail, postage prepaid, this 7th day of  
February, 2005, to the following:

David J. Hopkins, Esquire  
Hopkins Heltzel, LLP  
900 Beaver Drive  
DuBois, PA 15801

Hepro Gmbh  
Am Bauhof 9, D-33129  
Delbruck, Germany

  
Neil J. Gregorio

LIT:351092-1 021894-120674

CA

FILED No CC  
3/10:45/61  
MAR 14 2005 69

William A. Shaw  
Prothonotary/Clerk of Courts

**IN THE COURT OF COMMON PLEAS CLEARFIELD COUNTY, PENNSYLVANIA**

PRO\*ACT, LLC,

Plaintiff,

vs.

BACKUS USA, INC. and HEPRO GmbH,

Defendants.

CIVIL DIVISION

No. 04-1663-CD

**PRELIMINARY OBJECTIONS OF  
DEFENDANT HEPRO GMBH TO  
PLAINTIFF'S COMPLAINT**

Filed on Behalf of Defendant,  
HEPRO GmbH

Counsel of Record for This Party:

WAYNE W. RINGEISEN, ESQ.  
Pa. I.D. #53550

REED SMITH LLP  
Firm #234  
435 Sixth Avenue  
Pittsburgh, PA 15219  
(412) 288-3131  
(412) 288-3063 (Facsimile)

**JURY TRIAL DEMANDED**



**IN THE COURT OF COMMON PLEAS CLEARFIELD COUNTY, PENNSYLVANIA**

PRO\*ACT, LLC,

Plaintiff,

vs.

BACKUS USA, INC. and HEPRO GmbH,

Defendants.

CIVIL DIVISION

No. 04-1663-CD

\* \* \* \* \*

**PRELIMINARY OBJECTIONS OF DEFENDANT HEPRO GMBH TO PLAINTIFF'S COMPLAINT**

NOW INTO COURT, through undersigned counsel, comes Defendant, HEPRO GmbH ("Hepro") and pursuant to Rule 1028 of the Pennsylvania Rules of Civil Procedure files its preliminary objections to plaintiff's complaint averring as follows:

**I. BACKGROUND**

1. On or about October 22, 2004, Plaintiff, Pro\*Act, LLC ("Pro\*Act") filed a complaint against BACKUS USA, Inc. ("Backus") and Hepro, asserting claims for breach of express warranty, breach of implied warranty of merchantability, and breach of implied warranty of fitness for a particular purpose, in connection with the sale of a KP-50 carrot peeler (Plaintiff's complaint, 5). Backus has filed an answer denying liability and asserting a new matter cross claim against Hepro. For the reasons set forth below, both the Pro\*Act complaint and the Backus' cross claim must be dismissed.

**II. GROUNDS FOR PRELIMINARY OBJECTIONS**

**A. Lack of In Personam Jurisdiction**

2. Specific jurisdiction is improper as neither the complaint nor the crossclaim allege that Hepro has sufficient contacts with Pennsylvania to sustain this Court's jurisdiction over Hepro in this matter.

3. There are no "minimum contacts" with Pennsylvania alleged in Pro\*Act's complaint relating to its' claims in this litigation to satisfy "traditional notions of fair play and substantial justice."

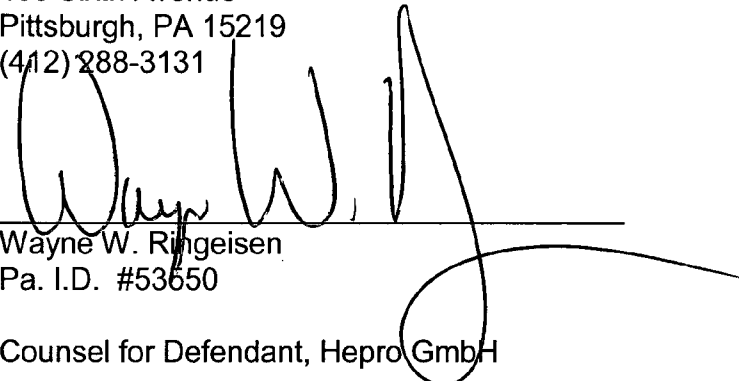
4. General jurisdiction over Hepro is also improper as there are no allegations in Pro\*Act's complaint that Hepro is incorporated, formed or qualified as a foreign corporation or entity under the laws of Pennsylvania, or has consented to this Court's jurisdiction. Further, there is no allegation in the complaint that Hepro exercises a "continuous and systematic part of its general business within this Commonwealth."

5. There are also no contacts with Pennsylvania alleged in the complaint to support the kind of systematic, substantial or continuous contacts that would constitutionally justify this Court's exercise of general personal jurisdiction over Hepro.

6. There are no allegations that Hepro conducts any business in the Commonwealth of Pennsylvania, other than the assertion that as to the underlying transaction Backus was Hepro's representative in the United States.

WHEREFORE, Defendant, Hepro GmbH respectfully requests that this Court sustain its preliminary objections and dismiss Plaintiff Pro\*Act, LLC's complaint and the cross claim filed by Backus.

REED SMITH, LLP  
435 Sixth Avenue  
Pittsburgh, PA 15219  
(412) 288-3131



Wayne W. Ringeisen  
Pa. I.D. #53650

Counsel for Defendant, Hepro GmbH

IN THE COURT OF COMMON PLEAS CLEARFIELD COUNTY, PENNSYLVANIA

PRO\*ACT, LLC,

Plaintiff,

vs.

BACKUS USA, INC. and HEPRO GmbH,

Defendants.

CIVIL DIVISION

No. 04-1663-CD

\* \* \* \* \*

**PROPOSED ORDER OF COURT**

AND NOW, this \_\_\_\_ day of \_\_\_\_\_, 2005, upon consideration of defendant Hepro GmbH's preliminary objections, it is hereby ORDERED, ADJUDGED and DECREED that the preliminary objections are sustained and Plaintiff's complaint and the cross claim of Backus USA, Inc are dismissed with prejudice.

BY THE COURT:

\_\_\_\_\_. J.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 11<sup>th</sup> day of March 2005, a true and correct copy of the foregoing **PRELIMINARY OBJECTIONS OF DEFENDANT HEPRO GMBH TO PLAINTIFF'S COMPLAINT** was served upon all counsel of record by U. S. Mail, postage prepaid.

Bradley S. Tupi, Esq.  
Tucker Arensberg, PC  
1500 One PPG Place  
Pittsburgh, PA 15222  
(*Counsel for Plaintiff*)

David J. Hopkins, Esq.  
Hopkins Heltzel, LLP  
900 Beaver Drive  
Dubois, PA 15801  
(*Counsel for Defendant, Backus USA, Inc.*)

  
\_\_\_\_\_  
WAYNE W. RINGEISEN

CA

**IN THE COURT OF COMMON PLEAS CLEARFIELD COUNTY, PENNSYLVANIA**

PRO\*ACT, LLC,

Plaintiff,

vs.

BACKUS USA, INC. and HEPRO GmbH,

Defendants.

CIVIL DIVISION

No. 04-1663-CD

**PRELIMINARY OBJECTIONS OF  
DEFENDANT HEPRO GmbH TO  
DEFENDANT BACKUS USA, INC.'S  
NEW MATTER**

Filed on Behalf of Defendant,  
HEPRO GmbH

Counsel of Record for This Party:

WAYNE W. RINGEISEN, ESQ.  
Pa. I.D. #53550

BRIAN T. HIMMEL, ESQ.  
Pa. I.D. #66086

REED SMITH LLP  
Firm #234  
435 Sixth Avenue  
Pittsburgh, PA 15219  
(412) 288-3131  
(412) 288-3063 (Facsimile)

**JURY TRIAL DEMANDED**

**FILED**

MAR 28 2005  
2/8:30 PM  
William A. Shaw  
Prothonotary/Clerk of Courts  
no c/c

IN THE COURT OF COMMON PLEAS CLEARFIELD COUNTY, PENNSYLVANIA

PRO\*ACT, LLC,

Plaintiff,

vs.

BACKUS USA, INC. and HEPRO GmbH,

Defendants.

CIVIL DIVISION

No. 04-1663-CD

\* \* \* \* \*

**PRELIMINARY OBJECTIONS OF DEFENDANT HEPRO GmbH TO DEFENDANT  
BACKUS USA, INC.'S NEW MATTER**

NOW INTO COURT, through undersigned counsel, comes Defendant, HEPRO GmbH ("Hepro") and pursuant to Rule 1028 of the Pennsylvania Rules of Civil Procedure files its preliminary objections to defendant Backus USA, Inc.'s new matter ("Backus") averring as follows:

**I. BACKGROUND**

1. On or about October 22, 2004, Plaintiff, Pro\*Act, LLC ("Pro\*Act") filed a complaint against Backus and Hepro, asserting claims for breach of express warranty, breach of implied warranty of merchantability, and breach of implied warranty of fitness for a particular purpose, in connection with the sale of a KP-50 carrot peeler (Plaintiff's complaint, at ¶5). Backus has filed an answer denying liability and in its new matter incorporating the allegations of paragraphs 1-66 of Pro\*Act's complaint and asserting a claim for indemnity and contribution against Hepro.<sup>1</sup> For the reasons set forth below, Backus' new matter as to Hepro must be dismissed.

---

<sup>1</sup> Backus improperly asserts its new matter, without a notice to plead, seeking indemnity and contribution from Hepro pursuant to Pa. R.C.P. 1030(a) rather than properly filing its new matter claim pursuant to Pa. R.C.P. Rule 2252(d). (See paragraph 68 of Backus' answer and new matter).

## **II. GROUNDS FOR PRELIMINARY OBJECTIONS**

### **A. Lack of In Personam Jurisdiction**

2. Specific jurisdiction is improper as neither Pro\*Act's complaint nor Backus' answer and new matter allege that Hepro has sufficient contacts with Pennsylvania to sustain this Court's jurisdiction over Hepro in this matter.

3. There are no "minimum contacts" with Pennsylvania alleged in Pro\*Act's complaint or Backus' answer and new matter relating to either of their claims in this litigation to satisfy "traditional notions of fair play and substantial justice."

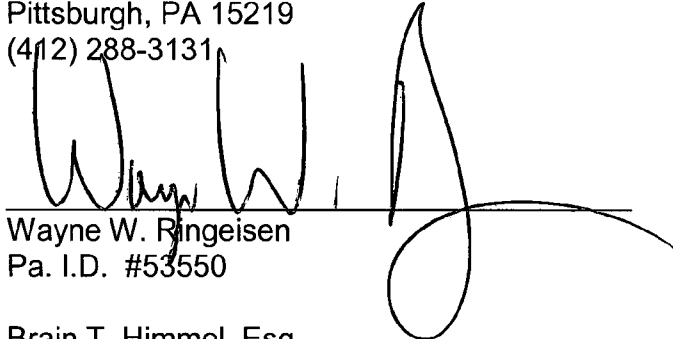
4. General jurisdiction over Hepro is also improper as there are no allegations in Pro\*Act's complaint or Backus' answer and new matter that Hepro is incorporated, formed or qualified as a foreign corporation or entity under the laws of Pennsylvania, or has consented to this Court's jurisdiction. Further, there is no allegation in Pro\*Act's complaint or Backus' answer and new matter that Hepro exercises a "continuous and systematic part of its general business within this Commonwealth."

5. There are also no contacts with Pennsylvania alleged in Pro\*Act's complaint or Backus' answer and new matter to support the kind of systematic, substantial or continuous contacts that would constitutionally justify this Court's exercise of general personal jurisdiction over Hepro.

6. There are no allegations in either Pro\*Act's complaint or Backus' answer and new matter that Hepro conducts any business in the Commonwealth of Pennsylvania, other than the assertion that as to the underlying transaction Backus was Hepro's representative in the United States.

WHEREFORE, Defendant, Hepro GmbH respectfully requests that this Court sustain its preliminary objections and dismiss defendant Backus USA, Inc.'s new matter crossclaim seeking indemnity and/or contribution from Hepro GmbH.

REED SMITH, LLP  
435 Sixth Avenue  
Pittsburgh, PA 15219  
(412) 288-3131



Wayne W. Ringeisen  
Pa. I.D. #53550

Brain T. Himmel, Esq.  
Pa. I.D. #66086

Counsel for Defendant, Hepro GmbH



**IN THE COURT OF COMMON PLEAS CLEARFIELD COUNTY, PENNSYLVANIA**

PRO\*ACT, LLC,

Plaintiff,

vs.

BACKUS USA, INC. and HEPRO GmbH,

Defendants.

CIVIL DIVISION

No. 04-1663-CD

\* \* \* \* \*

**PROPOSED ORDER OF COURT**

AND NOW, this \_\_\_\_ day of \_\_\_\_\_, 2005, upon consideration of defendant Hepro GmbH's preliminary objections, it is hereby ORDERED, ADJUDGED and DECREED that the preliminary objections are sustained and defendant Backus USA, Inc.'s new matter seeking contribution and/or indemnity from Hepro GmbH is with prejudice.

BY THE COURT:

\_\_\_\_\_  
J.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 27th day of March 2005, a true and correct copy of the foregoing **PRELIMINARY OBJECTIONS OF DEFENDANT HEPRO GmbH TO DEFENDANT BACKUS USA, INC.'S NEW MATTER** was served upon all counsel of record by U. S. Mail, postage prepaid.

Bradley S. Tupi, Esq.  
Tucker Arensberg, PC  
1500 One PPG Place  
Pittsburgh, PA 15222  
(*Counsel for Plaintiff*)

David J. Hopkins, Esq.  
Hopkins Heltzel, LLP  
900 Beaver Drive  
Dubois, PA 15801  
(*Counsel for Defendant, Backus USA, Inc.*)

  
WAYNE W. RINGEISEN

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

PRO\*ACT, LLC,

Plaintiff,

v.

BACKUS USA, INC. AND HEPRO Gmbh,

Defendants.

CIVIL DIVISION

NO. 04-1663 CD

**AMENDED COMPLAINT  
IN CIVIL ACTION**

CODE: 010

Filed on behalf of Plaintiff,

Pro\*Act, LLC  
Counsel of record for this party:

Bradley S. Tupi, Esquire  
PA Id. No. 28682  
Beverly Weiss Manne, Esquire  
PA Id. No. 34545  
Jeanne M. Stancampiano, Esquire  
PA Id. No. 89078

TUCKER ARENSBERG, P.C.  
1500 One PPG Place  
Pittsburgh, PA 15222

Tel. (412) 594-5545  
Fax (412) 594-5619  
Email [btupi@tuckerlaw.com](mailto:btupi@tuckerlaw.com)

**FILED** *no cc*  
*m/11/10*  
**MAR 31 2005** *GW*

William A. Shaw  
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

PRO\*ACT, LLC,

CIVIL DIVISION

Plaintiff,

NO. 04-1663 CD

v.

BACKUS USA, INC. and HEPRO GmbH,

Defendants.

**NOTICE TO PLEAD**

You have been sued in Court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty days after this Amended Complaint is served, by entering a written appearance personally or by attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you, and a judgment may be entered against you by the Court without further notice for any money claimed in the Amended Complaint or for any claim or relief requested by Plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE  
IF YOU DO NOT HAVE OR KNOW A LAWYER,  
THEN YOU SHOULD GO TO OR TELEPHONE THE OFFICE  
SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Court Administrator  
Clearfield County Courthouse  
Clearfield, PA 16830  
814-765-2641 ext. 1303

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

PRO\*ACT, LLC,

CIVIL DIVISION

Plaintiff,

NO. 04-1663 CD

v.

BACKUS USA, INC. and HEPRO Gmbh,

Defendants.

**AMENDED COMPLAINT**

Plaintiff, Pro\*Act, LLC, by its counsel, Tucker Arensberg, P.C., makes the following Amended Complaint against Defendants:

1. Plaintiff, Pro\*Act, LLC, is a limited liability company organized and existing under the laws of the State of Delaware with its principal place of business at 22 Lower Ragsdale Drive, Monterey, California 93940.
2. Defendant, Backus USA, Inc., is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 38 B North Brady Street, DuBois, Clearfield County, Pennsylvania 15801.
3. Defendant Hepro Gmbh is a corporation organized and existing under the laws of Germany with its principal place of business at Am Bauhof 9, D-33129, Delbruck, Germany.
4. Venue is proper in Clearfield County because Defendant Backus has its principal place of business in Clearfield County and regularly conducts business there, and because some of the events comprising the transaction at issue in this action took place there.
5. Defendant Hepro is a designer, manufacturer and merchant of mechanical equipment, including carrot peelers.

6. Defendant Backus is Hepro's exclusive reseller of carrot peelers in the United States and is a merchant with respect to such equipment.

7. Hepro has contacts with Pennsylvania as follows:

a. Hepro agreed to sell five KP-50B units to Backus, a Pennsylvania corporation, over a nine-month period. See Purchase Order No. 05070 dated May 8, 2002 ("Purchase Order"), attached as Exhibit A, and Purchase Order Confirmation attached as Exhibit B.

b. Hepro agreed to reserve Backus' exclusive selling rights to Hepro's KP-50B machines. See Purchase Order (Exhibit A) and Purchase Order Confirmation (Exhibit B).

c. Marc Broeren ("Broeren") of Backus USA was designated the "lead manager of Hepro" for purposes of facilitating the sale of Hepro's KP-50B peeler to Pro\*Act. See Purchase Order (Exhibit A) and Purchase Order Confirmation (Exhibit B).

d. Backus was the exclusive distributor of KP-50B peelers in North and South America. See Letter dated January 23, 2003 from Broeren to Pro\*Act attached as Exhibit C.

e. All payments by Pro\*Act for Hepro's KP-50B were made payable to Backus and delivered in the Commonwealth. See Pro\*Act's checks attached as Exhibit D.

f. Hepro billed Pro\*Act for the KP-50B through Backus, Hepro's exclusive dealer of KP-50B peelers. See Backus' Invoices attached as Exhibit E.

g. On at least one occasion, a KP-50B machine at issue in this action was shipped into and out of this Commonwealth. See Joyce Logistics, Inc.'s Invoice and Pro\*Act's payment attached as Exhibit F. Joyce Logistics, Inc. is a Pennsylvania corporation with its business address in Philadelphia.

h. Hepro, through Backus, sold and distributed at least 42 KP-50 peeler machines in the United States. See email from Broeren to Pro\*Act dated May 4, 2002 attached as Exhibit G.

i. Hepro used Backus to negotiate, sell, distribute, invoice, and collect payments, as well as to serve as the point of contact for purposes of rectifying problems associated with Hepro's KP-50B machine.

8. Defendant Backus showcased Hepro's newest design, the Hepro KP-50 peeler, at a trade show in Los Angeles. The KP-50 was specifically designed to peel small/baby carrots with tops.

9. The KP-50 peeler at the trade show was offered to Plaintiff as a demo to determine the machine's commercial viability. Based on initial tests, the demo KP-50 was not commercially viable. However, Defendants Backus and Hepro represented to Plaintiff that design modifications necessary for commercial viability could be made. In reliance on this representation, Plaintiff agreed to proceed.

10. Defendant Backus observed Plaintiff's then existing carrot peeling operation, including the raw product used in the peeling process. In addition, Plaintiff shipped raw carrots to Defendant Hepro in Germany on several occasions.

11. Pro\*Act representatives traveled to Germany in 2002 to meet with Hepro engineers to observe and discuss the suitability of the KP-50 carrot peeler to peel small/baby carrots.

12. Hepro agreed to modify the KP-50 carrot peeler to ensure its commercial viability for peeling the type of small/baby carrots provided by Plaintiff.

13. The machine, as modified to peel small/baby carrots, was called the KP-50B.

14. Hepro is a merchant with respect to the KP-50B carrot peeler.

15. In designing the KP-50B, Hepro was fully aware of Pro\*Act's specific purpose, to peel small/baby carrots for commercial sale.

16. Hepro both expressly and impliedly warranted the KP-50B as suitable for this purpose.

17. In reliance upon Hepro's representations regarding the suitability of the KP-50B for Pro\*Act's particular purpose, Pro\*Act ordered two KP-50B carrot machines, together with related equipment.

18. Upon information and belief, Backus is Hepro's exclusive sales representative in the United States.

19. Backus is a merchant with respect to the KP-50B carrot peeler.

20. On October 29, 2002, Backus sent an order confirmation for one KP-50B to Pro\*Act. The order confirmation is attached to this Amended Complaint as Exhibit B.

21. Backus' order confirmation specifically described the KP-50B as "for Baby Carrots," and referred to it as a "knife peeler for baby carrots." Raw product requirements were specifically described as "Carrots not less than 3.0 inches long and with a diameter not less than approximately 0.5 inches and not more than approximately 1 1/8 inches. There is not [sic] restrictions [sic] on the maximum length to be used."

22. Backus both expressly and impliedly warranted the suitability of the KP-50B for Plaintiff's particular purpose, namely, the peeling of small/baby carrots for commercial sale.

23. The first KP-50B carrot machine was delivered to Pro\*Act in November 2002. At this time, the second KP-50B was already in production.

24. The first KP-50B was installed in Pro\*Act's facility in December 2002. As soon as the machine was put into use, the machine jammed, making commercial use an impossibility.

25. Plaintiff immediately notified Defendants of the jamming and requested action to resolve the problem.



26. Anticipating that Defendants would resolve the problems with the first KP-50B, Plaintiff in good faith accepted delivery of the second KP-50B machine in the Spring of 2003.

27. Commercial viability of operating two KP-50B carrot peelers required purchase of a wash line system consisting of two parts: (1) a wash line; and (2) a chiller. Plaintiff ordered the wash line system from Defendant Backus.

28. After delivery, Plaintiff discovered that the wash line chiller unit had been omitted. Without the wash line chiller, the wash line system could not support two carrot peeling machines as designed and could not function as represented by Defendants.

29. Plaintiff immediately notified Defendants that the wash line chiller had been omitted from the shipment.

30. In August 2003, Defendants furnished the missing wash line chiller and the second KP-50B carrot machine was placed into operation. It experienced the same jamming problems and low production output that had been experienced with the first KP-50B machine. Both machines performed so poorly that their commercial utilization was simply not feasible.

31. On August 18, 2003, Plaintiff took both KP-50B machines out of service because of their unsatisfactory performance. Once again, Plaintiff notified Defendants of the problems Plaintiff was experiencing with the machines.

32. Defendant Hepro sent two of its engineers, Oliver Schipp and Christoph Protte, to Los Angeles to observe and videotape the production process to determine design modification requirements.

33. In October 2003, Plaintiff sent both KP-50B machines back to Hepro in Germany at Defendant Hepro's request. Representatives of Plaintiff traveled to Germany to work with Hepro engineers in an effort to resolve the problems.

34. In November 2003, Hepro returned one of the KP-50B machines to Plaintiff. As soon as it was placed into service, the same jamming problems recurred. The machine was taken out of service again in December 2003.

35. In February 2004, Defendants notified Plaintiff that the second KP-50B machine had been repaired and had performed satisfactorily during testing. Hepro shipped the machine to Plaintiff in February 2004. It was received and installed in April 2004.

36. During initial testing, the second KP-50B machine jammed frequently, yielding a production rate too low for commercial viability. Pro\*Act again took the machine out of service.

37. Plaintiff has requested a refund from Defendants for both KP-50B machines. Defendants have refused.

38. Plaintiff has incurred damages as follows:

- a. Over \$78,000 for two non-functional KP-50B carrot peeler machines;
- b. Over \$80,000 for related equipment;
- c. Approximately \$2,500 for shipping costs;
- d. Approximately \$4,600 for travel expenses;
- e. Approximately \$30,000 to upgrade electrical facilities to accommodate the carrot peelers;
- f. Extra costs associated with a five-year lease extension required by Plaintiff's landlord in exchange for permission to perform the electrical upgrade;
- g. Lost production and lost profits; and
- h. Other damages.

**COUNT I**

**BREACH OF EXPRESS WARRANTY**  
**(vs. Hepro)**

39. The allegations of paragraphs 1 through 38 are incorporated by reference.

40. Hepro expressly warranted that the KP-50B carrot machine would peel small/baby carrots in Plaintiff's commercial setting. This warranty was part of the basis of the bargain between Plaintiff and Hepro.

41. The KP-50B failed to conform to Hepro's warranty.

42. As a result of Hepro's breach of express warranties, Plaintiff has incurred damages.

WHEREFORE, Plaintiff demands judgment against Defendant in an amount to be determined at trial, together with costs, attorneys' fees and such other relief as the Court deems just.

**COUNT II**

**BREACH OF EXPRESS WARRANTY**  
**(vs. Backus)**

43. The allegations of paragraphs 1 through 42 are incorporated by reference.

44. Backus expressly warranted that the KP-50B carrot machine would peel small/baby carrots in Plaintiff's commercial setting. This warranty was part of the basis of the bargain between Plaintiff and Backus.

45. The KP-50B failed to conform to Backus' warranty.

46. As a result of Backus' breach of express warranties, Plaintiff has incurred damages.

WHEREFORE, Plaintiff demands judgment against Defendant in an amount to be determined at trial, together with costs, attorneys' fees and such other relief as the Court deems just.

### **COUNT III**

#### **BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY (vs. Hepro)**

47. The allegations of paragraphs 1 through 46 are incorporated by reference.

48. Hepro impliedly warranted to Plaintiff that the KP-50B would be fit for the ordinary purpose for which the machine was to be used, namely, peeling baby carrots.

49. The KP-50B was not of merchantable quality. It jammed so often that it could not be productively used in a commercial setting.

50. The KP-50B machines supplied by Defendant were not fit for their ordinary purpose.

51. As a result of Hepro's breach of warranty, Plaintiff has incurred damages.

WHEREFORE, Plaintiff demands judgment against Defendant in an amount to be determined at trial, together with costs, attorneys' fees and such other relief as the Court deems just.

### **COUNT IV**

#### **BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY (vs. Backus)**

52. The allegations of paragraphs 1 through 51 are incorporated by reference.

53. Backus impliedly warranted to Plaintiff that the KP-50B would be fit for the ordinary purpose for which the machine was to be used, namely, peeling small/baby carrots.

54. The KP-50B was not of merchantable quality. It jammed so often that it could not be productively used in a commercial setting.

55. The KP-50B machines supplied by Defendant were not fit for their ordinary purpose.

56. As a result of Backus' breach of warranty, Plaintiff has incurred damages.

WHEREFORE, Plaintiff demands judgment against Defendant in an amount to be determined at trial, together with costs, attorneys' fees and such other relief as the Court deems just.

#### **COUNT V**

#### **BREACH OF IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE (vs. Hepro)**

57. The allegations of paragraphs 1 through 56 are incorporated by reference.

58. At the time Hepro agreed to sell and Plaintiff agreed to buy the two KP-50B machines, Hepro knew Plaintiff's particular purpose for the machines, namely, peeling small/baby carrots.

59. In purchasing the KP-50B machines, Plaintiff relied upon the skill and engineering judgment of Hepro to design and furnish suitable machines.

60. The machines furnished were not suitable for Plaintiff's particular purpose. To the contrary, they jammed so often that they had to be taken out of service.

61. As a result of Hepro's breach of warranty, Plaintiff has incurred damages.

WHEREFORE, Plaintiff demands judgment against Defendant in an amount to be determined at trial, together with costs, attorneys' fees and such other relief as the Court deems just.

#### **COUNT VI**

#### **BREACH OF IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE (vs. Backus)**

62. The allegations of paragraphs 1 through 61 are incorporated by reference.

63. At the time Backus agreed to sell and Plaintiff agreed to buy the two KP-50B machines, Backus knew Plaintiff's particular purpose for the machines, namely, peeling small/baby carrots.

64. In purchasing the KP-50B machines, Plaintiff relied upon the skill and knowledge of Backus to furnish suitable machines.

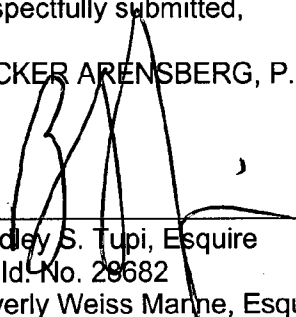
65. The machines furnished were not suitable for Plaintiff's particular purpose. To the contrary, they jammed so often that they had to be taken out of service.

66. As a result of Backus' breach of warranty, Plaintiff has incurred damages.

WHEREFORE, Plaintiff demands judgment against Defendant in an amount to be determined at trial, together with costs, attorneys' fees and such other relief as the Court deems just.

Respectfully submitted,

TUCKER ARENSBERG, P.C.



---

Bradley S. Tupi, Esquire  
PA Id. No. 29682  
Beverly Weiss Marne, Esquire  
PA Id. No. 34545  
Jeanne M. Stancampiano, Esquire  
PA Id. No. 89078

1500 One PPG Place  
Pittsburgh, PA 15222  
Tel. (412) 594-5545  
Fax (412) 594-5619  
Email: [btupi@tuckerlaw.com](mailto:btupi@tuckerlaw.com)  
Attorneys for Plaintiff

LIT:356087-1 021894-120674

## Backus USA, Inc.

P.O. Box 585 DuBois, PA 15801 Phone: 814-375-8999 Fax: 814-375-6609

### Company Name:

Hepro  
Christophe Protte

### Type of Equipment:

XXX New Equipment  
Spare Parts  
Warranty, please explain in special instructions.

## Purchase Order # 05070

SHIP TO: To Be Advised

BILL TO: Backus USA  
PO Box 585  
DuBois, PA, 15801

### PAYMENT METHOD

Check		Am't. enclosed		Purchase order number	
Credit card		Card type		Substitutions allowed?	No
		Card number		Backorder allowed?	No
On account	XX	Account no.		Ship via	To Be Advised
				(If overruled, please explain in special instructions below)	
COD				FOB destination	
Tax exempt	X	Exemption no.		Date ordered	May 08, 2002
				Delivery Date Requested By	see below

Please supply the following items

ITEM NO.	DESCRIPTION	UNIT	QTY	UNIT COST	TOTAL AMOUNT
001	Per discussions of Marc Broeren, and as listed below:  Call purchase order on (5) KP-50B units manufactured to new specifications per attached and per discussions with Marc Broeren. Backus USA has (9) months to complete sale of all (5) machines, or Backus USA will be charged full amount listed. Otherwise, balance due as machines ship from Hepto. Hepto further agrees to reserve exclusive North and South American selling rights to this machine and for further years and time thereafter upon successful sale(s). This includes exclusivity of machines and spare parts. Machines must perform to specifications and (9) months cannot begin until 1st machine is accepted. (12) week delivery on first machine. All \$\$\$ in Euros. One (1) year guarantee on all machines.	ea.	5		

Larry Salone  
Ordered by and Date 5/8/02  
Larry Salone  
Approved by and Date 5/8/02

Shipping charges  
Handling charges  
Insurance  
Tax

Tax rate 0 %

### SPECIAL INSTRUCTIONS

Marc Broeren of Backus USA to be lead manager of Hepto for contact.  
First machine in 12 weeks, ready for shipment.

EXHIBIT

tabbies

A

**Order Confirmation for KP-50 B for Baby Carrots**

For the delivery of a knife peeler for baby carrots. Type KP-50 B as follows:

**Product requirements**

Carrots not less than 3.0 inches long and with a diameter not less than approximately 0.5 inches and not more than approximately 1 1/8 inches. There is not restrictions on the maximum length to be used.

**Capacity**

The machine is "hand-fed" and can peel approximately 90 pieces per minute (5,400 pieces per hour).

**Recovery**

Depends entirely on carrot size and quality.

**Function of the machine**

Product is transported horizontally through the machine via a series of 16 pairs of soft rollers, which rotate on a vertical axis. Six sets of (2) spring-loaded peeling knives is located between the rollers. There are (6) sets of knives which peel a total of (12) "sides" of the product.

The green ends need to be pre-trimmed prior to peeling the baby carrot, the length of the green ends need to be cut to 1" to 2". The carrot tail will remain on the product and will not be cut.

Product is placed on the infeed table and manually moved forward until the first set of soft transport rollers grip the end of the product and draw it into the machine. From then on, the product is moved automatically through each peeling station. Completely peeled product is automatically discharged from the machine. Peeling waste falls directly into crates placed below the chute.

The peeler is mounted separately on caster wheels.

Knives and rollers are easy and quickly removable for cleaning and thorough sanitation.

Includes small table for feeding carrots.

**Technical data**

Total installed electric motor power is 0.75 HP.

120 volts one phase.

Air requirements - 0.15cf per minute clean and dry air at 116 psi.

Air supply system is not included with the machine.

No water required.

**Construction**

The carrot peeler is constructed of 304 stainless steel except for the motor drive, bearings, and electrical panel.

Worldwide Headquarters  
P.O. Box 419  
5900 AK Venlo  
the Netherlands

**EXHIBIT**

B





Pro-Act Specialities

Page 2

October 29, 2002

**Dimensions and weight**

71 inches long x 40 inches wide x 55.11 inches high, 375 lbs.

**Price** for machine complete as described;

US \$ 35,500.00

Special table to load carrots with two hands into peeler

US \$ 525.00

Additional special table for first peeler shipped 11/02

US \$ 525.00

Spare knives; 12 pieces per machine, shipped 11/02

US \$ 222.00

Spare rollers, 32 pieces, shipped 11/02

US \$ 944.00**Total:**US \$37,716.00**Terms and conditions:**

**Delivery:** ex works Venlo, the Netherlands, unpacked, unloaded, excluding transport, insurance and customs clearance, as per INCOTERMS 1990.

**Delivery Time:** Ready for shipment of December 16th 2002.

**Prices:** Net excluding set-up, installation, customs fees, duties and commissioning costs.

**Terms:** 50% at time of order  
50% net 10 days

**Guarantee:** 1 year after delivery ex works on spare parts, material, and construction failures. Not including consumables e.g., rollers, knives, etc.

**Shipping Cost:** Approximate cost is \$ 1,700.00 USD door to door.

**Metaalunie Conditions:**

To all our offers and quotations, to all orders given to us and to all contracts concluded with us outside the Netherlands, and in the United States and Canada, the Metaalunie Conditions are applicable, deposited at the office of the District Court in Rotterdam, as they are according to the latest text. All orders are subject to cancellation fees.

**backusUSAinc.**

P.O. Box 585, Dubois, PA 15801

**FAXMESSAGE**

Date : 23 January 2003  
To : PROACT  
Fax No. :  
Attn. : Bonnie  
From : Marc  
Subject : Contract  
Page : 1 of 1

Fax ref. No.: MB

Bonnie,

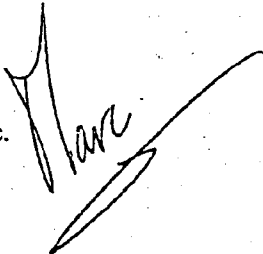
Here is the P.O. agreement we as Backus USA Inc. have with Hepro-Germany. It is a P.O. for 5 machines we have committed to sell within 12 months (the 9 months in the contract was re-negotiated). It's a call P.O. so we can ask for a machine whenever we want just as long as we have purchased all 5 machines before 11/1 2003. That's the date the first machine arrived in the USA. We are the only company that can sell these machines into North and South Americas.

We will be waiting for your reply as agreed before February 20th. (45 days).

If you have any questions please contact Dean so we can discuss.

Kindest regards,

Marc Broeren  
Backus USA Inc.



Worldwide Headquarters  
P.O. Box 419  
5900 AK Venlo  
the Netherlands

USA Office  
Phone : 814-375-6999  
Fax : 814-375-6909  
e-mail : marcb@backususa.com

**EXHIBIT**

C

18030

15754

PRO \* ACT SPECIALTY

Inv # 909 12/1/02 17,750.00

Balance on Carrot Peeler. 1st payment in 5/02

Inv # 893 12/2/02 2500.99 -

Shipping. Customs Cost on Carrot Peeler

CARROT PEELER #1

PRO \* ACT SPECIALTY

1205 WHOLESALE ST.  
LOS ANGELES, CA 90021  
(213) 895-6968

WELLS FARGO BANK  
www.wellsfargo.com

11-24  
1210-750

15754

CHECK NO.

15754

Twenty Thousand Two Hundred Fifty

DATE

12/11/02

AMOUNT

\$20,250.99

+ 17,750.00 DEP

ck 11304

PAY  
TO THE  
ORDER OF

BURBIS USA, INC.

NON-NEGOTIABLE

AUTHORIZED SIGNATURE

⑈065754⑈ ⑆121000248⑆4375 688694⑈

\$ 38,000.99

57-001

\$ 38,000.99

CARROT PEELER #1

5 yr

12/9/02

ck  
11304  
15754

EXHIBIT

D

Jan 13 09 12:45p

P\*H Specialties Acct Dept 213 895-6977

P.4  
11304

VERBODEN TOEGANG / Name: BACKUS USA, INC.

Invoice	Reference	Inv Date	Inv Amt	Amt Paid	Discount	Adj Amt	Net Amt
325	CARROT PEE	05/08/02	17750.00	17750.00	0.00	0.00	17750.00

(Acct 11010-)

Check Date = 05/10/02

Check Total = 17750.00

PRO \* ACT SPECIALTY

1205 WHOLESALE ST.  
LOS ANGELES, CA 90021  
(213) 895-6968WELLS FARGO BANK  
www.wellsfargo.com11-24  
1210-750

11304

CHECK NO.

\*\*\*Seventeen Thousand Seven Hundred Fifty &amp; No/100 Dollars

05/10/02  
DATE\*\*17,750.00  
AMOUNTPAY BACKUS USA, INC.  
TO THE P.O. BOX 585  
ORDER OF DUBOIS, PA 15801

NOT-NEGOTIABLE

AUTHORIZED SIGNATURE

⑈011304⑈ ⑆121000242⑆4375 688694⑈

POSTED

Check No:

Subtotal	17,750.00
Sales Tax	
Total Invoice Amount	17,750.00
Payment Received	0.00
<b>TOTAL</b>	<b>\$17,750.00</b>

PRO \* ACT SPECIALTY

16843

808-1 11/8/02 20,190.00

Balance of Washline System

33,650.00  
13,460.00 PD 11-27-02  
20,190.00 PD 3-10-03

Ø balance

PRO \* ACT SPECIALTY

1205 WHOLESALE ST.  
LOS ANGELES, CA 90021  
(213) 895-6968

WELLS FARGO BANK  
www.wellsfargo.com

11-24  
1210

16843

CHECK NO.

16843

Twenty Thousand One Hundred ninety & 00/100

DATE

3-10-03

AMOUNT

\$20,190.00

PAY  
TO THE  
ORDER OF

Backus USA, Inc

AUTHORIZED SIGNATURE

⑈016843⑈ ⑆121000248⑆4375 688694⑈

CODED TO 19022

SLB 18030 33,650-  
19010 <13,460>

PRO • ACT SPECIALTY

000-000-0000

P.2

1546

#808 11.8.02 33,650.00 Ship Date 12.23

40% 13,460.00

*Carol Bedler*

bal still open - 20,190.00

**POSTED**

Wash Line System

PRO • ACT SPECIALTY

1205 WHOLESALE ST.  
LOS ANGELES, CA 90021  
(213) 893-6968

WELLS FARGO BANK  
www.wellsfargo.com

11-24  
1210

15464

CHECK NO.  
15464

Thirteen Thousand Four Hundred Sixty & 00/100

DATE

11.27.02

AMOUNT

\$13,460.00

PAY  
TO THE  
ORDER OF

Backus USA, Inc.  
P.O. Box 585  
DUBOIS, PA 15801

**NON-NEGOTIABLE**

AUTHORIZED SIGNATURE

⑈015464⑈ ⑆121000248⑆4375 688694⑈

invoice. . . . .  
all or any part of this  
invoice must be submitted  
to Backus USA in  
writing within 7 + seven

40% 13,460.00

Check No:

Subtotal  
Sales Tax  
Total Invoice Amount  
Payment Received  
TOTAL

Continued  
Continued  
Continued  
Continued  
Continued

PRO \* ACT SPECIALTY

15753

Peeler #2

✓ # 769 -37,716.00

50% Deposit 18,858.00

PRO \* ACT SPECIALTY

1205 WHOLESALE ST.  
LOS ANGELES, CA 90021  
(213) 895-6968WELLS FARGO BANK  
www.wellsfargo.com11-24 759  
1210

15753

CHECK NO.

15753

Eighteen Thousand Eight Hundred Fifty Eight &amp; 00/100

DATE

12-11-02

AMOUNT

\$18,858.00

BY

THE  
DER OF

Backus USA, INC.

AUTHORIZED SIGNATURE

⑈015753⑈ ⑈121000248⑈4375 688694⑈

Feb 18 03 06:32a

P\*H Specialties Acct Dept 213 895-6977

P.3  
15798

PRO \* ACT SPECIALTY

Peeler #2

Inv # 769 37,716.00

5% pd 12/11 18,858.00

bni = 18,858.00

10% 15,086.40

bni = 37,716.00

10-29-02 Invoice Date  
12-16-02 Ship date

SECOND  
CARROT  
PEELER

POSTED

PRO \* ACT SPECIALTY

1205 WHOLESALE ST.  
LOS ANGELES, CA 90021  
(213) 895-6968

WELLS FARGO BANK  
www.wellsfargo.com

11-24  
1210

15798

CHECK NO.  
15778

Fifteen Thousand Eighty Six & 40/100

DATE  
1-21-03

AMOUNT  
\$15,086.40

PAY  
TO THE  
ORDER OF  
Backus USA INC  
PO BOX 585  
DuBois, PA 15801

NON-NEGOTIABLE

AUTHORIZED SIGNATURE

⑈015798⑈ ⑆12⑆000218⑆1375 688694⑈



PRO \* ACT SPECIALTY

2000

3771.60 Balance on General Capital  
1100.18 Inv # 311

**POSTED**

18022- Equip Warehouse

PRO \* ACT SPECIALTY  
1205 WHOLESALE ST.  
LOS ANGELES, CA 90021  
(213) 895-6968

WELLS FARGO BANK  
www.wellsfargo.com

11-24  
7230

20003

Five Thousand Four Hundred One & 10/100

CHECK NO.  
20003

PAY  
TO THE  
ORDER OF

Backus USA, Inc.  
PO Box 585  
Dubois, PA 15801

DATE

7-28-03

AMOUNT

115,401.88

**NOT-NEGOTIABLE**

AUTHORIZED SIGNATURE

⑆020003⑆ ⑆121000218⑆4375 688694⑆

invoice. objection to  
all or any part of this  
invoice must be submitted  
to Backus USA in  
writing within 7 ( seven  
) days of the invoice  
date on this invoice.

Check No:

Subtotal  
Sales Tax  
Total Invoice Amount  
Payment Received  
TOTAL

Continued  
Continued  
Continued  
Continued  
Continued

Backus USA, Inc.  
P.O. Box 585  
DuBois, PA 15801

Voice: 814-375-6999  
Fax: 814-375-6909

**Invoice**

Invoice Number:  
325

Invoice Date:  
May 8, 2002  
Page:  
1

Duplicate

Sold To:  
Pro-Act Specialities  
1205 Wholesale Street  
Los Angeles, CA 90021  
USA

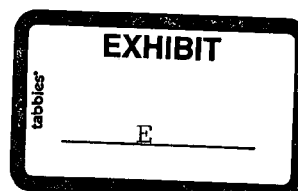
Ship To

Customer ID		Customer PO		Payment Terms	
160		Dean		Upon Receipt	
Sales Rep		Shipping Method		Ship Date	Due Date
		Best Way		7/31/02	5/8/02
Quantity	Item	Description		Unit Price	Extension
1.00		50 % down payment of the KP-50 B Carrot Peeler as per quotation that was faxed on 05-03-02, it is attached. Total cost of the machine is \$35,500.00 USD.		17,750.00	17,750.00
	12	Please pay to: Backus USA, Inc. P.O. Box 585 DuBois, PA 15801			
		All amounts in US dollars.			

Check No:

Subtotal	17,750.00
Sales Tax	
Total Invoice Amount	17,750.00
Payment Received	0.00
<b>TOTAL</b>	<b>\$17,750.00</b>

CK 11304 5/02  
50% DEP



Dec 09 02 03:16p

000-000-0000

p.2

Backus USA, Inc.  
P.O. Box 585  
DuBois, PA 15801

Voice: 814-375-6999  
Fax: 814-375-6909

# Invoice

Invoice Number:  
908

Invoice Date:  
Dec 9, 2002  
Page:  
1

Duplicate

Sold To:  
Pro-Act Specialities.  
1205 Wholesale Street  
Los Angeles, CA 90021  
USA

Ship To

Customer ID		Customer PO	Payment Terms	
160		Dean S.	Upon Receipt	
Sales Rep		Shipping Method	Ship Date	Due Date
		Best Way	11/1/02	12/9/02
Quantity	Item	Description	Unit Price	Extension
1.00		Last 50 % payment on the KP-50 B Carrot Peeler as per quotation that was faxed over to you on 05-03-02. Total cost of the machine is \$35,500.00 USD.	17,750.00	17,750.00
2		Please pay to: Backus USA, Inc. P.O. Box 585 DuBois, PA 15801		
3		All amounts in US dollars. Customer shall pay invoice to the payment due date terms on this invoice. Objection to all or any part of this invoice must be submitted to Backus USA in writing within 7 ( seven ) days of the invoice		
4				

Check No:

Subtotal  
Sales Tax  
Total Invoice Amount  
Payment Received  
TOTAL

Continued  
Continued  
Continued  
Continued  
Continued

Dec 09 02 03:16P

000-000-0000

p.3

Backus USA, Inc.  
P.O. Box 585  
DuBois, PA 15801

Voice: 814-375-6999  
Fax: 814-375-6909

# Invoice

Invoice Number:  
908

Invoice Date:  
Dec 9, 2002

Page:  
2

Duplicate

Sold To:  
Pro-Act Specialities,  
1205 Wholesale Street  
Los Angeles, CA 90021  
USA

Ship To

Customer ID		Customer PO	Payment Terms	
160		Dean S.	Upon Receipt	
Sales Rep		Shipping Method	Ship Date	Due Date
		Best Way	11/1/02	12/9/02
Quantity	Item	Description	Unit Price	Extension
5		date on this invoice. Absence of written notification of objection constitutes acceptance of invoice and payment terms. A 1 1/2 % per month interest penalty is effective on all unpaid balances. In the event client does not pay this invoice in listed and agreed upon terms and collection proceedings become necessary, Client hereby agrees to reimburse Backus USA for all legal and collection fees and other costs, including accumulated interest as listed above, associated with the collection of		
6				
7				

Check No:

Subtotal  
Sales Tax  
Total Invoice Amount  
Payment Received  
TOTAL

Continued  
Continued  
Continued  
Continued  
Continued

Dec 09 02 03:17P

000-000-0000

P. 4

Backus USA, Inc.  
P.O. Box 585  
DuBois, PA 15801

Voice: 814-375-6999  
Fax: 814-375-6909

# Invoice

Invoice Number:  
908

Invoice Date:  
Dec 9, 2002

Page:  
3

Duplicate

Sold To:  
Pro-Act Specialities.  
1205 Wholesale Street  
Los Angeles, CA 90021  
USA

Ship To

Customer ID		Customer PO	Payment Terms	
160		Dean S.	Upon Receipt	
Sales Rep		Shipping Method	Ship Date	Due Date
		Best Way	11/1/02	12/9/02
Quantity	Item	Description	Unit Price	Extension
18		the outstanding invoice. A mechanics lien is assumed in place for the equipment described in this invoice, if applicable, until the invoice is paid in full.		

Check No:

Subtotal	17,750.00
Sales Tax	
Total Invoice Amount	17,750.00
Payment Received	0.00
<b>TOTAL</b>	<b>\$17,750.00</b>

Backus USA, Inc.  
P.O. Box 585  
DuBois, PA 15801

Voice: 814-375-6999  
Fax: 814-375-6909

# Invoice

Invoice Number:  
893  
Invoice Date:  
Dec 2, 2002  
Page:  
1

Duplicate

Sold To:  
Pro-Act Specialities  
1205 Wholesale Street  
Los Angeles, CA 90021  
USA

Ship To

Customer ID  
160  
Sales Rep

Customer PO  
Dean Simons  
Shipping Method  
Best Way

Payment Terms  
Net 30 Days  
Ship Date  
11/6/02  
Due Date  
1/1/03

Quantity	Item	Description	Unit Price	Extension
1.00		Shipping cost on the KP-50 B Carrot Peeler from Europe.	1,985.00	1,985.00
1.00		Customs cost on clearing the KP-50 B Carrot Peeler into the US.	515.99	515.99
2		Please pay to: Backus USA, Inc. P.O. Box 585 DuBois, PA 15801		
3		All amounts in US dollars. Customer shall pay invoice to the payment due date terms on this invoice. Objection to all or any part of this invoice must be submitted to Backus USA in writing within 7 ( seven ) days of the invoice date on this invoice.		
4				

Check No:

Subtotal  
Sales Tax  
Total Invoice Amount  
Payment Received  
TOTAL

Continued  
Continued  
Continued  
Continued  
Continued

Backus USA, Inc.  
P.O. Box 585  
DuBois, PA 15801

**Invoice**

Invoice Number:  
893

Invoice Date:  
Dec 2, 2002

Page:  
2

Voice: 814-375-6999  
Fax: 814-375-6909

Duplicate

Sold To:  
Pro-Act Specialties  
1205 Wholesale Street  
Los Angeles, CA 90021  
USA

Ship To

Customer ID		Customer PO	Payment Terms	
160		Dean Simons	Net 30 Days	
Sales Rep		Shipping Method	Ship Date	Due Date
		Best Way	11/6/02	1/1/03
Quantity	Item	Description	Unit Price	Extension
5		Absence of written notification of objection constitutes acceptance of invoice and payment terms. A 1 1/2 % per month interest penalty is effective on all unpaid balances. In the event client does not pay this invoice in listed and agreed upon terms and collection proceedings become necessary, Client hereby agrees to reimburse Backus USA for all legal and collection fees and other costs, including accumulated interest as listed above, associated with the collection of the outstanding invoice.A		
6				
7				

Check No:

Subtotal  
Sales Tax  
Total Invoice Amount  
Payment Received  
TOTAL

Continued  
Continued  
Continued  
Continued  
Continued

**Invoice**Invoice Number:  
893Invoice Date:  
Dec 2, 2002Page:  
3Backus USA, Inc.  
P.O. Box 585  
DuBois, PA 15801Voice: 814-375-6999  
Fax: 814-375-6909

Duplicate

Ship To

Sold To:  
Pro-Act Specialties  
1205 Wholesale Street  
Los Angeles, CA 90021  
USA

Customer ID

160

Sales Rep

Customer PO

Dean Simons

Shipping Method

Best Way

Payment Terms

Net 30 Days

Ship Date

11/6/02

Due Date

1/1/03

Quantity

Item

Description

Unit Price

Extension

8

mechanics lien is assumed  
in place for the  
equipment described  
in this invoice, if  
applicable, until the  
invoice is paid in full.

Subtotal

2,500.99

Sales Tax

Total Invoice Amount

2,500.99

Payment Received

0.00

TOTAL

\$2,500.99

Check No:



Backus USA, Inc.  
P.O. Box 585  
DuBois, PA 15801

Voice: 814-375-6999  
Fax: 814-375-6909

# Invoice

Invoice Number:  
808

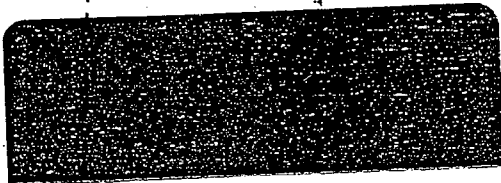
Invoice Date:  
Nov 8, 2002  
Page:  
3

Duplicate

Sold To:  
Pro-Act Specialities  
1205 Wholesale Street  
Los Angeles, CA 90021  
USA

Ship To

Customer ID	Customer PO	Payment Terms
160..	Verbal Dean...	Upon receipt
Sales Rep	Shipping Method	Ship Date
	Best Way	12/23/02
Quantity	Item	Description
18		with the collection of the outstanding invoice. A mechanics lien is assumed in place for the equipment described in this invoice, if applicable, until the invoice is paid in full.
Unit Price	Extension	



57-002 \$28,

3/10/03 35,962.50

WASHLINE System

542 ck 16843

Subtotal 33,650.00

Sales Tax

Total Invoice Amount 33,650.00

Payment Received 0.00

TOTAL \$33,650.00

Check No:

ck 16843 3/10/03 20,190 -

ck 15464 11/27/02 13,460 -

33,650 -

+ 1812.84 Due  
+ 2312.50 J Seto # 21197

35,962.50

+ 1812.84 Due 21197

35,962.50

Mar 05 03 10:14a

000-000-0000

P.3

Backus USA, Inc.  
P.O. Box 585  
DuBois, PA 15801

# Invoice

Invoice Number:  
808

Invoice Date:  
Nov 8, 2002

Page:  
2

Voice: 814-375-6999  
Fax: 814-375-6909

Duplicate

Sold To:  
Pro-Act Specialties  
1205 Wholesale Street  
Los Angeles, CA 90021  
USA

Ship To

Customer ID		Customer PO		Payment Terms	
160		Verbal Dean		Upon receipt	
Sales Rep		Shipping Method		Ship Date	Due Date
		Best Way		12/23/02	12/8/02
Quantity	Item	Description		Unit Price	Extension
		1) days of the invoice date on this invoice. Absence of written notification of objection constitutes acceptance of invoice and payment terms. A 1 1/2 % per month interest penalty is effective on all unpaid balances. In the event client does not pay this invoice in listed and agreed upon terms and collection proceedings become necessary, Client hereby agrees to reimburse Backus USA for all legal and collection fees and other costs, including accumulated interest as listed above, associated			
5					
6					
7					

Check No:

Subtotal  
Sales Tax  
Total Invoice Amount  
Payment Received  
TOTAL

Continued  
Continued  
Continued  
Continued  
Continued

Backus USA, Inc.  
P.O. Box 585  
DuBois, PA 15801

Voies: 814-375-6999  
Fax: 814-375-6909

**Invoice**

Invoice Number:

808

Invoice Date:

Nov 8, 2002

Page:

1

Duplicate

Sold To:

Ship To

Pro-Act Specialities  
1205 Wholesale Street  
Los Angeles, CA 90021  
USA

Customer ID		Customer PO	Payment Terms	
160		Verhal Dean	Upon receipt	
Sales Rep		Shipping Method	Ship Date	Due Date
		Best Way	12/23/02	12/8/02
Quantity	Item	Description	Unit Price	Extension
1.00		GRT 2000/500 Washline system with Heat Exchanger and Refrigeration Unit, total cost is \$ 33,650.00 USD.	33,650.00	33,650.00
		PLEASE PAY ONLY DOWN		
		PAYMENT OF 40% ,		
		\$13,460.00 USD.		
2		Please pay to:		
		Backus USA, Inc.		
		P.O. Box 585		
		DuBois, PA 15801		
3		All amounts in US dollars.		
		Customer shall pay		
		invoice to the payment		
		due date terms on this		
		invoice. Objection to		
		all or any part of this		
		invoice must be submitted		
4		to Backus USA in		
		writing within 7 (seven		

paid 40% down 12-3-02 V#154164

Check No:

\$20,190.00 due for 60% payment

Subtotal

Sales Tax

Total Invoice Amount

Payment Received

TOTAL

Continued

Continued

Continued

Continued

Continued

Backus USA, Inc.  
P.O. Box 585  
DuBois, PA 15801

Reel #2

## INVOICE

Invoice Number:  
769

Invoice Date:  
Oct 29, 2002  
Page:  
3

Voice: 814-375-6999  
Fax: 814-375-6909

Duplicate

Ship To

Sold To:  
Pro-Act Specialties  
1205 Wholesale Street  
Los Angeles, CA 90021  
USA

Customer ID

160

Sales Rep

Customer PO

Dean Simons

Shipping Method

Best Way

Payment Terms

Upon receipt

Ship Date

12/16/02

Due Date

11/28/02

Quantity

Item

Description

Unit Price

Extension

Backus USA for all legal  
and collection fees and  
other costs, including  
accumulated interest as  
listed above, associated  
with the collection of  
the outstanding invoice. A  
mechanics lien is assumed  
in place for the  
equipment described  
on this invoice, if  
applicable, until the  
invoice is paid in full.

S7-003

CARET #2

~~39,346.28~~

40,717.59

54R

JAN03

50%

\$ 18,858

Subtotal	37,716.00
Sales Tax	
Total Invoice Amount	37,716.00
Payment Received	0.00
TOTAL	\$37,716.00

+ 1630.28 inv #311

39,346.28

+ 1371.31 inv #200

40,717.59

Check No:

pd 12-11-02 18,858.00 50%

pd 1-21-03 15,086.40 40%

balance 3,771.60 10%

CARET #2

18030 (200107)

#15753

#15798

#20063

Dec 11 02 02:15p

P\*8 Specialties Acct Dept 213 895-6977

p.3

000-000-0000

p.4

Oct 29 02 02:52p

**Invoice**

Backus USA, Inc.  
P.O. Box 585  
DuBois, PA 15801

Invoice Number:  
769

Invoice Date:  
Oct 29, 2002

Page:

1

Voice: 814-375-6999  
Fax: 814-375-6909

Duplicate

Sold To:  
Pro-Art Specialties  
1205 Wholesale Street  
Los Angeles, CA 90021  
USA

Ship To

Customer ID		Customer PO		Payment Terms	
160		Dean Simons		Upon receipt	
Sales Rep.		Shipping Method		Ship Date	Due Date
		Best Way		12/16/02	11/28/02
Quantity	Item	Description	Unit Price	Extension	
1.00		KP-50 B baby carrot peeler	35,500.00	35,500.00	
1.00		Special table to load	525.00	525.00	
		carrot with two hands			
1.00		Additional special table	525.00	525.00	
		for first peeler shipped			
		on 11-02			
1.00		Spare knives, 12 pieces	222.00	222.00	
		per machine, shipped on			
		11-02			
1.00		Spare rollers, 32 pieces	944.00	944.00	
		shipped on 11/02			
		50 % down payment needed			
		at time of order			
		Please pay to:			
		Backus USA, Inc.			
		P.O. Box 585			
		DuBois, PA 15801			
		All amounts in US dollars			
		Customer shall pay			
		invoice to the payment			
		due date terms on this			

Subtotal

Sales Tax

Total Invoice Amount

Payment Received

TOTAL

Continued

Continued

Continued

Continued

Continued

Check No:

SA, Inc.  
Box 585  
DuBois, PA 15801

**Invoice**Invoice Number:  
311Invoice Date:  
May 9, 2003Page:  
3Voice: 814-375-6999  
Fax: 814-375-6909

Duplicate

Sold To:  
Pro-Act Specialities  
1205 Wholesale Street  
Los Angeles, CA 90021  
USA

Ship To

CUSTOMS/FET IN CARET #2

Customer ID

160

Sales Rep

Customer PO

Customs

Shipping Method

Best Way

Payment Terms

Net 15 Days

Ship Date

4/26/03

Due Date

5/24/03

Quantity

Item

Description

Unit Price

Extension

8

mechanics lien is assumed  
in place for the  
equipment described  
in this invoice, if  
applicable, until the  
invoice is paid in full.

Subtotal

1,630.28

Sales Tax

Total Invoice Amount

1,630.28

Check No:

Payment Received

0.00

TOTAL

\$1,630.28

18630 (20016)  
JUN 30

ck 20003

**Invoice**Invoice Number:  
311Invoice Date:  
May 9, 2003Page:  
2Voice: 814-375-6999  
Fax: 814-375-6909

Duplicate

Sold To:  
Pro-Act Specialties  
1205 Wholesale Street  
Los Angeles, CA 90021  
USA

Ship To

Customer ID		Customer PO		Payment Terms	
160		Customs		Net 15 Days	
Sales Rep		Shipping Method		Ship Date	Due Date
		Best Way		4/26/03	5/24/03
Quantity	Item	Description		Unit Price	Extension
5		Absence of written notification of objection constitutes acceptance of invoice and payment terms. A 1 1/2 % per month interest penalty is effective on all unpaid balances. In the event client does not pay this invoice in listed and agreed upon terms.			
6		and collection proceedings become necessary, Client hereby agrees to reimburse Backus USA for all legal and collection fees and other costs, including accumulated interest as listed above, associated with the collection of the outstanding invoice.A			
7					

Check No:

Subtotal  
Sales Tax  
Total Invoice Amount  
Payment Received  
TOTALContinued  
Continued  
Continued  
Continued  
Continued

Backus USA, Inc.  
P.O. Box 585  
DuBois, PA 15801

**Invoice**

Invoice Number:  
311

Invoice Date:  
May 9, 2003  
Page:  
1

Backus USA, Inc.  
P.O. Box 585  
DuBois, PA 15801

Voice: 814-375-6999  
Fax: 814-375-6909

Duplicate

Ship To

Sold To:  
Pro-Act Specialties  
1205 Wholesale Street  
Los Angeles, CA 90021  
USA

Customer ID		Customer PO		Payment Terms	
160		Customs		Net 15 Days	
Sales Rep		Shipping Method		Ship Date	Due Date
		Best Way		4/26/03	5/24/03
Quantity	Item	Description		Unit Price	Extension
1.00		Customs cost on clearing the second KP-50 B into the US.		495.67	495.67
1.00		Freight cost on the shipment of the second KP-50B, door to door.		1,134.61	1,134.61
	12	Please pay to: Backus USA, Inc. P.O. Box 585 DuBois, PA 15801			
	3	All amounts in US dollars. Customer shall pay invoice to the payment due date terms on this invoice. Objection to all or any part of this invoice must be submitted to Backus USA in writing within 7 ( seven ) days of the invoice date on this invoice.			
	4				

Subtotal  
Sales Tax  
Total Invoice Amount  
Payment Received

Continued  
Continued  
Continued  
Continued



Inv#6802 A

PRO \* ACT SPECIALTY

1205 WHOLESALE ST.  
LOS ANGELES, CA 90021  
(213) 895-6968

WELLS FARGO BANK  
www.wellsfargo.com

11-24  
1210-759

21249

CHECK NO.

21249

DATE

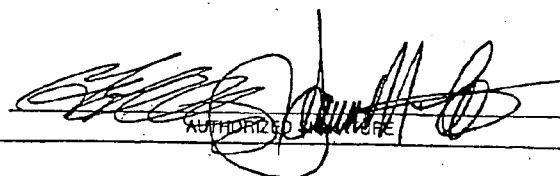
10.15.03

AMOUNT

\$2452.34

PAY  
TO THE  
ORDER OF

Joyce Logistics, Inc

  
AUTHORIZED SIGNATURE

⑈021249⑈ ⑆121000248⑆4375 688694⑈

EXHIBIT

tabbles

F



Jim Cotteen

---

From: Dean Simon [dsimon@proactusa.com]  
Sent: Friday, May 03, 2002 11:08 AM  
To: Gwen Kvavali Gulliksen (E-mail); Jim Cotteen (E-mail)  
Subject: FW: Backus baby carrot KP-50B knifepeeler

-----Original Message-----

From: Marc Broeren [mailto:march@backususa.com]  
Sent: Saturday, May 04, 2002 10:32 AM  
To: dsimon@proactusa.com  
Subject: Re: Backus baby carrot KP-50B knifepeeler

Dean, Gwen,

Rollers : \$ 32,- each.  
Knives: \$6,- each  
Airfreight incl. packing: approx. \$1500,-  
Seafreight incl. packing: approx. \$1100,-  
Duties: approx. \$ 500,-  
Warranty: 1 year excluding wear parts.

Our sales agent will be in L.A. every 5 weeks. All technical support is handled by our engineering department. ~~As we have 42 KP-50B knifepeelers throughout the nation we are very confident you will have no major problems with this machine.~~ All technical problems were solved by telephone in the past and our sales agent will call in on a regular basis to see how you are running the machine and keep an eye on the technical appearance.

On sight service charges

----- Original Message -----

From: Dean Simon <mailto:dsimon@proactusa.com>  
To: 'Marc Broeren' <mailto:march@backususa.com>  
Cc: Gwen Kvavali Gulliksen (E-mail) <mailto:ggulliksen@proactusa.com> ; Jim Cotteen (E-mail) <mailto:jcotteen@proactusa.com>  
Sent: Friday, May 03, 2002 4:07 PM  
Subject: RE: Backus baby carrot KP-50B knifepeeler

---

Please get me an estimate on the extra charges freight etc. Also I would like to get estimates on replacement parts, rollers, knives etc. and what on site service charges and warranty info.

Thanks,

Dean

-----Original Message-----

From: Marc Broeren [mailto:march@backususa.com]  
Sent: Friday, May 03, 2002 1:05 PM  
To: ggulliksen@proactusa.com  
Cc: dsimon@proactusa.com  
Subject: Backus baby carrot KP-50B knifepeeler

Gene, Dean,

We are happy to inform you that after a technical meeting we will have a machine engineered to handle a variety of baby carrots up to 1 1/8" (28 mm) in diameter. The rollers will be springloaded. This of course needs a different layout of the machine. The frame needs modifications and extra space needs to be created for the moving rollers.

Price for this machine is \$ 35.500,- (excl. freight, duties, packing) and will be ready for shipment in 12 weeks. This will be a new build machine!

We propose a downpayment of 40% on this machine with a satisfaction guarantee based on the specifications given.

During production of the machine you will be able to rent the proto-type machine available at our office for 3 months at a rental price of \$ 2.850,- per month including a new set of rollers. As you know you will have some restrictions as to the diameter size of the carrots but still you are able to mechanical peel selected, sized carrots up to 3/4".

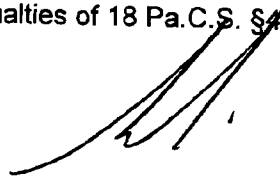
I'll be calling in today at around 2.30 p.m. and follow up with you.

Kindest regards,

Marc  
Backus USA Inc.

VERIFICATION

I, Dean Simon, state that I am Division President of Plaintiff, Pro\*Act, LLC, that I am authorized to make this Verification on its behalf, that the facts contained in the foregoing Amended Complaint are true and correct to the best of my knowledge, information and belief, and that I make this Verification subject to the penalties of 18 Pa.C.S. §904 relating to unsworn falsification to authorities.



---

Dean Simon

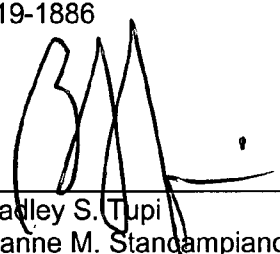
Dated: March 29, 2005

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Amended Complaint was served via first class U.S. Mail, postage prepaid, this 30<sup>th</sup> day of March, 2005, to the following counsel of record:

David J. Hopkins, Esquire  
Hopkins Heltzel, LLP  
900 Beaver Drive  
DuBois, PA 15801

Wayne W. Ringeisen, Esquire  
Reed Smith LLP  
435 Sixth Avenue  
Pittsburgh, PA 15219-1886



---

Bradley S. Tupi  
Jeanne M. Standampiano

GA

**IN THE COURT OF COMMON PLEAS CLEARFIELD COUNTY, PENNSYLVANIA**

PRO\*ACT, LLC,

Plaintiff,

vs.

BACKUS USA, INC. and HEPRO GmbH,

Defendants.

CIVIL DIVISION

No. 04-1663-CD

**PRELIMINARY OBJECTIONS OF  
DEFENDANT HEPRO GmbH TO  
PLAINTIFF'S AMENDED COMPLAINT**

Filed on Behalf of Defendant,  
HEPRO GmbH

Counsel of Record for This Party:

WAYNE W. RINGEISEN, ESQ.  
Pa. I.D. #53550

BRIAN T. HIMMEL, ESQ.  
Pa. I.D. #66086

REED SMITH LLP  
Firm #234  
435 Sixth Avenue  
Pittsburgh, PA 15219  
(412) 288-3131  
(412) 288-3063 (Facsimile)

**JURY TRIAL DEMANDED**

**FILED**

APR 27 2005

m/11:30/2  
William A. Shaw

Prothonotary/Clerk of Courts

WAC

**IN THE COURT OF COMMON PLEAS CLEARFIELD COUNTY, PENNSYLVANIA**

PRO\*ACT, LLC,

Plaintiff,

vs.

BACKUS USA, INC. and HEPRO GmbH,

Defendants.

CIVIL DIVISION

No. 04-1663-CD

\* \* \* \* \*

**PRELIMINARY OBJECTIONS OF DEFENDANT HEPRO GmbH TO PLAINTIFF'S  
AMENDED COMPLAINT**

NOW INTO COURT, through undersigned counsel, comes Defendant, HEPRO GmbH ("Hepro") and pursuant to Rule 1028 of the Pennsylvania Rules of Civil Procedure files its preliminary objections to plaintiff's amended complaint averring as follows:

**I. BACKGROUND**

1. On or about October 22, 2004, Plaintiff, Pro\*Act, LLC ("Pro\*Act") filed a complaint against Backus and Hepro, asserting claims for breach of express warranty, breach of implied warranty of merchantability, and breach of implied warranty of fitness for a particular purpose, in connection with the sale of a KP-50 carrot peeler (Plaintiff's complaint, at ¶15). Backus has filed an answer denying liability and in its new matter incorporating the allegations of paragraphs 1-66 of Pro\*Act's complaint and asserting a claim for indemnity and contribution against Hepro. Hepro filed preliminary objections to plaintiff's complaint on March 14, 2005 upon the grounds that this Court lacks personal jurisdiction over Hepro. On or about March 30, 2005, plaintiff filed an amended complaint attempting to rectify the jurisdictional deficiencies of plaintiff's original complaint. For the reasons set forth below, plaintiff's amended complaint as to Hepro must be dismissed.



## **II. GROUNDS FOR PRELIMINARY OBJECTIONS**

### **A. Lack of In Personam Jurisdiction**

2. Specific jurisdiction is improper as Pro\*Act's amended complaint does not allege sufficient contacts with Pennsylvania to sustain this Court's jurisdiction over Hepro in this matter.

3. There are no "minimum contacts" with Pennsylvania alleged in Pro\*Act's amended complaint relating to its claims in this litigation to satisfy "traditional notions of fair play and substantial justice."

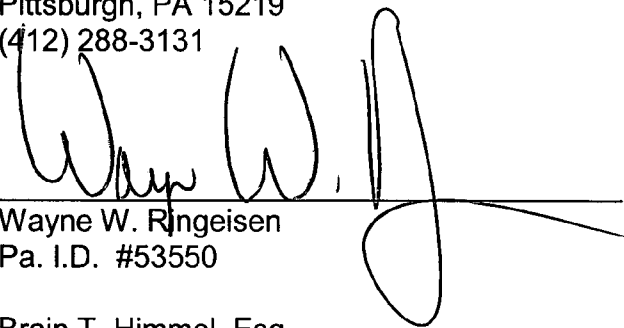
4. General jurisdiction over Hepro is also improper as there are no allegations in Pro\*Act's amended complaint that Hepro is incorporated, formed or qualified as a foreign corporation or entity under the laws of Pennsylvania, or has consented to this Court's jurisdiction. Further, there is no allegation in Pro\*Act's amended complaint that Hepro exercises a "continuous and systematic part of its general business within this Commonwealth."

5. There are also no contacts with Pennsylvania alleged in Pro\*Act's amended complaint to support the kind of systematic, substantial or continuous contacts that would constitutionally justify this Court's exercise of general personal jurisdiction over Hepro.

6. There are no allegations in either Pro\*Act's amended complaint that Hepro conducts any business in the Commonwealth of Pennsylvania, other than the assertion that as to the underlying transaction Backus was Hepro's representative in the United States.

WHEREFORE, Defendant, Hepro GmbH respectfully requests that this Court sustain its preliminary objections and dismiss plaintiff's amended complaint with prejudice.

REED SMITH, LLP  
435 Sixth Avenue  
Pittsburgh, PA 15219  
(412) 288-3131



Wayne W. Ringeisen  
Pa. I.D. #53550

Brain T. Himmel, Esq.  
Pa. I.D. #66086

Counsel for Defendant, Hepro GmbH

IN THE COURT OF COMMON PLEAS CLEARFIELD COUNTY, PENNSYLVANIA

PRO\*ACT, LLC,

Plaintiff,

vs.

BACKUS USA, INC. and HEPRO GmbH,

Defendants.

CIVIL DIVISION

No. 04-1663-CD

\* \* \* \* \*

**PROPOSED ORDER OF COURT**

AND NOW, this \_\_\_\_ day of \_\_\_\_\_, 2005, upon consideration of defendant Hepro GmbH's preliminary objections, it is hereby ORDERED, ADJUDGED and DECREED that the said preliminary objections are sustained and plaintiff's amended complaint is dismissed with prejudice.

BY THE COURT:

\_\_\_\_\_  
J.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 26<sup>th</sup> day of April 2005, a true and correct copy of the foregoing **PRELIMINARY OBJECTIONS OF DEFENDANT HEPRO GmbH TO PLAINTIFF'S AMENDED COMPLAINT** was served upon all counsel of record by U. S. Mail, postage prepaid.

Bradley S. Tupi, Esq.  
Tucker Arensberg, PC  
1500 One PPG Place  
Pittsburgh, PA 15222  
(*Counsel for Plaintiff*)

David J. Hopkins, Esq.  
Hopkins Heltzel, LLP  
900 Beaver Drive  
Dubois, PA 15801  
(*Counsel for Defendant, Backus USA, Inc.*)

  
\_\_\_\_\_  
WAYNE W. RINGEISEN

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA  
(CIVIL DIVISION)

PRO\*ACT, LLC,

Plaintiff,

v.

BACKUS USA, INC.

and HEPRO GmbH,

Defendants.

No. 04-1663-CD

Type of Pleading: Answer to Amended  
Complaint and New Matter and  
Crossclaim for Indemnification

Filed on behalf of: Backus USA, Inc.,  
Defendant

Counsel of Record for this party:  
HOPKINS HELTZEL LLP

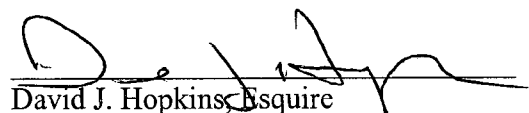
DAVID J. HOPKINS, Esquire  
Attorney at Law  
Supreme Court No. 42519

900 Beaver Drive  
DuBois, Pennsylvania 15801

(814) 375-0300

NOTICE TO PLEAD

You are hereby notified to plead  
to the within pleading within  
twenty (20) days of service thereof  
or default judgment may be entered  
against you.

  
David J. Hopkins, Esquire  
Attorney for Defendant Backus USA, Inc.

**FILED** <sup>GR</sup>  
4CC  
013:16/201  
APR 28 2005  
Anty Hopkins

William A. Shaw  
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA  
(CIVIL DIVISION)

PRO*ACT, LLC,	:	
Plaintiff,	:	
	:	
v.	:	No. 04-1663-CD
	:	
BACKUS USA, INC.	:	
and HEPRO Gmbh,	:	
Defendants.	:	

**ANSWER TO AMENDED COMPLAINT AND NEW MATTER**  
**AND CROSSCLAIM FOR INDEMNIFICATION**

AND NOW, comes Defendant, Backus USA, Inc. ("Backus"), by and through its undersigned counsel, Hopkins Heltzel LLP, and answers the Amended Complaint and New Matter of Plaintiff as follows:

1. Admitted.
2. Admitted.
3. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment and proof is demanded at trial.
4. Neither admitted or denied. Said paragraph calls for a legal conclusion to which no response is necessary.
5. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment and proof is demanded at trial.
6. Denied. It is denied that Backus is Hepro's exclusive reseller of carrot peelers in the United States. Backus Sormac, B.V., a Netherlands corporation ("Backus Sormac"), and Hepro are parties to a contract for the resale of the KP-50 carrot peelers. Backus USA acted as an agent for Backus Sormac for the resale of the KP-50 units in the

United States. Purchase Order No. 05070, attached as Exhibit A to the Amended Complaint states that “Backus USA has (9) months to complete sale of all (5) machines, or Backus USA will be charged full amount listed . . . Hepro further agrees to reserve exclusive North and South American selling rights to this machine and for further years and time thereafter *upon successful sale(s)*.” The exclusivity referenced in the purchase order was conditioned upon the sale of the five (5) KP-50B units. As such, because those sales were never completed, Backus USA was not the exclusive reseller of the KP-50B units in the United States. This exclusivity provision was required by Pro\*Act. Backus USA sold the KP-50B to Pro\*Act on behalf of Hepro, such that the sales of the units counted towards the five (5) sales needed to obtain exclusivity. Further, the averment in Paragraph 6 of the Complaint that Backus is a “merchant,” is a conclusion of law to which no response is necessary.

7. (a) Admitted.

(b) Denied. As set forth in the response to Paragraph 6, the exclusivity referenced in the purchase order was conditioned upon the sale of the five (5) KP-50B units. As such, until those sales were completed, Backus USA was not the exclusive reseller of the KP-50B units in the United States.

(c) Admitted.

(d) Denied. As set forth in the response to Paragraph 6, the exclusivity referenced in the purchase order was conditioned upon the sale of the five (5) KP-50B units. As such, until those sales were completed, Backus USA was not the exclusive reseller of the KP-50B units in the United States.

(e) Admitted.

(f) Admitted in part, denied in part. It is admitted that Hepro billed Pro\*Act for the KP-50B through Backus. It is denied that Backus is Hepro's exclusive dealer for the KP-50B peelers. As set forth in the response to Paragraph 6, the exclusivity referenced in the purchase order was conditioned upon the sale of the five (5) KP-50B units.

8. Admitted in part, denied in part. Defendant Backus did present the Hepro KP-50 peeler at a trade show in Los Angeles. It is denied that the KP-50 was "showcased"; rather, the KP-50 was among several items of food processing equipment displayed by Defendant Backus at the trade show. It is denied that the KP-50 was designed to peel small/baby carrots. The KP-50B was designed for small/baby carrots.

9. Admitted in part, denied in part. It is admitted that the peeler was offered to Plaintiff as a demo to determine whether the machine worked with Plaintiff's carrots. Following Plaintiff's trial usage, a representative of Plaintiff went to Germany and ran the new KP-50B, designed for baby carrots. Said machinery was approved by Plaintiff prior to its shipment. It is denied that following initial tests that the KP-50 was not "commercial viable." While it may not have met Plaintiff's specifications, the KP-50 is commercially viable for other food processors. Further, upon information and belief, following these trials, Hepro agreed to build Plaintiff a new machine that would fit Plaintiff's specifications.

10. Denied. Defendant Backus did not observe "Plaintiff's then existing carrot peeling operation, including the raw product used in the peeling process." Rather, it is believed that a representative of Backus Sormac observed such operation. Backus USA was a reseller of the KP-50B unit for Hepro, and was not involved in the design or



redesign of such machinery to Pro\*Act's specifications. Further, Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment that "Plaintiff shipped raw carrots to Defendant Hepro in Germany on several occasions."

11. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment and proof is demanded at trial.

12. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment and proof is demanded at trial. Defendant Backus was aware that after trying for several months to find a baby carrot that would fit the machine, Plaintiff decided to change to a bigger, straighter carrot in March or April of 2003. This amounted to a change in specifications such that the peeler had to be shipped back to Hepro in Germany so that it could be retrofitted according to the newer specifications. However, as a reseller for Hepro, Backus USA was not involved in the design or redesign of such machinery to Pro\*Act's specifications.

13. Admitted.

14. Denied. The statement contained in paragraph 14 amounts to a legal conclusion to which no response is necessary.

15. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment and proof is demanded at trial.

16. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment and proof is demanded at trial.

17. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment and proof is demanded at trial.

18. ***Denied. As set forth above, Defendant Backus has no arrangement with Hepro such that Defendant Backus is Hepro's exclusive sales representative in the United States.***

19. Denied. The statement contained in paragraph 19 amounts to a legal conclusion to which no response is necessary.

20. Admitted.

21. Admitted.

22. Denied. Defendant Backus made no warranties, either express or implied, regarding the fitness of the KP-50B for Plaintiff's particular purpose. Defendant Backus merely offered the Hepro machinery for resale, with no representations or warranties, whether express or implied. As a reseller for Hepro, Backus USA was not involved in the design or redesign of such machinery to Pro\*Act's specifications.

23. Denied. While the first KP-50B was delivered to Plaintiff in November 2002, Defendant Backus has no information or knowledge sufficient to form a belief that the second KP-50B was already in production. However, Defendant Backus does know that Plaintiff placed an order for the second machine in December 2002.

24. Admitted in part, denied in part. It is admitted that the first KP-50B was installed in December 2002. However, it is denied that the machine jammed such that commercial use was impossibility. Defendant Backus is unaware of the exact jamming rate; however, carrot peelers often jam during use yet remain commercially usable. Moreover, upon information and belief, Plaintiff's representatives traveled to Germany and approved the design of the machinery prior to its shipment to Plaintiff's facility.

25. Admitted.

26. Denied. Plaintiff ordered the second machine in December 2002. While Plaintiff may have anticipated resolving the problems it was having in using the KP-50B, upon information and belief, this was not a condition of Plaintiff's acceptance of the second machine. Additionally, as a reseller for Hepro, Backus USA was not involved in the design or redesign of such machinery due to any problems experienced by Pro\*Act.

27. Admitted in part, denied in part. The KP-50B carrot peeler is a stand-alone machine that produces a finished product. The purchase of a wash-line system is within the discretion of the customer, who may desire this additional component to meet its specific needs. It is admitted that Plaintiff ordered the wash-line system from Defendant Backus.

28. Admitted in part, denied in part. While the chiller unit was inadvertently omitted from the shipment, the wash line system could function with the two peeling machines without the chiller unit. The vegetables could be manually chilled, e.g., by using ice.

29. Admitted.

30. Admitted in part, denied in part. It is admitted that the omitted chiller was supplied in August 2003. Defendant Backus has no information as to accuracy of the averment as to when the second KP-50B was placed into operation, or whether the KP-50B experienced the same jamming problems or low production output as had been alleged by the first machine. The averment that the machines performed so poorly that their commercial utilization was not feasible is denied. It is common for carrot peelers to jam. However, it is denied that the jamming makes the use of such machinery commercially unfeasible.

31. Admitted.

32. Admitted.

33. Admitted.

34. Admitted in part, denied in part. Upon information and belief, Hepro returned the KP-50B machine to Plaintiff, incorporating certain changes, which had been approved by Plaintiff's own representatives. Defendant Backus has no knowledge or information as to the truth of whether the machine was taken out of service in December 2003 and proof is demanded at trial.

35. Admitted.

36. Admitted in part, denied in part. It is admitted that Plaintiff found the jamming frequency to be unacceptable and decided to take the KP-50B out of service. However, while the machine jammed frequently, as stated above, jamming in carrot peelers is not an unusual occurrence and does not render the machinery commercially useless.

37. Admitted.

38. Denied. It is denied that the KP-50B carrot peeler machines are "non-functional." Further, with respect to the averments of damages set forth in subsections (a) – (h), Defendant Backus notes that on the second page of the Order Confirmation attached as Exhibit A to the Complaint, all contracts executed with Backus USA, Inc. in the USA are subject to the Metaalunie Conditions, standard conditions of delivery and payment issued by the Metaalunie (Dutch Organization of Entrepreneurs in Small and Medium Sized Businesses in the Metalworking and Mechanical Engineering Industry).

Metaalunie Conditions are attached hereto as Exhibit 1. The Metaalunie Conditions do not authorize the damages set forth in these paragraphs.

## **COUNT I**

### **BREACH OF EXPRESS WARRANTY (vs. Hepro)**

39. Defendant Backus incorporates herein by reference each and every answer set forth in Paragraphs 1-38 above as if the same were herein set forth at length.

40. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment and proof is demanded at trial.

41. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment and proof is demanded at trial.

42. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment and proof is demanded at trial.

WHEREFORE, Defendant Backus USA, Inc., respectfully requests that this Honorable Court dismiss Plaintiff's Complaint and enter judgment in favor of Defendant Backus.

## **COUNT II**

### **BREACH OF EXPRESS WARRANTY vs. Backus**

43. Defendant Backus incorporates herein by reference each and every answer set forth in Paragraphs 1-42 above as if the same were herein set forth at length.

44. Denied. Defendant Backus is merely the reseller of the Hepro machinery purchased by Plaintiff, and made no express warranty to Plaintiff. Further, under the Metaluunie Conditions, Defendant Backus is only obligated to warrant the soundness of

an item of goods during a period of six months after delivery. During that period, Defendant Backus as the contractor has the option of repairing the item, replacing the item or providing the customer with a credit note for a proportionate part of the invoiced amount. *See Metaluunie Conditions, Article 14: Warranty.* Moreover, under the Metaluunie Conditions, no warranty is given for defects that are due to modification or repair by the customer. Other items of damage are not recoverable.

45. Denied. As stated above, Defendant Backus is merely the reseller of the Hepro machinery purchased by Plaintiff, and made no warranty to Plaintiff.

46. Denied. Defendant Backus is merely the reseller of the Hepro machinery purchased by Plaintiff, and made no warranty to Plaintiff.

WHEREFORE, Defendant Backus USA, Inc., respectfully requests that this Honorable Court dismiss Plaintiff's Complaint and enter judgment in favor of Defendant Backus.

### **COUNT III**

#### **BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY (vs. Hepro)**

47. Defendant Backus incorporates herein by reference each and every answer set forth in Paragraphs 1-46 above as if the same were herein set forth at length.

48. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment and proof is demanded at trial.

49. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment and proof is demanded at trial.

50. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment and proof is demanded at trial.

51. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment and proof is demanded at trial.

WHEREFORE, Defendant Backus USA, Inc., respectfully requests that this Honorable Court dismiss Plaintiff's Complaint and enter judgment in favor of Defendant Backus.

#### **COUNT IV**

#### **BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY (vs. Backus)**

52. Defendant Backus incorporates herein by reference each and every answer set forth in Paragraphs 1-51 above as if the same were herein set forth at length.

53. Denied. Defendant Backus is merely the reseller of the Hepro machinery purchased by Plaintiff, and no implied warranty of merchantability applies. Further, under the Metaluunie Conditions, Defendant Backus is only obligated to warrant the soundness of an item of goods during a period of six months after delivery. During that period, Defendant Backus as the contractor has the option of repairing the item, replacing the item or providing the customer with a credit note for a proportionate part of the invoiced amount. See *Metaluunie Conditions, Article 14: Warranty*. Moreover, under the Metaluunie Conditions, no warranty is given for defects that are due to modification or repair by the customer. Other items of damage are not recoverable.

54. Denied. As stated above, Defendant Backus is merely the reseller of the Hepro machinery purchased by Plaintiff, and as such the implied warranty of merchantability is inapplicable.

55. Denied. Defendant Backus is merely the reseller of the Hepro machinery purchased by Plaintiff, and such the implied warranty of merchantability is inapplicable.

56. Denied. Defendant Backus is merely the reseller of the Hepro machinery purchased by Plaintiff, and such the implied warranty of merchantability is inapplicable.

WHEREFORE, Defendant Backus USA, Inc., respectfully requests that this Honorable Court dismiss Plaintiff's Complaint and enter judgment in favor of Defendant Backus.

### **COUNT V**

#### **BREACH OF IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE (vs. Hepro)**

57. Defendant Backus incorporates herein by reference each and every answer set forth in Paragraphs 1-56 above as if the same were herein set forth at length.

58. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment.

59. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment.

60. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment.

61. Denied. Defendant Backus is without knowledge or information sufficient to form a belief as to the truth of the averment.

WHEREFORE, Defendant Backus USA, Inc., respectfully requests that this Honorable Court dismiss Plaintiff's Complaint and enter judgment in favor of Defendant Backus.



## **COUNT VI**

### **BREACH OF IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE (vs. Backus)**

62. Defendant Backus incorporates herein by reference each and every answer set forth in Paragraphs 1-61 above as if the same were herein set forth at length.

63. Denied. Defendant Backus is merely the reseller of the Hepro machinery purchased by Plaintiff, and no implied warranty of fitness for a particular purpose applies. Further, under the Metaluunie Conditions, Defendant Backus is only obligated to warrant the soundness of an item of goods during a period of six months after delivery. During that period, Defendant Backus as the contractor has the option of repairing the item, replacing the item or providing the customer with a credit note for a proportionate part of the invoiced amount. *See Metaluunie Conditions, Article 14: Warranty.* Moreover, under the Metaluunie Conditions, no warranty is given for defects that are due to modification or repair by the customer. Other items of damage are not recoverable.

64. Denied. As stated above, Defendant Backus is merely the reseller of the Hepro machinery purchased by Plaintiff, and as such the implied warranty of fitness for a particular purpose is inapplicable.

65. Denied. Defendant Backus is merely the reseller of the Hepro machinery purchased by Plaintiff, and such the implied warranty of fitness for a particular purpose is inapplicable.

66. Denied. Defendant Backus is merely the reseller of the Hepro machinery purchased by Plaintiff, and such the implied warranty of fitness for a particular purpose is inapplicable.

WHEREFORE, Defendant Backus USA, Inc., respectfully requests that this Honorable Court dismiss Plaintiff's Complaint and enter judgment in favor of Defendant.

**NEW MATTER**

67. Defendant Backus incorporates herein by reference each and every answer set forth in Paragraphs 1-66 above as if the same were herein set forth at length.

68. Defendant Backus, hereby asserts this New Matter, pursuant to Pa.R.C.P. 1030(a). If Plaintiff establishes that it suffered damages as alleged in its Complaint, which allegations answering Defendant denies, said damages were caused solely by Defendant Hepro's breaches of warranty with respect to the KP-50 series.

69. As a result of the aforesaid actions and/or omissions, Defendant, Hepro, is solely liable to Plaintiff for any alleged damages it may have suffered.

70. If, as a result of the matter alleged in Plaintiffs' Complaint, the Defendant, Backus USA, Inc., is held liable to Plaintiff for all or part of such damages as Plaintiff may have sustained, Defendant Hepro is the party primary liable for such damages, and is liable over to Defendant, Backus USA, Inc., by way of contribution and/or indemnification, for all such damages as may be required to pay to Plaintiff.

71. Further, Defendant Backus asserts that the "Order Confirmation for KP-50B for Baby Carrots" indicates that the Metaalunie Conditions are applicable.

72. The Metaalunie Conditions limit Defendant's liability for loss or damage, providing that a customer may not recover consequential loss or damages. *See* Metaalunie Conditions, Article 13.2.

73. Additionally, Article 14 of the Metaalunie Conditions provides that the only warranty applicable is a warranty for a period of six months from delivery, during

which the goods must be returned to the contractor free of charge. Thereafter, the contractor may choose to repair or replace the item or to provide the customer with a credit note for a proportionate part of the invoiced amount.

74. Article 14.9 of the Metaalunie Conditions provides that no warranty applies to defects resulting from normal wear and tear, injudicious use or modification by the customer or third parties.

75. As such, pursuant to the agreed upon terms of the contract existing between Plaintiff and Defendant Backus, liability and warranty issues are governed by the terms of the Metaalunie Conditions.

76. The present Complaint seeks damages not authorized under the terms of the Metaalunie Conditions, and should be dismissed.

WHEREFORE, Defendant, Backus USA, Inc. demands:

- (a) Judgment in Defendant Backus USA, Inc.'s favor, together with costs;
- (b) Judgment that, if there is any liability to Plaintiff, Defendant Hepro GmbH is solely liable to Plaintiff; and
- (c) In the event that judgment is entered in Plaintiff's favor and against Defendant, Backus USA, Inc., that Defendant, Backus USA, Inc. may have judgment over and against Defendant, Hepro GmbH, by way of indemnification and/or contribution to the amount recovered by Plaintiff against Defendant, together with costs.

#### **CROSSCLAIM FOR INDEMNIFICATION**

NOW comes, Defendant, Backus USA, Inc. ("Backus"), by and through its undersigned counsel, Hopkins Heltzel LLP, and files the within Crossclaim for Indemnification as follows:

77. Plaintiff's Complaint makes various allegations against Backus and Hepro Gmbh that Backus denies.

78. In the event Plaintiff's allegations are proven to be correct, then Hepro Gmbh rather than Backus is liable to Plaintiff.

79. Backus demands indemnification through this Crossclaim from Hepro Gmbh.

WHEREFORE, Defendant Backus USA, Inc. demands indemnification from Hepro Gmbh against the claims of Plaintiff.

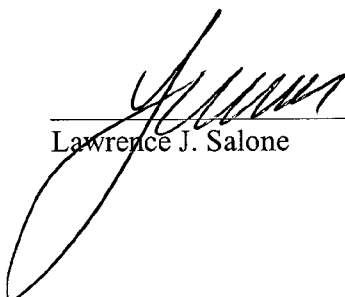
Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David J. Hopkins', is written over a horizontal line.

David J. Hopkins, Esquire  
Attorney for Defendant Backus, USA, Inc.

**VERIFICATION**

I hereby verify that the statements made in this pleading are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. Section 4904, relating to Unsworn Falsification to Authorities.



---

Lawrence J. Salone

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA  
(CIVIL DIVISION)

PRO*ACT, LLC,	:	
Plaintiff,	:	
	:	
v.	:	No. 04-1663-CD
	:	
BACKUS USA, INC.	:	
and HEPRO GmbH,	:	
Defendants.	:	


**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that a true and correct copy of Defendant Backus USA, Inc.'s Answer to Amended Complaint and New Matter and Counterclaim, filed on behalf of Backus USA, Inc. was forwarded by first class mail, postage prepaid, on the 27<sup>th</sup> day of April, 2005, to all counsel of record, addressed as follows:

Bradley S. Tupi, Esquire  
Tucker Arensberg, P.C.  
1500 One PPG Place  
Pittsburgh, PA 15222

Wayne W. Ringeisen, Esquire  
Reed Smith LLP  
435 Sixth Avenue  
Pittsburgh, PA 15219-1886

Hopkins Heltzel LLP

  
David J. Hopkins, Esquire  
Attorney for Defendant Backus, USA, Inc.

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

PRO\*ACT, LLC,

Plaintiff,

v.

BACKUS USA, INC. AND HEPRO GmbH,

Defendants.

CIVIL DIVISION

NO. 04-1663 CD

**REPLY TO NEW MATTER**

CODE: 010

Filed on behalf of Plaintiff,

Pro\*Act, LLC

Counsel of record for this party:

Bradley S. Tupi, Esquire

PA Id. No. 28682

Beverly Weiss Manne, Esquire

PA Id. No. 34545

Jeanne M. Stancampiano, Esquire

PA Id. No. 89078

TUCKER ARENSBERG, P.C.

1500 One PPG Place

Pittsburgh, PA 15222

Tel. (412) 594-5545

Fax (412) 594-5619

Email [btupi@tuckerlaw.com](mailto:btupi@tuckerlaw.com)

**FILED** <sup>60</sup>  
MAY 11 4 47 PM '05  
MAY 05 2005

William A. Shaw  
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

PRO\*ACT, LLC, CIVIL DIVISION

Plaintiff,

v. NO. 04-1663 CD

BACKUS USA, INC. and HEPRO Gmbh,

Defendants.

**REPLY TO NEW MATTER**

Plaintiff, Pro\*Act, LLC, by its counsel, Tucker Arensberg, P.C., makes the following Reply to New Matter contained the Answer to Amended Complaint and New Matter and Crossclaim for Indemnification filed by Backus USA, Inc.:

67. Paragraph 67 contains no averment of fact to which a response is required.

68. Paragraph 68 contains a conclusion of law to which no response is required. To the extent a response is required, Plaintiff denies the allegations contained in Paragraph 68.

69. Admitted in part and denied in part. It is admitted that Hepro GmbH ("Hepro") is liable for damages it caused Plaintiff. It is denied that Backus USA, Inc. ("Backus") is not liable for the damages Backus caused Plaintiff. To the contrary, for the reasons stated in Plaintiff's Amended Complaint, Backus is liable to Plaintiff.

70. Paragraph 70 contains a conclusion of law to which no response is required. To the extent a response is required, after a reasonable investigation, Plaintiff is without information sufficient to form a belief as to the truth of the allegations contained in Paragraph 70. Accordingly, those allegations are denied.

71. Any document referenced in Paragraph 71 speaks for itself. Except as thus averred, Plaintiff denies the allegations in Paragraph 71. By way of further response, Plaintiff



specifically denies that the Metaalunie Conditions govern this action. To the contrary, this action is governed by the laws of the Commonwealth of Pennsylvania.

72. Any document referenced in Paragraph 72 speaks for itself. Except as thus averred, Plaintiff denies the allegations contained in Paragraph 72. By way of further response, Plaintiff specifically denies that the Metaalunie Conditions govern this action. To the contrary, this action is governed by the laws of the Commonwealth of Pennsylvania.

73. Any document referenced in Paragraph 73 speaks for itself. Except as thus averred, Plaintiff denies the allegations contained in Paragraph 73. By way further response, Plaintiff specifically denies that the Metaalunie Conditions govern this action. To the contrary, this action is governed by the laws of the Commonwealth of Pennsylvania.

74. Any document referenced in Paragraph 74 speaks for itself. Except as thus averred, Plaintiff denies the allegations contained in Paragraph 74. By way further response, Plaintiff specifically denies that the Metaalunie Conditions govern this action. To the contrary, this action is governed by the laws of the Commonwealth of Pennsylvania.

75. Denied. It is denied that the Plaintiff agreed to have the Metaalunie Conditions govern the liability and warranty issues involved in this action. To the contrary, Plaintiff made no such agreement.

76. Denied. It is denied that the Metaalunie Conditions govern this action. It is further denied that Plaintiff seeks unauthorized damages. To the contrary, Plaintiff seeks damages fully warranted under the governing law.

WHEREFORE, Plaintiff demands judgment against Defendants, jointly and severally, in an amount to be determined at trial, together with costs, attorneys' fees and such other relief as the Court deems just.

Respectfully submitted,

TUCKER ARENSBERG, P.C.

A handwritten signature in black ink, appearing to read 'Bradley S. Tupi', is written over a horizontal line.

Bradley S. Tupi, Esquire

PA Id. No. 28682

Jeanne M. Stancampiano, Esquire

PA Id. No. 89079

1500 One PPG Place

Pittsburgh, PA 15222

Tel. (412) 594-5545

Fax (412) 594-5619

Email: [btupi@tuckerlaw.com](mailto:btupi@tuckerlaw.com)


Attorneys for Plaintiff

**CERTIFICATE OF SERVICE**

I certify that true and correct copies of the foregoing Reply to New Matter were served via first class U.S. Mail, postage prepaid, this 3<sup>rd</sup> day of May, 2005, upon the following counsel of record:

David J. Hopkins, Esquire  
Hopkins Heltzel, LLP  
900 Beaver Drive  
DuBois, PA 15801

Wayne W. Ringeisen, Esquire  
Reed Smith LLP  
435 Sixth Avenue  
Pittsburgh, PA 15219-1886

  
\_\_\_\_\_  
Bradley S. Tupi  
Jeanne M. Stancampiano

CR

IN THE COURT OF COMMON PLEAS CLEARFIELD COUNTY, PENNSYLVANIA

PRO\*ACT, LLC,

Plaintiff,

vs.

BACKUS USA, INC. and HEPRO GmbH,

Defendants.

CIVIL DIVISION

No. 04-1663-CD

**PRELIMINARY OBJECTIONS OF  
DEFENDANT HEPRO GmbH TO  
PLAINTIFF'S AMENDED COMPLAINT**

Filed on Behalf of Defendant,  
HEPRO GmbH

Counsel of Record for This Party:

WAYNE W. RINGEISEN, ESQ.  
Pa. I.D. #53550

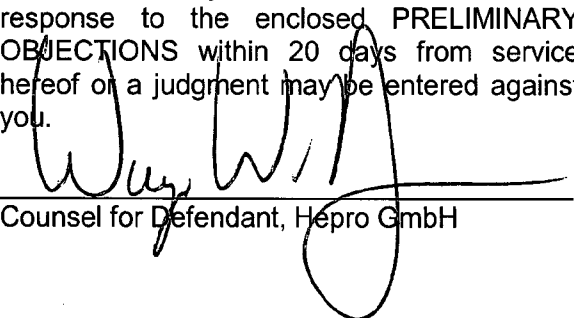
BRIAN T. HIMMEL, ESQ.  
Pa. I.D. #66086

REED SMITH LLP  
Firm #234  
435 Sixth Avenue  
Pittsburgh, PA 15219  
(412) 288-3131  
(412) 288-3063 (Facsimile)

**NOTICE TO PLEAD**

To: Plaintiff

You are hereby notified to file a written response to the enclosed PRELIMINARY OBJECTIONS within 20 days from service hereof or a judgment may be entered against you.

  
Counsel for Defendant, Hepro GmbH

FILED

MAY 06 2005

William A. Shaw  
Prothonotary/Clerk of Courts

**IN THE COURT OF COMMON PLEAS CLEARFIELD COUNTY, PENNSYLVANIA**

PRO\*ACT, LLC,

Plaintiff,

vs.

BACKUS USA, INC. and HEPRO GmbH,

Defendants.

CIVIL DIVISION

No. 04-1663-CD

\* \* \* \* \*

**PRELIMINARY OBJECTIONS OF DEFENDANT HEPRO GmbH TO PLAINTIFF'S  
AMENDED COMPLAINT**

NOW INTO COURT, through undersigned counsel, comes Defendant, HEPRO GmbH ("Hepro") and pursuant to Rule 1028 of the Pennsylvania Rules of Civil Procedure files its preliminary objections to plaintiff's amended complaint averring as follows:

**I. BACKGROUND**

1. On or about October 22, 2004, Plaintiff, Pro\*Act, LLC ("Pro\*Act") filed a complaint against Backus and Hepro, asserting claims for breach of express warranty, breach of implied warranty of merchantability, and breach of implied warranty of fitness for a particular purpose, in connection with the sale of a KP-50 carrot peeler (Plaintiff's complaint, at ¶5). Backus has filed an answer denying liability and in its new matter incorporating the allegations of paragraphs 1-66 of Pro\*Act's complaint and asserting a claim for indemnity and contribution against Hepro. Hepro filed preliminary objections to plaintiff's complaint on March 14, 2005 upon the grounds that this Court lacks personal jurisdiction over Hepro. On or about March 30, 2005, plaintiff filed an amended complaint attempting to rectify the jurisdictional deficiencies of plaintiff's original complaint. For the reasons set forth below, plaintiff's amended complaint as to Hepro must be dismissed.

## **II. GROUNDS FOR PRELIMINARY OBJECTIONS**

### **A. Lack of In Personam Jurisdiction**

2. Specific jurisdiction is improper as Pro\*Act's amended complaint does not allege sufficient contacts with Pennsylvania to sustain this Court's jurisdiction over Hepro in this matter.

3. There are no "minimum contacts" with Pennsylvania alleged in Pro\*Act's amended complaint relating to its claims in this litigation to satisfy "traditional notions of fair play and substantial justice."

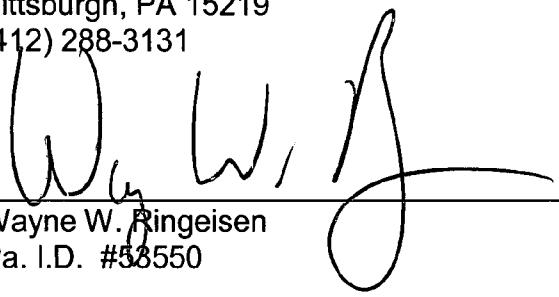
4. General jurisdiction over Hepro is also improper as there are no allegations in Pro\*Act's amended complaint that Hepro is incorporated, formed or qualified as a foreign corporation or entity under the laws of Pennsylvania, or has consented to this Court's jurisdiction. Further, there is no allegation in Pro\*Act's amended complaint that Hepro exercises a "continuous and systematic part of its general business within this Commonwealth."

5. There are also no contacts with Pennsylvania alleged in Pro\*Act's amended complaint to support the kind of systematic, substantial or continuous contacts that would constitutionally justify this Court's exercise of general personal jurisdiction over Hepro.

6. There are no allegations in either Pro\*Act's amended complaint that Hepro conducts any business in the Commonwealth of Pennsylvania, other than the assertion that as to the underlying transaction Backus was Hepro's representative in the United States.

WHEREFORE, Defendant, Hepro GmbH respectfully requests that this Court sustain its preliminary objections and dismiss plaintiff's amended complaint with prejudice.

REED SMITH, LLP  
435 Sixth Avenue  
Pittsburgh, PA 15219  
(412) 288-3131



---

Wayne W. Ringeisen  
Pa. I.D. #53550

Brain T. Himmel, Esq.  
Pa. I.D. #66086

Counsel for Defendant, Hepro GmbH

IN THE COURT OF COMMON PLEAS CLEARFIELD COUNTY, PENNSYLVANIA

PRO\*ACT, LLC,

Plaintiff,

vs.

BACKUS USA, INC. and HEPRO GmbH,

Defendants.

CIVIL DIVISION

No. 04-1663-CD

\* \* \* \* \*

**PROPOSED ORDER OF COURT**

AND NOW, this \_\_\_\_ day of \_\_\_\_\_, 2005, upon consideration of defendant Hepro GmbH's preliminary objections, it is hereby ORDERED, ADJUDGED and DECREED that the said preliminary objections are sustained and plaintiff's amended complaint is dismissed with prejudice.

BY THE COURT:

\_\_\_\_\_. J.

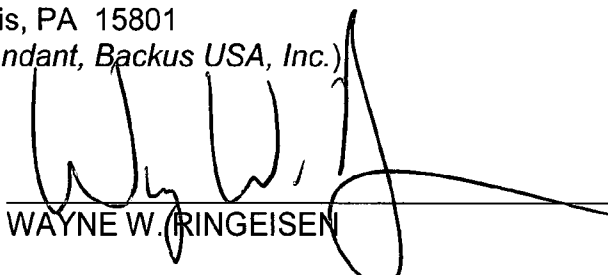


**CERTIFICATE OF SERVICE**

I hereby certify that on this 5<sup>th</sup> day of May 2005, a true and correct copy of the foregoing **PRELIMINARY OBJECTIONS OF DEFENDANT HEPRO GmbH TO PLAINTIFF'S AMENDED COMPLAINT** was served upon all counsel of record by U. S. Mail, postage prepaid.

Bradley S. Tupi, Esq.  
Tucker Arensberg, PC  
1500 One PPG Place  
Pittsburgh, PA 15222  
(*Counsel for Plaintiff*)

David J. Hopkins, Esq.  
Hopkins Heltzel, LLP  
900 Beaver Drive  
Dubois, PA 15801  
(*Counsel for Defendant, Backus USA, Inc.*)



WAYNE W. RINGEISEN

FILED

MAY 06 2005

William A. Shaw  
Prothonotary/Clerk of Courts

**IN THE COURT OF COMMON PLEAS CLEARFIELD COUNTY, PENNSYLVANIA**

PRO\*ACT, LLC,

Plaintiff,

vs.

BACKUS USA, INC. and HEPRO GmbH,

Defendants.

CIVIL DIVISION

No. 04-1663-CD

**PRELIMINARY OBJECTIONS OF  
DEFENDANT HEPRO GmbH TO  
DEFENDANT BACKUS USA, INC.'S  
NEW MATTER TO PLAINTIFF'S  
AMENDED COMPLAINT AND  
CROSSCLAIM**

Filed on Behalf of Defendant,  
HEPRO GmbH

Counsel of Record for This Party:

WAYNE W. RINGEISEN, ESQ.  
Pa. I.D. #53550

BRIAN T. HIMMEL, ESQ.  
Pa. I.D. #66086

REED SMITH LLP  
Firm #234  
435 Sixth Avenue  
Pittsburgh, PA 15219  
(412) 288-3131  
(412) 288-3063 (Facsimile)

**NOTICE TO PLEAD**

To: Defendant, Backus USA, Inc.

You are hereby notified to file a written  
response to the enclosed PRELIMINARY  
OBJECTIONS within 20 days from service  
hereof or a judgment may be entered against  
you.

  
Counsel for Defendant, Hepro GmbH

IN THE COURT OF COMMON PLEAS CLEARFIELD COUNTY, PENNSYLVANIA

PRO\*ACT, LLC,

Plaintiff,

vs.

BACKUS USA, INC. and HEPRO GmbH,

Defendants.

CIVIL DIVISION

No. 04-1663-CD

\* \* \* \* \*

**PRELIMINARY OBJECTIONS OF DEFENDANT HEPRO GmbH TO DEFENDANT  
BACKUS USA, INC.'S NEW MATTER TO PLAINTIFF'S AMENDED COMPLAINT  
AND CROSSCLAIM**

NOW INTO COURT, through undersigned counsel, comes Defendant, HEPRO GmbH ("Hepro") and pursuant to Rule 1028 of the Pennsylvania Rules of Civil Procedure files its preliminary objections to defendant Backus USA, Inc.'s ("Backus") new matter and crossclaim averring as follows:

**I. BACKGROUND**

1. On or about March 30, 2005, Plaintiff, Pro\*Act, LLC ("Pro\*Act") filed an amended complaint, in an attempt to allege sufficient contacts with Pennsylvania to sustain this court's jurisdiction over Hepro in this matter. Plaintiff's amended complaint against Backus and Hepro, asserts claims for breach of express warranty, breach of implied warranty of merchantability, and breach of implied warranty of fitness for a particular purpose, in connection with the sale of a KP-50 carrot peeler (Plaintiff's complaint, at ¶5). Backus has filed an answer denying liability and in its new matter incorporates the allegations of paragraphs 1-66 of Pro\*Act's amended complaint.<sup>1</sup> Backus then appears to assert a "crossclaim for indemnification" against Hepro at paragraphs 77-79. For the reasons set forth below, Backus' new matter and crossclaim as to Hepro must be stricken.

<sup>1</sup> Backus continue to improperly assert in its new matter, what appears to be a crossclaim, seeking indemnity and contribution from Hepro, rather than properly asserting its claim for indemnity and contribution pursuant to Pa. R.C.P. Rule 2252(d). (See paragraphs 68-70 of Backus' answer and new matter).

## **II. GROUNDS FOR PRELIMINARY OBJECTIONS**

### **A. Lack of In Personam Jurisdiction**

2. Specific jurisdiction is improper as Backus' answer and new matter to Pro\*Act's amended complaint and crossclaim as to Hepro fails to allege any facts to sustain this Court's jurisdiction over Hepro and its crossclaim also fails to incorporate, adopt or reiterate the allegations of Pro\*Act's amended complaint. Even if Backus had incorporated the allegations of Pro\*Act's amended complaint in its crossclaim, which it plainly has not, specific jurisdiction over Hepro remains improper as Pro\*Act's amended complaint also fails to allege sufficient facts to sustain this Court's jurisdiction over Hepro in this matter.

3. There are no "minimum contacts" with Pennsylvania alleged in Pro\*Act's amended complaint or Backus' answer and purported new matter and crossclaim relating to either of their claims in this litigation to satisfy "traditional notions of fair play and substantial justice." Indeed, Backus' crossclaim is devoid of any factual allegations, let alone any allegations sufficient to sustain jurisdiction over Hepro in this case.

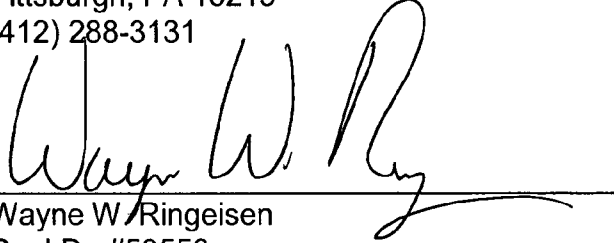
4. General jurisdiction over Hepro is also improper as there are no allegations in Pro\*Act's amended complaint or Backus' answer and purported new matter and crossclaim that Hepro is incorporated, formed or qualified as a foreign corporation or entity under the laws of Pennsylvania, or has consented to this Court's jurisdiction. Further, there is no allegation in Pro\*Act's amended complaint or Backus' answer, new matter and crossclaim that Hepro exercises a "continuous and systematic part of its general business within this Commonwealth."

5. There are also no contacts with Pennsylvania alleged in Pro\*Act's amended complaint or Backus' answer and purported new matter and crossclaim to support the kind of systematic, substantial or continuous contacts that would constitutionally justify this Court's exercise of general personal jurisdiction over Hepro.

6. Finally, there are no allegations in either Pro\*Act's amended complaint or Backus' answer and purported new matter and crossclaim that Hepro conducts any business in the Commonwealth of Pennsylvania, other than the assertion that as to the underlying transaction Backus was Hepro's representative in the United States.

WHEREFORE, Defendant, Hepro GmbH respectfully requests that this Court sustain its preliminary objections and dismiss defendant Backus USA, Inc.'s new matter and crossclaim purportedly seeking indemnity and/or contribution from Hepro GmbH.

REED SMITH, LLP  
435 Sixth Avenue  
Pittsburgh, PA 15219  
(412) 288-3131



Wayne W. Ringeisen  
Pa. I.D. #53550

Brain T. Himmel, Esq.  
Pa. I.D. #66086

Counsel for Defendant, Hepro GmbH

IN THE COURT OF COMMON PLEAS CLEARFIELD COUNTY, PENNSYLVANIA

PRO\*ACT, LLC,

Plaintiff,

vs.

BACKUS USA, INC. and HEPRO GmbH,

Defendants.

CIVIL DIVISION

No. 04-1663-CD

\* \* \* \* \*

**PROPOSED ORDER OF COURT**

AND NOW, this \_\_\_\_ day of \_\_\_\_\_, 2005, upon consideration of defendant Hepro GmbH's preliminary objections, it is hereby ORDERED, ADJUDGED and DECREED that the preliminary objections are sustained and defendant Backus USA, Inc.'s new matter and crossclaim seeking contribution and/or indemnity from Hepro GmbH are stricken with prejudice.

BY THE COURT:

\_\_\_\_\_.J.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 3<sup>rd</sup> day of May 2005, a true and correct copy of the foregoing **PRELIMINARY OBJECTIONS OF DEFENDANT HEPRO GmbH TO DEFENDANT BACKUS USA, INC.'S NEW MATTER TO PLAINTIFF'S AMENDED COMPLAINT AND CROSSCLAIM** was served upon all counsel of record by U. S. Mail, postage prepaid.

Bradley S. Tupi, Esq.  
Tucker Arensberg, PC  
1500 One PPG Place  
Pittsburgh, PA 15222  
(*Counsel for Plaintiff*)

David J. Hopkins, Esq.  
Hopkins Heltzel, LLP  
900 Beaver Drive  
Dubois, PA 15801  
(*Counsel for Defendant, Backus USA, Inc.*)

  
\_\_\_\_\_  
WAYNE W. RINGEISEN

CA

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY,  
PENNSYLVANIA  
CIVIL DIVISION

PRO\*ACT, LLC :  
 :  
 :  
 vs. : No. 04-1663-CD  
 :  
 :  
 BACKUS USA, INC. and :  
 :  
 HEPRO GmbH :

ORDER

AND NOW, this 9<sup>th</sup> day of May, 2005, upon consideration of Attorney Ringeisen's Preliminary Objections of Defendant Hepro GmbH to Plaintiff's Amended Complaint filed in the above matter, it is the Order of the Court that argument has been scheduled for the 31 day of May, 2005, at 11:00 A.M, in Courtroom No. 1, Clearfield County Courthouse, Clearfield, PA.

FILED <sup>cc</sup> 300  
019:523744y Ringeisen  
MAY 10 2005

William A. Shaw  
Prothonotary/Clerk of Courts

BY THE COURT:

*Fredric J. Ammerman*

FREDRIC J. AMMERMAN  
President Judge





OFFICE OF COURT ADMINISTRATOR  
FORTY-SIXTH JUDICIAL DISTRICT OF PENNSYLVANIA

CLEARFIELD COUNTY COURTHOUSE  
SUITE 228, 230 EAST MARKET STREET  
CLEARFIELD, PENNSYLVANIA 16830

DAVID S. MEHOLICK  
COURT ADMINISTRATOR

PHONE: (814) 765-2641  
FAX: 1-814-765-7649

MARCY KELLEY  
DEPUTY COURT ADMINISTRATOR

MEMO: To all parties filing Petitions/Motions in Clearfield County:

Please make note of the following:

Rule 206(f) The party who has obtained the issuance of a Rule to Show Cause shall forthwith serve a true and correct copy of both the Court Order entering the Rule and specifying a return date, and the underlying Petition or Motion, upon every other party to the proceeding in the manner prescribed by the Pennsylvania Rules of Civil Procedure (see PA. R.C.P. 440) and upon the Court Administrator.

Rule 206(g) The party who has obtained the issuance of a Rule to Show Cause shall file with the Prothonotary, within seven (7) days of the issuance of the Rule, an Affidavit of Service indicating the time, place and manner of service. Failure to comply with this provision may constitute sufficient basis for the Court to deny the prayer of the Petition or Motion.

**\*\*\* Please note: This also includes service of scheduling orders obtained as the result of the filing of any pleading.**

GA

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY,  
PENNSYLVANIA  
CIVIL DIVISION

PRO\*ACT, LLC

vs.

BACKUS USA, INC. and  
HEPRO GmbH

:  
:  
: No. 04-1663-CD  
:  
:  
:

**ORDER**

AND NOW, this 9<sup>th</sup> day of May, 2005, upon consideration of Attorney Ringeisen's Preliminary Objections of Defendant Hepro GmbH to Defendant Backus USA, Inc.'s New Matter to Plaintiff's Amended Complaint and Crossclaim filed in the above matter, it is the Order of the Court that argument has been scheduled for the 31 day of May, 2005, at 11:00 A.M, in Courtroom No. 1, Clearfield County Courthouse, Clearfield, PA.

FILED <sup>6K</sup> 3CC  
019:4261 Atty Ringeisen  
MAY 10 2005 w/ service memo

William A. Shaw  
Prothonotary/Clerk of Courts

BY THE COURT:

Fredric J. Ammerman  
FREDRIC J. AMMERMAN  
President Judge



OFFICE OF COURT ADMINISTRATOR  
FORTY-SIXTH JUDICIAL DISTRICT OF PENNSYLVANIA

CLEARFIELD COUNTY COURTHOUSE  
SUITE 228, 230 EAST MARKET STREET  
CLEARFIELD, PENNSYLVANIA 16830

DAVID S. MEHOLICK  
COURT ADMINISTRATOR

PHONE: (814) 765-2641  
FAX: 1-814-765-7649

MARCY KELLEY  
DEPUTY COURT ADMINISTRATOR

MEMO: To all parties filing Petitions/Motions in Clearfield County:

Please make note of the following:

Rule 206(f) The party who has obtained the issuance of a Rule to Show Cause shall forthwith serve a true and correct copy of both the Court Order entering the Rule and specifying a return date, and the underlying Petition or Motion, upon every other party to the proceeding in the manner prescribed by the Pennsylvania Rules of Civil Procedure (see P.A. R.C.P. 440) and upon the Court Administrator.

Rule 206(g) The party who has obtained the issuance of a Rule to Show Cause shall file with the Prothonotary, within seven (7) days of the issuance of the Rule, an Affidavit of Service indicating the time, place and manner of service. Failure to comply with this provision may constitute sufficient basis for the Court to deny the prayer of the Petition or Motion.

**\*\*\* Please note: This also includes service of scheduling orders obtained as the result of the filing of any pleading.**

**IN THE COURT OF COMMON PLEAS CLEARFIELD COUNTY, PENNSYLVANIA**

PRO\*ACT, LLC,

Plaintiff,

vs.

BACKUS USA, INC. and HEPRO GmbH,

Defendants.

CIVIL DIVISION

No. 04-1663-CD

**AFFIDAVIT OF SERVICE OF COURT'S  
MAY 9, 2005 SCHEDULING ORDERS**

Filed on Behalf of Defendant,  
HEPRO GmbH

Counsel of Record for This Party:

WAYNE W. RINGEISEN, ESQ.  
Pa. I.D. #53550

BRIAN T. HIMMEL, ESQ.  
Pa. I.D. #66086

REED SMITH LLP  
Firm #234  
435 Sixth Avenue  
Pittsburgh, PA 15219  
(412) 288-3131  
(412) 288-3063 (Facsimile)

**JURY TRIAL DEMANDED**

**FILED** <sup>16</sup>  
MAY 19 3 30 PM '05  
MAY 16 2005

William A. Shaw  
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS CLEARFIELD COUNTY, PENNSYLVANIA

PRO\*ACT, LLC,

Plaintiff,

vs.

BACKUS USA, INC. and HEPRO GmbH,

Defendants.

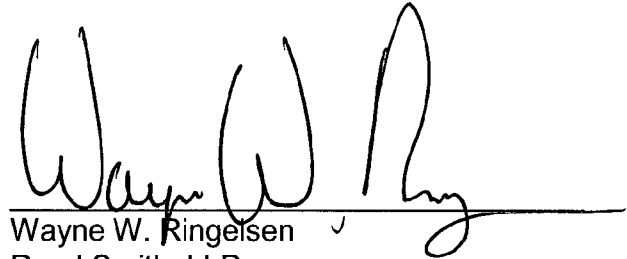
CIVIL DIVISION

No. 04-1663-CD

\* \* \* \* \*

**AFFIDAVIT OF SERVICE OF COURT'S MAY 9, 2005 SCHEDULING ORDERS**

I, Wayne W. Ringeisen, hereby certify that I served on May 12, 2005, true and correct copies of the Court's May 9, 2005 scheduling orders scheduling argument on defendant Hepro GmbH's preliminary objections to plaintiff's amended complaint and defendant Backus USA, Inc.'s new matter to plaintiff's amended complaint and crossclaim for May 31, 2005 on all counsel of record.



Wayne W. Ringeisen  
Reed Smith, LLP  
435 Sixth Avenue  
Pittsburgh, PA 15219  
(Counsel for Defendant, Hepro GmbH)

Sworn before me this 12 day

of May, 2005

  
Notary Public

COMMONWEALTH OF PENNSYLVANIA

Notarial Seal  
Agnes S. Lesko, Notary Public  
City Of Pittsburgh, Allegheny County  
My Commission Expires Jan. 13, 2008

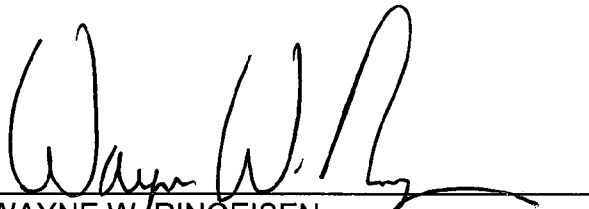
Member, Pennsylvania Association Of Notaries

**CERTIFICATE OF SERVICE**

I hereby certify that on this 12<sup>th</sup> day of May 2005, a true and correct copy of the foregoing **AFFIDAVIT OF SERVICE OF COURT'S MAY 9, 2005 SCHEDULING ORDERS** was served upon all counsel of record by U. S. Mail, postage prepaid.

Bradley S. Tupi, Esq.  
Tucker Arensberg, PC  
1500 One PPG Place  
Pittsburgh, PA 15222  
(*Counsel for Plaintiff*)

David J. Hopkins, Esq.  
Hopkins Heltzel, LLP  
900 Beaver Drive  
Dubois, PA 15801  
(*Counsel for Defendant, Backus USA, Inc.*)

  
\_\_\_\_\_  
WAYNE W. RINGEISEN

CA

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

PRO\*ACT, LLC,

Plaintiff,

v.

BACKUS USA, INC. AND HEPRO GmbH,

Defendants.

CIVIL DIVISION

NO. 04-1663-CD

**OPPOSITION TO PRELIMINARY  
OBJECTIONS OF DEFENDANT HEPRO  
GMBH TO PLAINTIFF'S AMENDED  
COMPLAINT**

CODE: 010  
Filed on behalf of Plaintiff,  
Pro\*Act, LLC

Counsel of record for this party:

Bradley S. Tupi, Esquire  
PA Id. No. 28682  
Beverly Weiss Manne, Esquire  
PA Id. No. 34545  
Jeanne M. Stancampiano, Esquire  
PA Id. No. 89078

TUCKER ARENSBERG, P.C.  
1500 One PPG Place  
Pittsburgh, PA 15222

Tel. (412) 594-5545  
Fax (412) 594-5619  
Email [btupi@tuckerlaw.com](mailto:btupi@tuckerlaw.com)

**FILED** *NO CC*  
*m/11/2005*  
**MAY 17 2005**  
William A. Shaw  
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

PRO\*ACT, LLC,

CIVIL DIVISION

Plaintiff,

NO. 04-1663-CD

v.

BACKUS USA, INC. and HEPRO Gmbh,

Defendants.

**OPPOSITION TO PRELIMINARY OBJECTIONS  
OF DEFENDANT HEPRO GMBH TO PLAINTIFF'S AMENDED COMPLAINT**

Plaintiff, Pro\*Act LLC ("Pro\*Act") files this Opposition to Preliminary Objections of Defendant Hepro GmbH To Plaintiff's Amended Complaint and states as follows:

1. For the reasons stated in Pro\*Act's Brief in Support of Opposition to Preliminary Objections of Defendant Hepro GmbH to Plaintiff's Amended Complaint, which is incorporated herein by reference, Defendant Hepro GmbH has ample contacts with the Commonwealth of Pennsylvania for this Court to exercise specific and general jurisdiction over Hepro.

WHEREFORE, Pro\*Act, LLC, respectfully requests that this Court overrule the Preliminary Objections filed by Hepro GmbH to the Amended Complaint and grant such other relief as this Court deems just and proper.

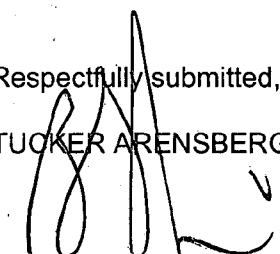


### III CONCLUSION

For the foregoing reasons, Hepro's Preliminary Objections must be overruled.

Respectfully submitted,

TUCKER ARENSBERG, P.C.



---

Bradley S. Tupi, Esquire  
PA Id. No. 28682  
Jeanne M. Stancampiano, Esquire  
Pa. Id. No. 89078  
1500 One PPG Place  
Pittsburgh, PA 15222  
Tel. (412) 594-5545  
Fax (412) 594-5619  
Email: [btupi@tuckerlaw.com](mailto:btupi@tuckerlaw.com)

*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I certify that true and correct copies of the foregoing Opposition to Preliminary Objections of Defendant Hepro GmbH to Plaintiff's Amended Complaint were served via first class U.S. Mail, postage prepaid, this 16<sup>th</sup> day of May, 2005, upon the following counsel of record:

David J. Hopkins, Esquire  
Hopkins Heltzel, LLP  
900 Beaver Drive  
DuBois, PA 15801

Wayne W. Ringeisen, Esquire  
Reed Smith LLP  
435 Sixth Avenue  
Pittsburgh, PA 15219-1886

  
Jeanne M. Stancampiano

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA  
(CIVIL DIVISION)

PRO\*ACT, LLC,

Plaintiff,

v.

BACKUS USA, INC.  
and HEPRO GmbH,

Defendants.

No. 04-1663-CD

Type of Pleading: Reply in Opposition to  
Preliminary Objections of Defendant  
Hepro GmbH to Plaintiff's Amended  
Complaint

Filed on behalf of: Backus USA, Inc.,  
Defendant

Counsel of Record for this party:  
HOPKINS HELTZEL LLP

DAVID J. HOPKINS, Esquire  
Attorney at Law  
Supreme Court No. 42519

900 Beaver Drive  
DuBois, Pennsylvania 15801

(814) 375-0300

FILED <sup>GP</sup> <sub>no cc</sub>  
MAY 25 2005

William A. Shaw  
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA  
(CIVIL DIVISION)

PRO*ACT, LLC,	:	
Plaintiff,	:	
	:	
v.	:	No. 04-1663-CD
	:	
BACKUS USA, INC.	:	
and HEPRO GmbH,	:	
Defendants.	:	

**REPLY IN OPPOSITION TO PRELIMINARY OBJECTIONS OF DEFENDANT  
HEPRO GMBH TO PLAINTIFF'S AMENDED COMPLAINT**

AND NOW, comes Defendant, Backus USA, Inc. ("Backus"), by and through its undersigned counsel, Hopkins Heltzel LLP, and files this Reply in Opposition to Preliminary Objections of Defendant Hepro GmbH ("Hepro") to Plaintiff's Amended Complaint, and states as follows:

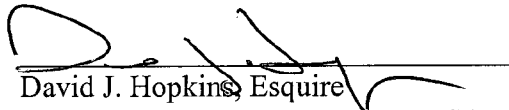
1. It is denied that Defendant Backus' Answer and New Mater incorporates the allegations of paragraphs 1-66 of Pro\*Act's Complaint. Rather, Defendant Backus' Answer, in Paragraph 67, incorporates "by reference each and every answer set forth in Paragraphs 1-66 above as if the same were herein set forth at length." In its Answer to Amended Complaint, New Matter and Crossclaim, Defendant Backus asserted its separate claim against Defendant Hepro GmbH for indemnity and/or contribution.

2. Denied. Defendant Hepro has ample contacts with the Commonwealth of Pennsylvania for this Court to exercise specific and general jurisdiction over Hepro. Defendant Backus hereby adopts the reasoning and analysis set forth in Pro\*Act's Brief in Support of Opposition to Preliminary Objections of Defendant Hepro GmbH to Plaintiff's Amended Complaint insofar as it relates to the exercise of specific and general

jurisdiction over Hepro. However, to the extent that the Brief suggests that Backus is the exclusive reseller of carrot peelers in the United States, Backus specifically denies such allegations. As set forth in Backus' Answer to Amended Complaint and New Matter and Crossclaim, it is denied that Backus is Hepro's exclusive reseller of carrot peelers in the United States. Backus Sormac, B.V., a Netherlands corporation ("Backus Sormac"), and Hepro are parties to a contract for the resale of the KP-50 carrot peelers. Backus USA acted as an agent for Backus Sormac for the resale of the KP-50 units in the United States. Backus USA was not the exclusive reseller of the KP-50B units in the United States.

WHEREFORE, Defendant Backus USA, Inc. respectfully requests that this Court overrule the Preliminary Objections filed by Hepro GmbH to the Amended Complaint and grant such other relief as the Court deems just and proper.

Respectfully submitted,

  
David J. Hopkins, Esquire  
Attorney for Defendant Backus, USA, Inc.

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA  
(CIVIL DIVISION)

PRO*ACT, LLC,	:	
	:	
Plaintiff,	:	
	:	
v.	:	No. 04-1663-CD
	:	
BACKUS USA, INC.	:	
and HEPRO GmbH,	:	
Defendants.	:	

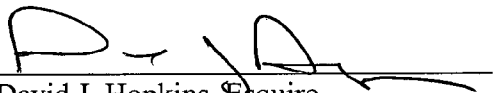
**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that a true and correct copy of Defendant Backus USA, Inc.'s Reply in Oppositions to Preliminary Objections of Defendant Hepro GmbH to Plaintiff's Amended Complaint, filed on behalf of Backus USA, Inc. was forwarded by first class mail, postage prepaid, on the 23rd day of May, 2005, to all counsel of record, addressed as follows:

Bradley S. Tupi, Esquire  
Tucker Arensberg, P.C.  
1500 One PPG Place  
Pittsburgh, PA 15222

Wayne W. Ringeisen, Esquire  
Reed Smith LLP  
435 Sixth Avenue  
Pittsburgh, PA 15219-1886

Hopkins Heltzel LLP

By:   
David J. Hopkins, Esquire  
Attorney for Defendant Backus, USA, Inc.

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA  
(CIVIL DIVISION)

PRO\*ACT, LLC,

Plaintiff,

v.

BACKUS USA, INC.  
and HEPRO GmbH,

Defendants.

No. 04-1663-CD

Type of Pleading: Reply in Opposition to  
Preliminary Objections of Defendant  
Hepro GmbH to Defendant Backus USA,  
Inc.'s New Matter to Plaintiff's Amended  
Complaint and Crossclaim

Filed on behalf of: Backus USA, Inc.,  
Defendant

Counsel of Record for this party:

HOPKINS HELTZEL LLP

DAVID J. HOPKINS, Esquire  
Attorney at Law  
Supreme Court No. 42519

900 Beaver Drive  
DuBois, Pennsylvania 15801

(814) 375-0300

**FILED** *NO cc*  
*m11:53/21*  
**MAY 25 2005** *@*

William A. Shaw  
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA  
(CIVIL DIVISION)

PRO*ACT, LLC,	:	
Plaintiff,	:	
	:	
v.	:	No. 04-1663-CD
	:	
BACKUS USA, INC.	:	
and HEPRO GmbH,	:	
Defendants.	:	

**REPLY IN OPPOSITION TO PRELIMINARY OBJECTIONS OF DEFENDANT  
HEPRO GMBH TO DEFENDANT BACKUS USA, INC.'S NEW MATTER TO  
PLAINTIFF'S AMENDED COMPLAINT AND CROSSCLAIM**

AND NOW, comes Defendant, Backus USA, Inc. ("Backus"), by and through its undersigned counsel, Hopkins Heltzel LLP, and files this Reply in Opposition to Preliminary Objections of Defendant Hepro GmbH ("Hepro") to Defendant Backus USA, Inc.'s New Matter to Plaintiff's Amended Complaint and Crossclaim, and states as follows:

1. It is denied that Defendant Backus' Answer and New Mater incorporates the allegations of paragraphs 1-66 of Pro\*Act's Complaint. Rather, Defendant Backus' Answer, in Paragraph 67, incorporates "by reference each and every answer set forth in Paragraphs 1-66 above as if the same were herein set forth at length." In its Answer to Amended Complaint, Defendant Backus properly asserted in paragraphs 67-76 under the heading "New Matter" (in accordance with Rule 2252(d)<sup>1</sup> of the Pennsylvania Rules of

---

<sup>1</sup> Rule 2252(d) provides that

If the person sought to be joined is a party, the joining party shall, without moving for severance or the filing of a praecipe for a writ or a complaint, assert *in the answer as new matter* that such part is alone liable to the plaintiff or liable over to the joining party or jointly or severally liable to the plaintiff or liable to the joining party directly setting forth the ground therefore. The case shall proceed thereafter as if such party had been joined by a writ or a complaint.  
Emphasis added.



Civil Procedure), its separate claim against Defendant Hepro GmbH for indemnity and/or contribution.

2. Denied. Plaintiff's Amended Complaint has sufficiently alleged that Defendant Hepro has ample contacts with the Commonwealth of Pennsylvania for this Court to exercise specific and general jurisdiction over Hepro. As set forth in Pro\*Act's Brief in Support of Opposition to Preliminary Objections of Defendant Hepro GmbH to Plaintiff's Amended Complaint, Pro\*Act has alleged, and Defendant Backus has admitted the following forum contacts in its Answer to Amended Complaint ("Backus' Answer"):

(1) Hepro agreed to sell five KP-50B units to Backus, a Pennsylvania corporation, over a nine-month period (Amended Complaint);

(2) Hepro indicated that it intended to reserve to Backus exclusive selling rights to the Hepro's KP-50B machines. As stated in Backus' Answer, such exclusivity was conditioned upon the sale of the five (5) KP-50B units (which were not in fact sold and as such the exclusivity provision did not apply). However, Backus did sell the KP-50B to Pro\*Act on behalf of Hepro, such that the sales of the units counted towards the five (5) sales needed to obtain exclusivity;

(3) Backus employee was designated as the "lead manager of Hepro" for purposes of facilitating the sale of Hepro's KP-50B peeler to Pro\*Act;

(4) all payments by Pro\*Act for Hepro's KP-50B were made payable to Backus and delivered to the Commonwealth;

(5) Hepro billed Pro\*Act for the KP-50B through Backus;

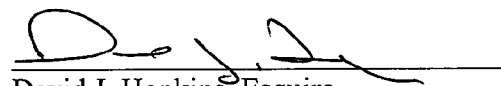
(6) On at least one occasion, a KP-50B machine at issue in this action was shipped into and out of the Commonwealth; and

(7) Hepro used Backus to negotiate, sell, distribute, invoice, and collect payments, as well as serve as the point of contact for purposes of rectifying problems associated with Hepro's KP-50B machine.

3. Defendant Backus hereby adopts the reasoning and analysis set forth in Pro\*Act's Opposition to Preliminary Objections of Defendant Hepro GmbH, and Brief in Support of Opposition to Preliminary Objections of Defendant Hepro GmbH to Plaintiff's Amended Complaint (copies of which are incorporated herein and attached hereto as Attachment A), insofar as such documents set forth the basis for the exercise of specific and general jurisdiction over Hepro. For the reasons set forth in the Brief, Defendant Backus respectfully requests that this Honorable Court dismiss Hepro's preliminary objections. To the extent that the Opposition or Brief suggest that Backus is the exclusive reseller of carrot peelers in the United States, as set forth in Backus' Answer to Amended Complaint and New Matter and Crossclaim, it is denied that Backus is Hepro's exclusive reseller of carrot peelers in the United States.

WHEREFORE, Defendant Backus USA, Inc. respectfully requests that this Court overrule the Preliminary Objections filed by Hepro GmbH to Defendant Backus USA, Inc.'s New Matter to Plaintiff's Amended Complaint and Crossclaim and grant such other relief as the Court deems just and proper.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. J. Hopkins", is written over a horizontal line.

David J. Hopkins, Esquire  
Attorney for Defendant Backus, USA, Inc.

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA  
(CIVIL DIVISION)

PRO*ACT, LLC,	:	
	:	
Plaintiff,	:	
	:	
v.	:	No. 04-1663-CD
	:	
BACKUS USA, INC.	:	
and HEPRO GmbH,	:	
Defendants.	:	


**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that a true and correct copy of Defendant Backus USA, Inc.'s Reply in Opposition to Preliminary Objections of Defendant Hepro GmbH to Defendant Backus USA, Inc.'s New Matter to Plaintiff's Amended Complaint and Crossclaim, filed on behalf of Backus USA, Inc. was forwarded by first class mail, postage prepaid, on the 23rd day of May, 2005, to all counsel of record, addressed as follows:

Bradley S. Tupi, Esquire  
Tucker Arensberg, P.C.  
1500 One PPG Place  
Pittsburgh, PA 15222

Wayne W. Ringeisen, Esquire  
Reed Smith LLP  
435 Sixth Avenue  
Pittsburgh, PA 15219-1886

Hopkins Heltzel LLP

By:   
David J. Hopkins, Esquire  
Attorney for Defendant Backus, USA, Inc.

A

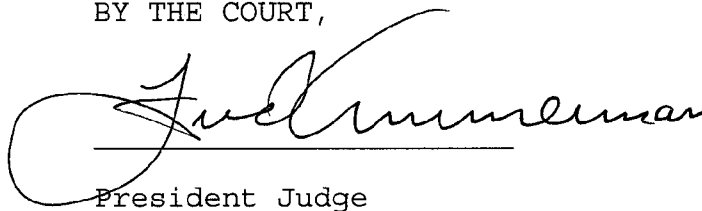
IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA  
CIVIL DIVISION

PRO\*ACT, LLC :  
VS. : NO. 04-1663-CD  
BACKUS USA, INC., and :  
HEPRO GmbH :

O R D E R

NOW, this 31st day of May, 2005, following argument relative Preliminary Objections filed on behalf of Defendant Hepro; with the Court noting that no ruling has yet been issued on the same, it is the ORDER of this Court that Defendant Hepro is not required to answer any discovery requests related to issues which are not jurisdictional in nature until such time as the Court should rule on the Preliminary Objections.

BY THE COURT,

  
President Judge

FILED cc: Augs:

013:3801 Tupi  
JUN 01 2005 Hopkins

William A. Shaw  
Prothonotary/Clerk of Courts  
Ringeisen  
@

CA

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA  
CIVIL DIVISION

PRO\*ACT, LLC

v.

BACKUS USA, INC., and  
HEPRO GmbH.


:  
:  
:  
:  
:  
:  
:

No. 04-1663-CD

ORDER

AND NOW, this 27<sup>th</sup> day of June, 2005, following the submission of briefs and argument relative Hepro GmbH's (Defendant-Hepro) Preliminary Objections to Pro\*Act, LLC's (Plaintiff) Amended Complaint the Court HEREBY DENIES Defendant-Hepro's Preliminary Objections.

By the Court

  
President Judge

FILED

01/10:21/01  
JUN 28 2005

William A. Shaw  
Prothonotary/Clerk of Courts

100  
Atty's: Tupi  
Hopkins  
Ringerisen

**IN THE COURT OF COMMON PLEAS CLEARFIELD COUNTY, PENNSYLVANIA**

PRO\*ACT, LLC,

Plaintiff,

vs.

BACKUS USA, INC. and HEPRO GmbH,

Defendants.

**NOTICE TO PLEAD**

To: Plaintiff:

You are hereby notified to file a written response to the enclosed NEW MATTER within 20 days from service hereof or a judgment may be entered against you.

  
Counsel for Defendant, Hepro GmbH

**NOTICE TO PLEAD**

To: Defendant Backus USA, Inc.:

You are hereby notified to file a written response to the enclosed NEW MATTER PURSUANT TO Pa.R.Civ.P. 2252(d) within 20 days from service hereof or a judgment may be entered against you.

  
Counsel for Defendant, Hepro GmbH

CIVIL DIVISION

No. 04-1663-CD

**DEFENDANT HEPRO GmbH'S ANSWER  
AND NEW MATTER TO PLAINTIFF'S  
AMENDED COMPLAINT AND NEW  
MATTER PURSUANT TO  
Pa.R.Civ.P. 2252(d)**

Filed on Behalf of Defendant,  
HEPRO GmbH

Counsel of Record for This Party:

BRIAN T. HIMMEL, ESQ.  
Pa. I.D. #66086

WAYNE W. RINGEISEN, ESQ.  
Pa. I.D. #53550

REED SMITH LLP  
Firm #234  
435 Sixth Avenue  
Pittsburgh, PA 15219  
(412) 288-3131  
(412) 288-3063 (Facsimile)

**FILED**

SEP 13 2005  
William A. Sikaw  
Prothonotary/Clerk of Courts  
no c/c

**IN THE COURT OF COMMON PLEAS CLEARFIELD COUNTY, PENNSYLVANIA**

PRO\*ACT, LLC,

Plaintiff,

vs.

BACKUS USA, INC. and HEPRO GmbH,

Defendants.

CIVIL DIVISION

No. 04-1663-CD

\* \* \* \* \*

**DEFENDANT HEPRO GmbH'S ANSWER AND NEW MATTER TO PLAINTIFF'S  
AMENDED COMPLAINT AND  
NEW MATTER PURSUANT TO P.A.R.CIV.P. 2252(d)**

**ANSWER**

NOW INTO COURT, through undersigned counsel, comes Defendant, HEPRO GmbH (hereinafter referred to as "Hepro"), and for its answer to Plaintiff's Amended Complaint, avers as follows:

1-2. The allegations paragraphs 1-2 of Plaintiff's Amended Complaint state conclusions of law to which no response is necessary. To the extent a response is deemed necessary, the allegations of paragraphs 1-2 are denied for lack of sufficient knowledge and information to justify a belief therein.

3. The allegations of paragraph 3 of Plaintiff's Amended Complaint state conclusions of law to which no response is necessary. To the extent a response is deemed necessary, the allegations of paragraph 2 are admitted.

4. The allegations of paragraph 4 of Plaintiff's Amended Complaint state conclusions of law to which no response is necessary. To the extent a response is deemed necessary, the allegations of paragraph 4 are denied. To the contrary, it is specifically denied that Hepro regularly conducts business in the Commonwealth of Pennsylvania and Clearfield County. To the contrary, this Court lacks personal jurisdiction over Hepro because Hepro performed no act in Pennsylvania out of which

this lawsuit arises, is not present in Pennsylvania, conducts no activities in Pennsylvania and transacts no business in Pennsylvania.

5. The allegations of paragraph 5 of Plaintiff's Amended Complaint state conclusions of law to which no response is necessary. To the extent a response is deemed necessary, the allegations of paragraph 5 are denied to the extent they suggest or imply that any produced and/or sold by Hepro is made the subject of this litigation, is defective and/or caused Plaintiff's alleged damages. It is denied Hepro is a designer, manufacturer and merchant of "mechanical equipment." By way of further response, the carrot peelers made the subject of litigation were produced pursuant to Plaintiff's specifications and were approved by Plaintiff prior to shipment.

6. The allegations of paragraph 6 of Plaintiff's Amended Complaint state conclusions state of law to which no response is necessary. To the extent a response is deemed necessary, the allegations of paragraph 6 are denied. To the contrary, Backus is not Hepro's exclusive reseller of carrot peelers in the United States. The remaining allegations of paragraph 6 are denied for lack of sufficient knowledge and information to justify a belief therein.

7. The allegations of paragraph 7 of Plaintiff's Amended Complaint and its subparts state conclusions of law to which no response is necessary. To the extent a response is deemed necessary, the allegations of paragraph 7 and its subparts are denied as written. To the contrary, it is specifically denied that Hepro regularly conducts business in the Commonwealth of Pennsylvania and in Clearfield County. To the contrary, this Court lacks personal jurisdiction over Hepro because Hepro performed no act in Pennsylvania out of which this lawsuit arises is not present in Pennsylvania, conducts no activities in Pennsylvania and transacts no business in Pennsylvania. The allegations of subparts 7(a)-(i) purporting to interpret the terms, conditions, provisions, language, wording and contents of Exhibits (a)-(g) are denied. To the contrary, the best and only evidence of the terms, conditions, provisions, language, wording and contents of Exhibits (a)-(g) are the documents themselves, and anything and everything at



variance therewith is denied. The remaining allegations of paragraph 7 and its subparts are denied for lack of sufficient knowledge and information to justify a belief therein.

8. The allegations of paragraph 8 of Plaintiff's Amended Complaint state conclusions of law to which no response is necessary. To the extent a response is deemed necessary, the allegations of paragraph 8 are admitted in part and denied in part. Based upon information and belief, it is admitted that Backus presented the Hepro KP-50 peeler at a tradeshow in Los Angeles. It is denied that the KP-50 was "showcased." It is further denied that the KP-50 was specifically designed to peel "small/baby carrots with tops." To the contrary, the KP-50 was designed to peel carrots within its design specifications. The remaining allegations of paragraph 8 are denied for lack for sufficient knowledge and information to justify a belief therein.

9. The allegations of paragraph 9 of Plaintiff's Amended Complaint state conclusions of law to which no response is necessary. To the extent a response is deemed necessary, the allegations of paragraph 9 are denied. To the contrary, as a result of specifications requested by Plaintiff, Plaintiff's representative traveled to Germany to examine and operate the KP-50B machine to ensure it conformed to the Plaintiff's specifications. Following this examination/operation of the KP-50B machine, Plaintiff approved the KP 50-B machine prior to shipment. It is specifically denied that the KP-50 machine is not "commercially viable." To the contrary, the KP-50 was in all respects properly and correctly produced, and was suitable and adequate for its intended purpose. The remaining allegations of paragraph 9 are denied for lack of sufficient knowledge and information to justify a belief therein.

10. The allegations of paragraph 10 of Plaintiff's Amended Complaint are admitted in part and denied in part. It is admitted that Plaintiff shipped raw carrots to Hepro. It is denied that it did so on "several occasions." The remaining allegations of paragraph 10 are denied for lack of sufficient knowledge and information to justify a belief therein.

11. The allegations of paragraph 11 of Plaintiff's Amended Complaint state conclusions of law to which no response is necessary. To the extent a response

is deemed necessary, the allegations of paragraph 11 are denied as stated. To the contrary, Plaintiff's representatives traveled to Germany to examine and operate the KP-50B peeler. Plaintiff's representatives approved the KP-50B peeler prior to shipment. By way of further response, any product produced and/or sold by Hepro was in all respects properly and correctly produced, pursuant to any applicable specifications provided by Plaintiff and was suitable and adequate for its intended purpose.

12. The allegations of paragraphs 12 of Plaintiff's Amended Complaint state conclusions of law to which no response is necessary. To the extent a response is deemed necessary, the allegations of paragraph 12 are denied. To the contrary, any product produced and/or sold by Hepro was not defective and did not cause Plaintiff's alleged damages. To the contrary, any product produced and/or sold by Hepro were in all respects properly and correctly produced and were suitable and adequate for their intended purpose. It is denied that Hepro agreed to modify the KP-50 machine "to ensure its commercial viability for peeling small/baby carrots provided by Plaintiff." To the contrary, the KP-50B was already fully developed.

13. The allegations of paragraphs 13 of Plaintiff's Amended Complaint state conclusions of law to which no response is necessary. To the extent a response is deemed necessary, the allegations of paragraph 13 are denied as stated. To the contrary, the KP-50 machine was already fully developed. By way of further response, the KP-50B machine was in all respects properly and correctly produced, complied with Plaintiff's specifications and was suitable and adequate for its intended purpose of peeling carrots within its design specifications, as approved by Plaintiff prior to shipment.

14-17. The allegations of paragraphs 14-17 of Plaintiff's Amended Complaint state conclusions of law to which no response is necessary. To the extent a response is deemed necessary, the allegations of paragraphs 14-17 are denied to the extent they suggest or imply that any product produced and/or sold by Hepro was defective and/or caused Plaintiff's alleged damages. To the contrary, any product produced and/or sold by Hepro was in all respects properly and correctly produced and

was suitable and adequate for its intended purpose of peeling carrots within its design specifications as approved by Plaintiff prior to shipment. The remaining allegations of paragraph 14-17 are denied for lack of sufficient knowledge and information to justify a belief therein.

18-19. The allegations of paragraphs 18-19 of Plaintiff's Amended Complaint state conclusions of law to which no response is necessary. To the extent a response is deemed necessary, the allegations of paragraphs 18-19 are denied to the extent that they suggest or imply that Backus is "Hepro's exclusive sales representative in the United States." To the contrary, Backus is not "Hepro's exclusive sales representative in the United States." The remaining allegations of paragraphs 18-19 are denied for lack for sufficient knowledge and information to justify a belief therein.

20-22. The allegations of paragraphs 20-22 of Plaintiff's Amended Complaint state conclusions of law to which no response is necessary. To the extent a response is deemed necessary, the allegations of paragraphs 20-22 that Backus and ProAct exchanged an order confirmation are admitted. The best and only evidence of the terms, conditions, provisions, language, wording and/or contents of Backus' October 29, 2002 order confirmation is the document itself, and anything and everything at variance therewith is denied.

23. The allegations of paragraph 23 of Plaintiff's Amended Complaint state conclusions of law to which no response is necessary. To the extent a response is deemed necessary, the allegations of paragraph 23 are denied for lack of sufficient knowledge and information to justify a belief therein.

24. The allegations of paragraph 24 of Plaintiff's Amended Complaint state conclusions of law to which no response is necessary. To the extent a response is deemed necessary, the allegations of paragraph 24 are denied to the extent they suggest or imply that any product produced and/or sold by Hepro was defective and/or caused Plaintiff's alleged damages. To the contrary, any product produced and/or sold by Hepro was in all respects properly and correctly produced and suitable and adequate for its intended purpose of peeling carrots within its design specifications as approved

by Plaintiff prior to shipment. Moreover, Hepro did not install, operate and/or supervise the installation, operation and/or use of the product. This was done by others, not within Hepro's control. The remaining allegations of paragraph 24 are denied for lack of sufficient knowledge and information to justify a belief therein.

25. The allegations of paragraph 25 of Plaintiff's Amended Complaint are admitted in part and denied in part. It is admitted that Plaintiff notified Hepro of certain alleged concerns. It is denied that Plaintiff notified Hepro of its alleged concerns "immediately." The remaining allegations of paragraph 25 are denied for lack of sufficient knowledge and information to justify a belief therein.

26. The allegations of paragraph 26 of Plaintiff's Amended Complaint state conclusions of law to which no response is necessary. To the extent a response is deemed necessary, the allegations of paragraph 26 are admitted in part and denied in part. It is admitted that Plaintiff ordered and took delivery of a second KP-50B machine. It is denied that any product produced and/or sold by Hepro was defective and/or caused the Plaintiff's alleged damages. To the contrary, any such product was in all respects properly and correctly produced and was suitable and adequate for its intended purpose of peeling carrots within its design specifications as approved by Plaintiff prior to shipment. The remaining allegations of paragraph 26 are denied for lack of sufficient knowledge and information to justify a belief therein.

27. The allegations of paragraph 27 of Plaintiff's Amended Complaint state conclusions of law to which no response is necessary. To the extent a response is deemed necessary, the allegations of paragraph 27 are admitted in part and denied in part. Upon information and belief, it is admitted that Plaintiff ordered a wash line system from defendant Backus. The remaining allegations of paragraph 27 are denied. To the contrary, the KP-50B machine is a stand-alone machine. A customer's decision to purchase a wash line system is at its own discretion pursuant to its specific needs. By way of further response, any product produced and/or sold by Hepro was in all respects properly and correctly produced and was suitable and adequate for its intended purpose

of peeling carrots within its design specifications as approved by Plaintiff prior to shipment.

28 -29. The allegations of paragraphs 28 -29 of Plaintiff's Amended Complaint state conclusions of law to which no response is necessary. To the extent a response is deemed necessary, the allegations of paragraphs 28 -29 are admitted in part and denied in part. Upon information and belief, it is admitted that Plaintiff purchased a wash line from Backus. It is denied that any product produced and/or sold by Hepro was defective and/or caused Plaintiff's alleged damages. To the contrary, Hepro's KP-50B machine is a stand alone machine. Any product produced and sold by Hepro was in all respects properly and correctly produced and was suitable and adequate for its intended purpose of peeling carrots within its design specifications as approved by Plaintiff prior to shipment. The remaining allegations of paragraphs 28 -29 are denied for lack of sufficient knowledge and information to justify a belief therein.

30. The allegations of paragraph 30 of Plaintiff's Amended Complaint state conclusions of law to which no response is necessary. To the extent a response is deemed necessary, and to the extent such allegations are directed to Hepro, the allegations of paragraph 30 are denied to the extent they suggest or imply that any product produced and/or sold by Hepro was defective and/or caused Plaintiff's alleged damages. To the contrary, any product produced and/or sold by Hepro was in all respects properly and correctly produced and was suitable and adequate for its intended purpose of peeling carrots within its design specifications as approved by Plaintiff prior to shipment. By way of further response, Hepro did not furnish any "wash line chiller" to Plaintiff. Upon information and belief, the "missing wash line chiller" was furnished by Backus. The remaining allegations of paragraph 30 are denied for lack of sufficient knowledge and information to justify a belief therein.

31. The allegations of paragraph 31 of Plaintiff's Amended Complaint state conclusion of law to which no response is necessary. To the extent a response is necessary, and to the extent such allegations are directed to Hepro, the allegations of paragraph 31 are denied to the extent they suggest or imply that any product produced

and/or sold by Hepro was defective and/or caused Plaintiff's alleged damages. To the contrary, any product produced and/or sold by Hepro was in all respects properly and correctly produced and was suitable and adequate for its intended purpose of peeling carrots within its design specifications as approved by Plaintiff prior to shipment. It is admitted Plaintiff notified Hepro of certain alleged concerns. The remaining allegations of paragraph 31 are denied for lack of sufficient knowledge and information to justify a belief therein.

32. The allegations of paragraph 32 of Plaintiff's Amended Complaint state conclusions of law to which no response is necessary. To the extent a response is deemed necessary, the allegations of paragraph 32 are denied to the extent they suggest or imply that any product produced and/or sold by Hepro was defective and/or caused Plaintiff's alleged damages. To the contrary, any product produced and/or sold by Hepro was in all respects properly and correctly produced and was suitable and adequate for its intended purpose of peeling carrots within its design specifications as approved by Plaintiff prior to shipment. By way of further response, upon information and belief, representatives of Hepro, which may have been Oliver Schipp and Christoph Protte, observed and videotaped Plaintiff's production process.

33. The allegations of paragraph 33 of Plaintiff's Amended Complaint state conclusions of law to which no response is necessary. To the extent a response is deemed necessary, the allegations of paragraph 33 are denied to the extent they suggest or imply that any product produced and/or sold by Hepro was defective and/or caused Plaintiff's alleged damages. To the contrary, any product produced and/or sold by Hepro was in all respects properly and correctly produced and was suitable and adequate for its intended purpose of peeling carrots within its design specifications as approved by Plaintiff prior to shipment. It is admitted that Plaintiff's representatives traveled to Germany and approved the KP-50B machines prior to shipment. The remaining allegations of paragraph 33 are denied for lack of sufficient knowledge and information to justify a belief therein.

34-36. The allegations of paragraphs 34-36 of Plaintiff's Amended Complaint state conclusions of law to which no response is necessary. To the extent a response is deemed necessary, the allegations of paragraphs 34-36 are denied to the extent they suggest or imply that any product produced and/or sold by Hepro was defective and/or caused Plaintiff's alleged damages. To the contrary, any product produced and/or sold by Hepro was in all respects properly and correctly produced and was suitable and adequate for its intended purpose of peeling carrots within design specifications as approved by Plaintiff prior to shipment. It is further denied that the subject carrot peeler's jammed "frequently" or at an unusual rate. The remaining allegations of paragraphs 34-36 are denied for lack of sufficient knowledge and information to justify a belief therein.

37. The allegations of paragraph 37 of Plaintiff's Amended Complaint state conclusions of law to which no response is necessary. To the extent a response is deemed necessary, and to the extent such allegations are directed to Hepro, the allegations of paragraph 37 are denied to the extent they suggest or imply that any product produced and/or sold by Hepro was defective and/or caused Plaintiff's alleged damages. To the contrary, any product produced and/or sold by Hepro was in all respects properly and correctly produced and was suitable and adequate for its intended purpose as approved by Plaintiff prior to shipment. The remaining allegations of paragraph 37 are denied for lack of sufficient knowledge and information to justify a belief therein.

38. The allegations of paragraph 38 of Plaintiff's Amended Complaint and its subparts state conclusions of law to which no response is necessary. To the extent a response is deemed necessary, the allegations of paragraph 38 and its subparts are denied. To the contrary, no product produced and/or sold by Hepro was defective and/or caused Plaintiff's alleged damages. To the contrary, any product produced and/or sold by Hepro was in all respects properly and correctly produced and was suitable and adequate for its intended purpose. The remaining allegations of paragraph 38 and its subparts are denied for lack of sufficient knowledge and information to justify a belief therein.

## **COUNT I**

### **BREACH OF EXPRESSED WARRANTY (vs. HEPRO)**

39. Hepro re-alleges, reiterates and incorporates herein by this reference as if set forth in full its answers to paragraphs 1-38 and their subparts of Plaintiff's Complaint.

40-42. The allegations of paragraphs 40-42 of Plaintiff's Amended Complaint state conclusions of law to which no response is necessary. To the extent a response is deemed necessary, the allegations of paragraphs 40-42 are denied. To the contrary, no product produced and/or sold by Hepro was defective and/or caused Plaintiff's alleged damages. By way of further response, any product produced and/or sold by Hepro was in all respects properly and correctly produced, and was suitable and adequate for its intended purpose of peeling carrots within its specifications. Moreover, Hepro did not install and/or operate the product. This was done by others, not within Hepro's control. The remaining allegations of paragraphs 40-42 are denied for lack of sufficient knowledge and information to justify a belief therein.

## **COUNT II**

### **BREACH OF EXPRESSED WARRANTY (vs. BACKUS)**

43. Hepro reiterates, re-alleges and incorporates herein by this reference as if set forth in full its answers to paragraphs 1-42 and their subparts of Plaintiff's Amended Complaint.

44-46. The allegations of paragraphs 44-46 of Plaintiff's Amended Complaint are not directed to Hepro and therefore no response is necessary. To the extent a response is deemed necessary and to the extent that the allegations of paragraphs 44-46 are directed to Hepro, these allegations are denied to the extent they suggest or imply any product produced and/or sold by Hepro was defective and/or caused Plaintiff's alleged damages. To the contrary no product produced and/or sold by Hepro was defective and/or caused the Plaintiff's alleged damages. By way of further response, any product produced and/or supplied by Hepro, was properly and correctly



produced and was suitable for its intended purpose. The remaining allegations of paragraph 44-46 are otherwise denied for lack of sufficient knowledge and information to justify a belief therein.

### **COUNT III**

#### **BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY (vs. HEPRO)**

47. Hepro re-alleges, reiterates and incorporates herein by this reference as if set forth in full in its answers to paragraphs 1-46 and their subparts of Plaintiff's Amended Complaint.

48-51. The allegations of paragraphs 48-51 of Plaintiff's Amended Complaint state conclusions of law to which no response is necessary. To the extent a response is deemed necessary, the allegations of paragraphs 48-51 are denied. To the contrary, no product produced and/or sold by Hepro was defective and/or caused Plaintiff's alleged damages. By way of further response, any product produced and/or sold by Hepro was in all respects properly and correctly produced, was merchantable, and was suitable and adequate for its intended purpose. Moreover, Hepro did not install and/or operate the product. This was done by others, not within Hepro's control. The remaining allegations of paragraphs 48-51 are denied for lack of sufficient knowledge and information to justify a belief therein.

### **COUNT IV**

#### **BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY (vs. BACKUS)**

52. Hepro reiterates, re-alleges and incorporates herein by this reference as if set forth in full its answers to paragraphs 1-51 and their subparts of Plaintiff's Amended Complaint.

53-56. The allegations of paragraphs 53-56 of Plaintiff's Amended Complaint are not directed to Hepro and therefore no response is necessary. To the extent a response is deemed necessary and to the extent that the allegations of paragraphs 53-56 are directed to Hepro, these allegations are denied to the extent they

suggest or imply that any product produced and/or sold by Hepro was defective and/or caused Plaintiff's alleged damages. To the contrary, no product produced and/or sold by Hepro was defective and/or caused the Plaintiff's alleged damages. By way of further response, any product produced and/or sold by Hepro, if any, was properly and correctly produced, was merchantable, and was suitable for its intended purpose. The remaining allegations of paragraph 53-56 are otherwise denied for lack of sufficient knowledge and information to justify a belief therein.

#### **COUNT V**

#### **BREACH OF IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE** **(vs. HEPRO)**

57. Hepro reiterates, re-alleges and incorporates herein by this reference as if set forth in full its answers to paragraphs 1-56 and their subparts of Plaintiff's Amended Complaint.

58-61. The allegations of paragraphs 58-61 of Plaintiff's Complaint state conclusions of law to which no response is necessary. To the extent a response is deemed necessary, the allegations of paragraphs 58-61 are denied. To the contrary, no product produced and/or sold by Hepro was defective and/or caused Plaintiff's alleged damages. By way of further response, any product produced and/or sold by Hepro was in all respects properly and correctly produced, and was suitable and adequate for its intended and/or particular purpose. Moreover, Hepro did not install and/or operate the product. This was done by others, not within Hepro's control. The remaining allegations of paragraphs 58-61 are denied for lack of sufficient knowledge and information to justify a belief therein.

## **COUNT VI**

### **BREACH OF IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE** **(vs. BACKUS)**

62. Hepro reiterates, re-alleges and incorporates herein by this reference as if set forth in full its answers to paragraphs 1-60 and their subparts of Plaintiff's Amended Complaint.

63-66. The allegations of paragraphs 63-66 of Plaintiff's Amended Complaint are not directed to Hepro and therefore no response is necessary. To the extent a response is deemed necessary and to the extent that the allegations of paragraphs 63-66 are directed to Hepro, these allegations are denied to the extent they suggest or imply that any product produced and/or sold by Hepro was defective and/or caused Plaintiff's alleged damages. To the contrary, no product produced and/or sold by Hepro was defective and/or caused Plaintiff's alleged damages. By way of further response, any product produced and/or sold by Hepro was in all respects properly and correctly produced, and was suitable and adequate for its intended and/or particular purpose. The remaining allegations of paragraphs 63-66 are denied for lack of sufficient knowledge and information to justify a belief therein.

## **NEW MATTER**

AND NOW, in further answer to Plaintiff's Amended Complaint, Hepro incorporates the forgoing provisions of this Answer as if set forth in full and further avers as follows:

1. This Court lacks personal jurisdiction over Hepro.
2. Pursuant to applicable contract documents, this is not the appropriate forum in which to litigate this action. See Exhibit "A" attached hereto.

3. The applicable law, the proper forum for adjudication of this dispute and this Court's jurisdiction, *vel non*, over the subject matter of this case are governed by the terms of the applicable warranty and contract including the "Metaalunie Conditions" which are referenced in the contract attached to Plaintiff's Complaint at Exhibit B and attached to the Answer and New Matter filed by Backus as Exhibit "1" as well as the contract attached hereto as Exhibit "A".

4. Plaintiff's Amended Complaint fails to state a claim against Hepro upon which relief can be granted.

5. Plaintiff's claims are barred by the applicable statutes of limitations and/or laches.

6. Plaintiff's claims are barred by equity including, *inter alia*, the equitable defenses of laches, unclean hands, waiver, equitable estoppel and unjust enrichment.

7. Plaintiff's claims are limited and/or barred by the express and implied terms of any applicable warranty or contract, including but not limited to the "Metaalunie Conditions" which are referenced in the contract attached to Plaintiff's Complaint at Exhibit B and attached to the Answer and New Matter filed by Backus as Exhibit "1" and the contract attached hereto as Exhibit "A".

8. Plaintiff's alleged damages are consequential and are expressly disclaimed pursuant to Article 13 of the "Metaalunie Conditions" which are referenced in the contract attached to Plaintiff's Complaint at Exhibit B and attached to the Answer and New Matter filed by Backus as Exhibit "1" and the contract attached hereto as Exhibit "A".

9. Any warranties provided are limited to those expressly set forth in Article 14 of the "Metaalunie Conditions" which are referenced in the contract attached to Plaintiff's Complaint at Exhibit B and attached to the Answer and New Matter filed by Backus as Exhibit "1" and the contract attached hereto as Exhibit "A".

10. All implied warranties were disclaimed pursuant to the "Metaalunie Conditions" which are referenced in the contract attached to Plaintiff's Complaint at Exhibit B and attached to the Answer and New Matter filed by Backus as Exhibit "1" and the contract attached hereto as Exhibit "A".

11. Plaintiff's recourse is limited to the time period and remedies set forth in the "Metaalunie Conditions" which are referenced in the contract attached to Plaintiff's Complaint at Exhibit B and attached to the Answer and New Matter filed by Backus as Exhibit "1" and the contract attached hereto as Exhibit "A".

12. Any Hepro liability is limited to repair and replacement as described in the "Metaalunie Conditions" which are referenced in the contract attached to Plaintiff's Complaint at Exhibit B and attached to the Answer and New Matter filed by Backus as Exhibit "1" and the contract attached hereto as Exhibit "A".

13. As described in the "Metaalunie Conditions" which are referenced in the contract attached to Plaintiff's Complaint at Exhibit B and attached to the Answer and New Matter filed by Backus as Exhibit "1" and the contract attached hereto as Exhibit "A", Plaintiff cannot recover for defects resulting from normal wear and tear, injudicious use and or modifications by the customer and/or third parties.

14. Plaintiff lacks standing or legal basis to assert any cause of action against Hepro because of lack of privity.

15. The products made the subject of litigation were produced pursuant to Plaintiff's specifications and Plaintiff approved this design and operation of the machines in Germany, prior to shipment.

16. Plaintiff accepted the products at issue in this case.

17. Any products of Hepro at issue in this litigation were in all ways conforming to the contract terms and specifications, and in all ways performed as warranted. Alternatively, all products provided by Hepro substantially complied with the contract terms and specifications. In the further alternative, to the extent that such products were in some way non-conforming, which is categorically denied, Plaintiff accepted the goods notwithstanding the non-conformity and/or waived any rights to sue for breach.

18. If any product designed, manufactured, tested and/or sold by Hepro is made the basis of this lawsuit, then Hepro denies that the product in question was in any way defective and/or caused the Plaintiff's alleged damages. To the contrary, no product produced and/or sold by Hepro was defective and/or caused Plaintiff's alleged damages. Any product produced and/or sold by Hepro was properly and correctly produced, was merchantable, and was suitable for its intended and particular purpose.

19. Alternatively, if any defect is found to have existed or exists in any Hepro product and/or that any such product is found to in have in any way improperly or deficiently performed, which is again categorically denied, then Hepro alleges that any such defect was caused solely and wholly by the misuse, abuse, alteration,

modification, damage or improper operation, maintenance, repair, handling, servicing and/or installation and/or fault of others now unknown, but possibly including but not limited to any of the following: employees or agents of Plaintiff or contractors or subcontractors hired by or performing work for the benefit of Plaintiff or employees or agents of or contractors or subcontractors hired by or performing work for the benefit of Backus USA, Inc. and/or others over whom Hepro had no control and for whom Hepro had no responsibility, all of which totally precludes recovery by Plaintiff against Hepro in the premises of this action.

20. Alternatively, if Hepro is found to have been at fault and/or any Hepro product is found to have been or is defective, which is again categorically denied, then Hepro pleads that the Plaintiff's alleged damages were caused solely by the independent, intervening and superseding negligence, contributory and comparative negligence, breach of duty and/or fault of others, now unknown, but possibly including but not limited to employees or agents of or contractors or subcontractors hired by or performing work for the benefit of any or all of the following: Plaintiff and/or Backus USA, Inc. over whom Hepro had no control and for whom Hepro had no responsibility, all of which totally precludes recovery against Hepro in the premises of this action, or alternatively, mitigates or reduces any recoverable damages.

21. To the extent Plaintiff has suffered any injury or damages, which is categorically denied, Plaintiff has failed to mitigate their respective damages as required by law.

22. At all times material to this litigation, any Hepro product made the basis of this litigation complied with and conformed to any and all applicable local, state and federal codes, regulations, laws, rules and standards.

23. Plaintiff has failed to meet and/or satisfy all the conditions precedent to asserting and/or recovering for alleged breach of warranty.

24. Hepro breached no duty at all in the premises of this action. To the contrary, in all respects, Hepro acted properly, correctly and satisfactorily.

25. No act or inaction by Hepro caused the Plaintiff's alleged damages. To the contrary, any and all Plaintiff's alleged damages were caused solely and wholly by Plaintiff's own conduct including pre-sale misrepresentations or omissions and/or misuse, abuse, improper operation and/or maintenance/servicing, assumption of the risk and/or other acts of omission and/or commission, all which bar the recovery of any and all damages, or alternatively, reduces any recoverable damages to the degree of Plaintiff's fault and/or breach of duty.

26. Hepro reserves the right to assert additional defenses, affirmative and/or otherwise, as warranted by the facts of this case and/or as they become apparent during discovery.

WHEREFORE, defendant, Hepro GmbH, prays for judgment in its favor dismissing Plaintiff's Amended Complaint and for all costs and for all such other relief as law, justice and equity may require.

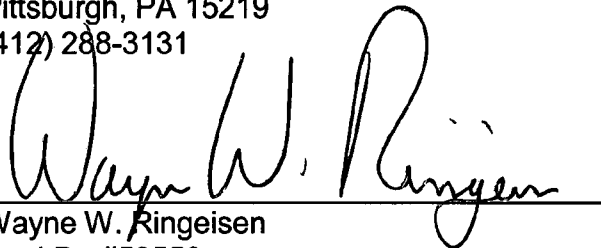


**NEW MATTER PURSUANT TO Pa.R.C.P. 2252(d)**

1. Solely for the purposes of this New Matter Pursuant to Pa.R.C.P. 2252(d), and without admitting the truth of any allegations contained therein, Hepro incorporates by reference hereto each and every allegation in Plaintiff's Amended Complaint directed against Hepro and Backus as if fully set forth herein.

2. To the extent that Plaintiff is entitled to any recovery, said entitlement being specifically denied, then, with regard to Plaintiff's recovery Hepro hereby asserts claims against co-defendant Backus USA, Inc. as follows: co-defendant Backus USA, Inc. is alone or solely liable to the Plaintiff and/or co-defendant Backus USA, Inc. is liable over Hepro and/or co-defendant Backus USA, Inc. is jointly or severally liable with Hepro and/or co-defendant Backus USA, Inc. is directly liable to Hepro for contribution and/or indemnity.

REED SMITH, LLP  
435 Sixth Avenue  
Pittsburgh, PA 15219  
(412) 288-3131

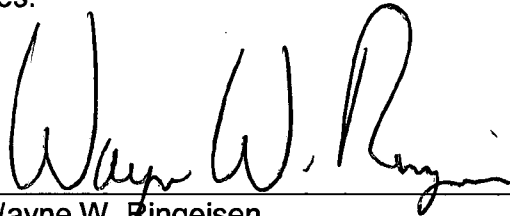
A handwritten signature in black ink, appearing to read "Wayne W. Ringeisen", is written over a horizontal line.

Wayne W. Ringeisen  
Pa. I.D. #53550

Counsel for Defendant, Hepro GmbH

**ATTORNEY VERIFICATION**

In accordance with Pa.R.Civ.P. 1024(c), the Party represented by the undersigned is located outside this jurisdiction and their verification could not be obtained within the time allowed for the filing of this pleading. Accordingly, the undersigned verifies that the foregoing facts and denials of fact are true and correct to the best of my knowledge, information and belief. The undersigned understands that any false statements made herein are subject to the penalties of 18 Pa.C.S.A. § 4904 relating to unsworn falsification to authorities.

  
\_\_\_\_\_  
Wayne W. Ringeisen

# HEPRO GmbH

Maschinen und Spezialgeräte  
Nahrungsmitteltechnik

4

HEPRO GmbH - Am Bauhof 9 - 33129 Delbrück

BACKUS USA INC.

P.O. BOX 585

PA 15801 Dubois  
UNITED STATES OF AMERICA

## Auftragsbestätigung

Kunden-Nr.: 10116

Auftrag: 220010

Datum: 27.05.2002

Seite: 1

HEPRO

Ihr Auftrag vom: 15.05.2002    Ihre Auftragsnr.: 05070 / Marc Broeren    Sachbearbeiter: Herr Schipp    Tel.: +49 5250 99499-15    Fax: +49 5250 99499-21  
schipp@hepro-gmbh.de

Abnahmebedingung: 5 Maschinen bis zum 15.06.2003

Zahlungsbedingung (je Maschine): 30% bei Auftragseingang  
60% bei Lieferung  
10% innerhalb 14 Tage nach Inbetriebnahme

Garantie: Firma HEPRO gewährt 6 Monate Garantie ausschließlich auf Maschinenteile. Die mit Service verbundenen Reise-Arbeitskosten werden auch innerhalb der Garantiezeit berechnet.

Pos.	Bezeichnung	Menge	Termin:	Einzelpreis	Gesamtpreis
1	100.00006 Karotten-Schälmaschine HSM-MK - bewegliche Antriebsrollen D=40 - 6 Schälstationen (12 Schnitte) - Messer: F (0,9 mm) - Aufgabetisch / Auffangwanne Version USA (110V / 60 Hz / UL- Zulassung)	1 St.	38/2002	28.000,00 €	28.000,00 €
2	100.00006 Karotten-Schälmaschine HSM-MK	4 St.	25/2003	28.000,00 €	112.000,00 €

Lieferung an:

BACKUS USA INC.

P.O. BOX 585

PA 15801 Dubois

Warenwert: 140.000,00 €  
Versandkosten: 0,00 €  
Nettosumme: 140.000,00 €  
MwSt. 0% 0,00 €

Gesamtsumme: 140.000,00 €

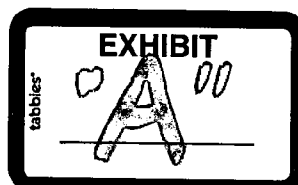
Versandart: Ab Werk, ausschl. Verpackung    Zahlungsbedingung: gemäß Sondervereinbarung

HEPRO GmbH  
Maschinen und Spezialgeräte  
Nahrungsmitteltechnik  
Am Bauhof 9  
D-33129 Delbrück  
Tel.: 052 50/93 05 80  
Fax: 052 50/93 05 81

Sparkasse Delbrück  
BLZ 472 517 40  
Kto.-Nr. 2 002 111  
Volksbank Westerloh-Westerwiehe  
BLZ 472 634 72  
Kto.-Nr. 2 550 700

USt-IdNr.: DE B11745103  
Betriebs-St.-Nr.: 339 / 5820 / 0561  
Amtsgericht Delbrück  
HRB 0444  
Gerichtsstand ist Delbrück  
Geschäftsführer:  
S. Hennemeier, Chr. Protte

Wir liefern zu den „Allgemeinen  
Geschäftsbedingungen für Lieferung  
von Maschinen“, empfohlen vom  
Verband Deutscher Maschinen- und  
Anlagenbau e.V.  
Die gelieferte Ware und die daraus  
entstehenden Forderungen bleiben  
bis zur endgültigen Bezahlung unser  
Eigentum.



**CERTIFICATE OF SERVICE**

I hereby certify that on this 12th day of September 2005, a true and correct copy of the foregoing **DEFENDANT HEPRO GmbH'S ANSWER AND NEW MATTER TO PLAINTIFF'S AMENDED COMPLAINT AND NEW MATTER PURSUANT TO Pa.R.Civ.P. 2252(d)** was served upon all counsel of record as follows:

***Via Fax and U.S. Mail, Postage Prepaid:***

Bradley S. Tupi, Esq.  
Tucker Arensberg, PC  
1500 One PPG Place  
Pittsburgh, PA 15222  
(*Counsel for Plaintiff*)

***Via U.S. Mail, Postage Prepaid***

David J. Hopkins, Esq.  
Hopkins Heltzel, LLP  
900 Beaver Drive  
Dubois, PA 15801  
(*Counsel for Defendant, Backus USA, Inc.*)

  
\_\_\_\_\_  
WAYNE W. RINGEISEN

Extra  
Coversheet  
for Protho  
time stamp

SEP 13 2005

William A. Shaw  
Prothonotary/Clerk of Courts

**IN THE COURT OF COMMON PLEAS CLEARFIELD COUNTY, PENNSYLVANIA**

PRO\*ACT, LLC,

Plaintiff,

vs.

BACKUS USA, INC. and HEPRO GmbH,

Defendants.

CIVIL DIVISION

No. 04-1663-CD

**DEFENDANT HEPRO GmbH'S ANSWER  
AND NEW MATTER TO PLAINTIFF'S  
AMENDED COMPLAINT AND NEW  
MATTER PURSUANT TO  
Pa.R.Civ.P. 2252(d)**

Filed on Behalf of Defendant,  
HEPRO GmbH

Counsel of Record for This Party:

BRIAN T. HIMMEL, ESQ.  
Pa. I.D. #66086

WAYNE W. RINGEISEN, ESQ.  
Pa. I.D. #53550

REED SMITH LLP  
Firm #234  
435 Sixth Avenue  
Pittsburgh, PA 15219  
(412) 288-3131  
(412) 288-3063 (Facsimile)

**NOTICE TO PLEAD**

To: Plaintiff:

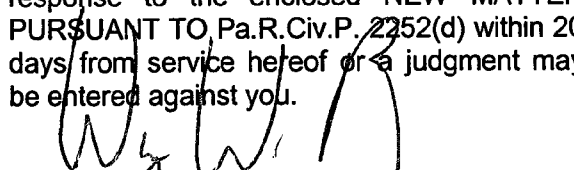
You are hereby notified to file a written response to the enclosed NEW MATTER within 20 days from service hereof or a judgment may be entered against you.

  
Counsel for Defendant, Hepro GmbH

**NOTICE TO PLEAD**

To: Defendant Backus USA, Inc.:

You are hereby notified to file a written response to the enclosed NEW MATTER PURSUANT TO Pa.R.Civ.P. 2252(d) within 20 days from service hereof or a judgment may be entered against you.

  
Counsel for Defendant, Hepro GmbH

# ReedSmith

Wayne W. Ringeisen  
Direct Phone: 412.288.3314  
Email: wringeisen@reedsmith.com

Reed Smith LLP  
435 Sixth Avenue  
Pittsburgh, PA 15219-1886  
412.288.3131  
Fax 412.288.3063

September 12, 2005

VIA UPS

William A. Shaw  
Prothonotary  
Court of Common Pleas of Clearfield County  
230 East Market Street  
P.O. Box 549  
Clearfield, PA 16830-0549

Re: Pro\*Act, LLC v. Backus USA, Inc. and Hepro Gmbh (No. 04-1663 CD)

Dear Mr. Shaw:

Enclosed for filing in the above referenced matter, please find **DEFENDANT HEPRO GmbH'S ANSWER AND NEW MATTER TO PLAINTIFF'S AMENDED COMPLAINT AND NEW MATTER PURSUANT TO PA.R.CIV.P. 2252(d)**. Also enclosed is an extra coversheet for you to time stamp and return to me in the self-addressed stamped envelope. Should you have any questions, please do not hesitate to contact me.

Very truly yours,

REED SMITH LLP

By:   
Wayne W. Ringeisen

WWR: jpm

Enclosure

cc: Bradley S. Tupi, Esq. (via fax 412-594-5619 and U.S. Mail)  
David J. Hopkins, Esq. (via U.S. Mail)

NO S/A/S/E

IN ENVELOP



LONDON ♦ NEW YORK ♦ LOS ANGELES ♦ SAN FRANCISCO ♦ WASHINGTON, D.C. ♦ PHILADELPHIA ♦ PITTSBURGH ♦ OAKLAND  
MUNICH ♦ PRINCETON ♦ FALLS CHURCH ♦ WILMINGTON ♦ NEWARK ♦ MIDLANDS, U.K. ♦ CENTURY CITY ♦ RICHMOND ♦ LEESBURG

reedsmith.com

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

PRO\*ACT, LLC,

Plaintiff,

v.

BACKUS USA, INC. and  
HEPRO GMBH,

Defendants.

CIVIL DIVISION

NO. 04-1663 CD

**REPLY TO NEW MATTER**

CODE: 010

Filed on behalf of Plaintiff,

Pro\*Act, LLC

Counsel of record for this party:

Bradley S. Tupi, Esquire

PA Id. No. 28682

Beverly Weiss Manne, Esquire

PA Id. No. 34545

Jeanne S. Lofgren, Esquire

PA Id. No. 89078

TUCKER ARENSBERG, P.C.

1500 One PPG Place

Pittsburgh, PA 15222

Tel. (412) 594-5545

Fax (412) 594-5619

Email [btupi@tuckerlaw.com](mailto:btupi@tuckerlaw.com)

**FILED** *NO CC*  
*m/12:48*  
SEP 30 2005 *(N)*

William A. Shaw  
Prothonotary/Clerk of Courts



IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

PRO\*ACT, LLC,

CIVIL DIVISION

Plaintiff,

NO. 04-1663 CD

v.

BACKUS USA, INC. and  
HEPRO GMBH,

Defendants.

**REPLY TO NEW MATTER**

Plaintiff, Pro\*Act, LLC, by its counsel, Tucker Arensberg, P.C., makes the following Reply to New Matter contained the Answer to Amended Complaint and New Matter filed by Hepro GmbH:

1. Denied. By Order dated June 25, 2005, this Court determined that it has personal jurisdiction over Hepro. The time to appeal the Order has expired. Accordingly, Hepro is subject to this Court's jurisdiction.

2. Any document referenced in Paragraph 2 speaks for itself. Otherwise, the allegations contained in Paragraph 2 are denied. By way of further response, it is specifically denied that the Metaalunie Conditions govern this transaction. To the contrary, the laws of the Commonwealth of Pennsylvania govern this transaction.

3. Any document referenced in Paragraph 3 speaks for itself. Otherwise, the allegations contained in Paragraph 3 are denied. By way of further response, it is specifically denied that the Metaalunie Conditions govern this transaction. To the contrary, the laws of the Commonwealth of Pennsylvania govern this transaction.

4. Paragraph 4 states a conclusion of law to which no response is required. To the extent a response is required, the allegations contained in Paragraph 4 are denied. To the contrary, Plaintiff's Amended Complaint states a proper claim against Hepro.

5. Paragraph 5 states a conclusion of law to which no response is required. To the extent a response is required, the allegations contained in Paragraph 5 are denied. To the contrary, Plaintiff's claims are timely.

6. Paragraph 6 states a conclusion of law to which no response is required. To the extent a response is required, the allegations contained in Paragraph 6 are denied. To the contrary, Plaintiff's claims are not barred by any equitable defenses.

7. Any document referenced in Paragraph 7 speaks for itself. Otherwise, the allegations contained in Paragraph 7 are denied. By way of further response, it is specifically denied that the Metaalunie Conditions govern this transaction. To the contrary, the laws of the Commonwealth of Pennsylvania govern this transaction.

8. Any document referenced in Paragraph 8 speaks for itself. Otherwise, the allegations contained in Paragraph 8 are denied. By way of further response, it is specifically denied that Plaintiff's damages are only consequential and that the Metaalunie Conditions govern this transaction. To the contrary, Plaintiff's damages are as averred in Plaintiff's Amended Complaint, and the laws of the Commonwealth of Pennsylvania govern this transaction.

9. Any document referenced in Paragraph 9 speaks for itself. Otherwise, the allegations contained in Paragraph 9 are denied. By way of further response, it is specifically denied that the Metaalunie Conditions govern this transaction. To the contrary, the laws of the Commonwealth of Pennsylvania govern this transaction.

10. Any document referenced in Paragraph 10 speaks for itself. Otherwise, the allegations contained in Paragraph 10 are denied. By way of further response, it is specifically denied that the Metaalunie Conditions govern this transaction. To the contrary, the laws of the Commonwealth of Pennsylvania govern this transaction.

11. Any document referenced in Paragraph 11 speaks for itself. Otherwise, the allegations contained in Paragraph 11 are denied. By way of further response, it is specifically denied that the Metaalunie Conditions govern this transaction. To the contrary, the laws of the Commonwealth of Pennsylvania govern this transaction.

12. Any document referenced in Paragraph 12 speaks for itself. Otherwise, the allegations contained in Paragraph 12 are denied. By way of further response, it is specifically denied that the Metaalunie Conditions govern this transaction. To the contrary, the laws of the Commonwealth of Pennsylvania govern this transaction.

13. Any document referenced in Paragraph 13 speaks for itself. Otherwise, the allegations contained in Paragraph 13 are denied. By way of further response, it is specifically denied that the Metaalunie Conditions govern this transaction. To the contrary, the laws of the Commonwealth of Pennsylvania govern this transaction.

14. Paragraph 14 states a conclusion of law to which no response is required. To the extent a response is required the allegations in Paragraph 14 are denied.

15. Admitted in part and denied in part. It is admitted that Plaintiff communicated to Defendants the intended and particular purpose for the products at issue in this litigation. It is specifically denied that Plaintiff designed the products to fit the intended and particular purpose. To the contrary, Plaintiff relied on the Defendants' skill and representations that the products were fit for Plaintiff's stated purpose. Otherwise, the allegations contained in Paragraph 15 are denied.

16. Admitted in part and denied in part. It is admitted that Plaintiff received shipment of the products at issue in this litigation. It is denied that Plaintiff accepted the products as non-conforming. To the contrary, Plaintiff immediately notified the Defendants of the product defects and requested action to resolve the problems. Otherwise, the allegations contained in Paragraph 16 are denied.

17. Denied. The products of Hepro at issue in this litigation did not conform to contract terms and did not perform as warranted because they were not suitable for their intended or particular purpose. The products provided by Hepro did not substantially comply with contract terms because they were not suitable for their intended or particular purpose. Further, Plaintiff did not accept the non-conforming products produced by Hepro and did not waive Plaintiff's right to sue for breach as a result of Defendants' providing non-conforming products. To the contrary, Plaintiff immediately notified the Defendants of the product defects and requested action to resolve the problems. Otherwise, the allegations contained in Paragraph 17 are denied.

18. Denied. The products designed, manufactured, tested and sold by the Defendants were defective and caused Plaintiff's damages. Further, the products produced and sold by the Defendants in this litigation were not properly and correctly produced, were not merchantable and were not suitable for their intended and particular purpose.

19. Denied. The defects in the products Defendants produced and sold to Plaintiff were not caused by any misuse, abuse, alteration, modification, damage or improper operation, maintenance, repair, handling, servicing and/or installation and/or fault of parties not named as Defendants in this action.

20. Denied. There was no independent, intervening and superseding negligence, contributory and comparative negligence, breach of duty and/or fault of parties not named as Defendants in this action that caused the Plaintiff's damages as a result of the defective products produced and sold by the Defendants to the Plaintiff.

21. Paragraph 21 contains a conclusion of law to which no response is required. To the extent a response is required, Plaintiff denies the allegations contained in Paragraph 21. To the contrary, Plaintiff has mitigated its damages to the extent practicable.

22. Paragraph 22 contains a conclusion of law to which no response is required. To the extent a response is required, Plaintiff denies the allegations contained in Paragraph 22.

23. Paragraph 23 contains a conclusion of law to which no response is required. To the extent a response is required, Plaintiff denies the allegations contained in Paragraph 23. To the contrary, Plaintiff has satisfied all conditions precedent to the claims stated in this action.

24. Denied. Hepro breached its express warranty, and the implied warranties of merchantability and fitness for a particular purpose with respect to the products designed, manufactured and sold by the Defendants to the Plaintiff that are at issue in this litigation.

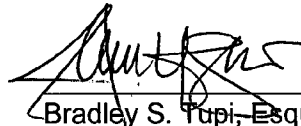
25. Denied. The Defendants' breach of warranties with respect to the products at issue in this litigation are the sole cause of the Plaintiff's damages.

26. Paragraph 26 contains no averment of fact to which a response is required.

WHEREFORE, Plaintiff demands judgment against Defendants, jointly and severally, in an amount to be determined at trial, together with costs, attorneys' fees and such other relief as the Court deems just.

Respectfully submitted,

TUCKER ARENSBERG, P.C.



Bradley S. Tupi, Esquire

PA Id. No. 28682

Jeanne S. Lofgren, Esquire

PA Id. No. 89079

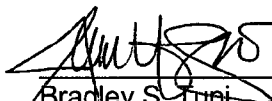
1500 One PPG Place  
Pittsburgh, PA 15222  
Tel. (412) 594-5545  
Fax (412) 594-5619  
Email: [btupi@tuckerlaw.com](mailto:btupi@tuckerlaw.com)  
Attorneys for Plaintiff

**CERTIFICATE OF SERVICE**

I certify that true and correct copies of the foregoing Reply to New Matter were served via first class U.S. Mail, postage prepaid, this 28<sup>th</sup> day of September, 2005, upon the following counsel of record:

David J. Hopkins, Esquire  
Hopkins Heltzel, LLP  
900 Beaver Drive  
DuBois, PA 15801

Wayne W. Ringeisen, Esquire  
Reed Smith LLP  
435 Sixth Avenue  
Pittsburgh, PA 15219-1886

  
\_\_\_\_\_  
Bradley S. Tupi  
Jeanne S. Lofgren

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA  
(CIVIL DIVISION)

PRO\*ACT, LLC,

Plaintiff,

v.

BACKUS USA, INC.  
and HEPRO GmbH,

Defendants.

No. 04-1663-CD

Type of Pleading: Answer to New Matter  
Pursuant to Pa.R.C.P. § 2252(d)

Filed on behalf of: Backus USA, Inc.,  
Defendant

Counsel of Record for this party:

HOPKINS HELTZEL LLP

DAVID J. HOPKINS, Esquire  
Attorney at Law  
Supreme Court No. 42519

900 Beaver Drive  
DuBois, Pennsylvania 15801

(814) 375-0300

FILED NO CC  
m/11:24/21  
OCT 04 2005 (R)  
VICTORIA A. BROWN  
Prothonotary, Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA  
(CIVIL DIVISION)

PRO*ACT, LLC,	:	
Plaintiff,	:	
	:	
v.	:	No. 04-1663-CD
	:	
BACKUS USA, INC.	:	
and HEPRO Gmbh,	:	
Defendants.	:	

**ANSWER TO NEW MATTER PURSUANT TO Pa.R.C.P. §2252(d)**

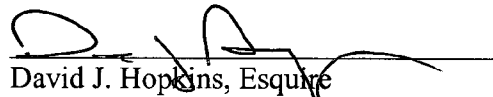
AND NOW, comes Defendant, Backus USA, Inc. ("Backus"), by and through its undersigned counsel, Hopkins Heltzel LLP, and files an Answer to New Matter Pursuant to Pa.R.C.P. §2252(d) filed by Hepro GmbH.

1. No answer is required of this paragraph.
2. For all of the reasons set forth in Defendant Backus USA, Inc.'s Answer to Plaintiff's Amended Complaint, Backus USA, Inc. denies any liability, be it solely or jointly, to Plaintiff or Hepro GmbH. Backus further denies any obligation or liability for contribution or indemnity.

WHEREFORE, Defendant Backus USA, Inc. respectfully request this Honorable Court dismiss Hepro GmbH's New Matter with prejudice.

Respectfully submitted,

HOPKINS HELTZEL LLP



David J. Hopkins, Esquire  
Attorney for Defendant Backus, USA, Inc.



IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA  
(CIVIL DIVISION)

PRO*ACT, LLC,	:	
	:	
Plaintiff,	:	
	:	
v.	:	No. 04-1663-CD
	:	
BACKUS USA, INC.	:	
and HEPRO GmbH,	:	
Defendants.	:	

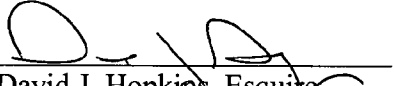
**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that a true and correct copy of Defendant Backus USA, Inc.'s Answer to New Matter Pursuant to Pa.R.C.P. 2252(d), filed on behalf of Backus USA, Inc. was forwarded by first class mail, postage prepaid, on the 3rd day of October, 2005, to all counsel of record, addressed as follows:

Bradley S. Tupi, Esquire  
Tucker Arensberg, P.C.  
1500 One PPG Place  
Pittsburgh, PA 15222

Wayne W. Ringeisen, Esquire  
Reed Smith LLP  
435 Sixth Avenue  
Pittsburgh, PA 15219-1886

Hopkins Heltzel LLP

By:   
David J. Hopkins, Esquire  
Attorney for Defendant Backus, USA, Inc.

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

PRO\*ACT, LLC,

Plaintiff,

v.

BACKUS USA, INC. and  
HEPRO GMBH,

Defendants.

CIVIL DIVISION

NO. 04-1663 CD

**PRAECIPE TO SETTLE AND  
DISCONTINUE**

CODE: 010

Filed on behalf of Plaintiff,

Pro\*Act, LLC  
Counsel of record for this party:

Bradley S. Tupi, Esquire  
PA Id. No. 28682

Beverly Weiss Manne, Esquire  
PA Id. No. 34545

TUCKER ARENSBERG, P.C.  
1500 One PPG Place  
Pittsburgh, PA 15222

Tel. (412) 594-5545  
Fax (412) 594-5619  
Email [btupi@tuckerlaw.com](mailto:btupi@tuckerlaw.com)

LIT:383245-1 021894-120674

**FILED**

FEB 16 2006

*m/12/06/w* *(fw)*  
William A. Shaw  
Prothonotary

*no cc*

*sent of Disc to*

*ATTY + C/A*

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

PRO\*ACT, LLC,

CIVIL DIVISION

Plaintiff,

NO. 04-1663 CD

v.

BACKUS USA, INC. and  
HEPRO GMBH,

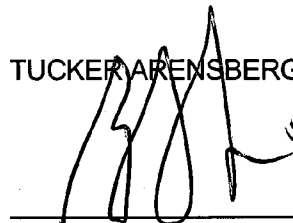
Defendants.

**PRAECIPE TO SETTLE AND DISCONTINUE**

To: Prothonotary

Kindly mark the docket settled and discontinued in the above captioned case.

TUCKER ARENSBERG, P.C.



---

Bradley S. Tupi, Esquire  
PA Id. No. 28682

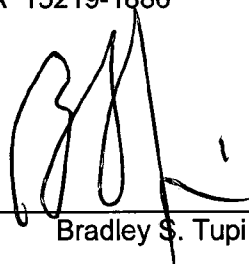
1500 One PPG Place  
Pittsburgh, PA 15222  
(412) 566-1212

**CERTIFICATE OF SERVICE**

I certify that true and correct copies of the foregoing Praeceptum to Settle and Discontinue was served via first class U.S. Mail, postage prepaid, this 31<sup>st</sup> day of January, 2006, upon the following counsel of record:

David J. Hopkins, Esquire  
Hopkins Heltzel, LLP  
900 Beaver Drive  
DuBois, PA 15801

Wayne W. Ringeisen, Esquire  
Reed Smith LLP  
435 Sixth Avenue  
Pittsburgh, PA 15219-1886



Bradley S. Tupi

**IN THE COURT OF COMMON PLEAS OF  
CLEARFIELD COUNTY, PENNSYLVANIA**

**CIVIL DIVISION**

**Pro\*Act, LLC**

**Vs.**

**No. 2004-01663-CD**

**Backus USA, Inc.  
Hepro GmbH**

**CERTIFICATE OF DISCONTINUATION**

Commonwealth of PA  
County of Clearfield

I, William A. Shaw, Prothonotary of the Court of Common Pleas in and for the County and Commonwealth aforesaid do hereby certify that the above case was on February 16, 2006, marked:

Settled and Discontinued

Record costs in the sum of \$141.50 have been paid in full by Tucker Arensberg, P.C.

IN WITNESS WHEREOF, I have hereunto affixed my hand and seal of this Court at Clearfield, Clearfield County, Pennsylvania this 16th day of February A.D. 2006.

---

William A. Shaw, Prothonotary