

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT, IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

CLASS REPRESENTATION

CASE NO. 03-8255 CA 13

IN RE: CITRUS CANKER LITIGATION

**ORDER GRANTING IN PART AND DENYING IN PART
MOTION FOR PARTIAL SUMMARY JUDGMENT
AS TO DEPARTMENT'S FIRST AFFIRMATIVE DEFENSE**

THIS MATTER came before the Court on May 12, 2006 on the motion of class representative plaintiffs Harry Roberge, Dr. Evelyn Lopez-Brignoni and Elba Brignoni, on behalf of themselves and the certified class (collectively the "Class") for partial summary judgment as to that portion of the Department's first affirmative defense asserting a right of set-off based on the Shade Florida Cards.¹ Having reviewed the motion and exhibits thereto, including the affidavit of Mike Gresham (the administrator of the Shade Florida program), the Department's opposing memoranda of law, other relevant portions of the record, and having heard argument of counsel, the Court grants the motion in part and denies the motion in part for the reasons discussed herein.

1. The Department's first affirmative defense to the Second Amended Class Action Complaint (hereafter the "Complaint") asserts that:

¹ The Class is defined as:

All owners of citrus trees within Miami-Dade County, incorporated or otherwise, not used for commercial purposes, which were not determined by the Department to be infected with citrus canker and which were destroyed under the CCEP from January 1, 2000 to the present.

The Department is entitled to a set-off based on any collateral sources of payment to Plaintiffs or class members, including, but not limited to, insurance payments, tax benefits, Shade Dade or Shade Florida cards, State of Florida compensation payments, and grants to Florida counties for reforestation passed through to Plaintiffs or class members. (emphasis added).

2. The Shade Florida Program began in 1998 to fund the replacement of trees for owners of residential citrus trees destroyed under the Citrus Canker Eradication Program (“CCEP”) in Miami-Dade County. (Affidavit of Mike Gresham, ¶ 3). Originally known as the Shade Dade Program, the program was expanded in 1999 to include all areas of Florida affected by the CCEP and thereafter became known as the Shade Florida Program. (Id.). Under the Shade Florida Program, the Department mailed standardized applications to all Florida property owners – including members of the Class – within weeks following the destruction of their citrus trees under the CCEP. (Id. at ¶ 6i; Motion, Exh. B). The standardized applications did not seek the agreement of these property owners to accept Shade Florida Cards in substitution, in whole or in part, for a monetary compensation award. (Motion, Exh. B). The applications were silent on this issue. (Id.). Moreover, the applications did not state that acceptance or use of the Shade Florida Cards would constitute a set-off against any future inverse condemnation award recovered against the Department. (Id.). The Department thereafter issued Shade Florida Cards, commonly known as Wal-Mart Cards, to all members of the Class who completed and returned the applications to the Department. (Gresham Aff. at ¶ 6). The cards had a face value of \$100, and were usable at designated lawn and garden centers of Wal-Mart Stores towards the purchase of certain

pre-approved lawn and garden merchandise. (Id. at ¶ 8). The cards expired at the end of the calendar year in which they were issued. (Id. at ¶ 9). Any unused balance on the cards was lost upon their expiration. (Id. at ¶ 12). The cards were not redeemable for cash. (Id. at ¶ 9). The cards were issued pursuant to an agreement between the Department and Wal-Mart, under which the Department reimbursed Wal-Mart for the actual amount of usage against the cards, plus specified administrative expenses. (Id. at ¶¶ 12-13). Details concerning which eligible Florida property owners – including members of the Class – completed and returned applications requesting such cards and those who did not, as well as actual usage (or lack thereof) by those members of the Class who received such cards, was electronically tracked and is readily available through the Department’s database. (Id. at ¶¶ 9, 13).

3. The Department’s first affirmative defense does not specify whether the claim for a set-off is based on the face amount of the Shade Florida Cards (\$100) issued to members of the Class or based on the actual amount of usage of such cards (i.e., based on the goods actually purchased with such cards) by members of the Class.

4. The Class’ motion argues the Department is not entitled to a set-off based on the face amount of the Shade Florida Cards (\$100) issued to members of the Class or based on the actual amount of usage of such cards (i.e., based on the goods actually purchased with such cards) by Class members.

5. During oral argument, the Department’s counsel asserted the Department is entitled to a set-off based on: (i) the aggregate face value of all cards made available

(“tendered”) to the Class, regardless of whether members of the Class even completed and returned the applications requesting the cards; (ii) the face value (\$100) of all cards actually distributed to the Class, regardless of whether they were used in whole, in part or not at all; and (iii) the actual amount of usage of the cards by members of the Class.

6. This Court disagrees with the Department’s first and second positions. The Court concludes the Department is not entitled to a set-off based on: (i) the aggregate face value of all cards made available (“tendered”) to the Class, regardless of whether Class members even completed and returned the applications requesting the cards; or (ii) the face value (\$100) of all cards actually distributed to the Class, regardless of whether they were used in whole, in part or not at all.

7. The Department may seek a set-off at trial based solely on the actual amount of usage of such cards (i.e., based on the goods actually purchased with such cards). The jury will be free to accept or reject the Department’s set-off defense in whole or in part.

8. In reaching this decision, the Court relies upon and adopts *in hac verba* the pertinent portions of Judge J. Leonard Fleet Jr.’s well-reasoned order dated November 3, 2004 entered in the related case styled *In Re: Citrus Canker Litigation*, Broward Circuit Court, Case No. 00-18394 (08) CACE, as well as the order entered on March 8, 2006 in the same action by Judge Ronald J. Rothschild denying the Department’s motion to reconsider and vacate the prior order granting partial summary judgment for setoff based on Shade Florida Cards in light of *Patchen v. Dept. of Agriculture*.

Accordingly, it is ORDERED AND ADJUDGED that the Class' motion for partial summary judgment as to that portion of the Department's first affirmative defense asserting a right of set-off based on the Shade Florida Cards is GRANTED in part. The Department is not entitled to a set-off based on: (i) the aggregate face value of all cards made available ("tendered") to the Class, regardless of whether Class members completed and returned the applications requesting the cards; or (ii) the face value (\$100) of all cards actually distributed to the Class, regardless of whether they were used in whole, in part or not at all. In all other respects, the Class' motion is DENIED.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida this ____ day
of May, 2006.

Conformed Copy

MAY 23 2006

**Pedro P. Echarte, Jr.
Circuit Court Judge**

Honorable Pedro Echarte, Jr.
Circuit Court Judge

Copies to:
Robert C. Gilbert, Esq.
Joseph H. Serota, Esq.
Wesley R. Parsons, Esq.
Jerold I. Budney, Esq.

F:\Clients\Citrus\Dade (transfer)\Pleadings\O-MSJ Set-Off.wpd