11-26-2008

# Panike & Sons Farms, Inc. v. Smith Respondent's Reply Brief Dckt. 35062

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## III. STATEMENT OF THE CASE

### A. Nature of the Case

Appellant Panike & Sons Farms, Inc. (Panike) is an Oregon corporation owned by the Panike family which raises, among other crops, onions. Respondent Four Rivers Packing Co. (Four Rivers) is an Idaho corporation organized for the purpose of purchasing onions from area growers, packing and contracting to resell those onions nationwide. This action involves a written pre-season contract (Contract herein) entered into by Panike Farms and Four Rivers in early 2006 whereby Panike agreed to sell Four Rivers 25,000 hundred weight (cwt) of 75% three inch minimum field run onions. The Contract sets ***minimum*** size and quality standards which the onions must comply with. The Contract clearly states that Four Rivers will specify the fields from which the onions were to be delivered by Panike. This contract provision is recognized and utilized in the onion industry. Four Rivers has used the same pre-season contract since its formation in 1999. The use of the field designation clause enables Four Rivers to obtain onions that best meet the needs of the business entities which it sells packed onions to.

On November 22, 2006, Panike filed suit against Four Rivers in its corporate capacity and against Randy Smith, Four Rivers General Manager (Smith herein) and against Janine Smith, a co-owner and Four Rivers office manager, in their individual capacities in the District Court of the Third Judicial in and for Washington County, Idaho, seeking entry of a declaratory injunction as well as the declaration of the Court regarding to the validity of the Contract signed by the parties

earlier that year. On November 7, 2006, Four Rivers sued Panike for breach of contract in the District Court of the Third Judicial District in and for Payette, County, Idaho. Subsequently the parties stipulated to transfer venue of the Payette County action to Washington County where the cases were consolidated for trial. Although originally scheduled for a jury trial, the parties stipulated to waive trial before a jury and tried the case to the Court on October 29, 2007. Before trial commenced, Panike advised the Court that it did not intend to pursue a claim against Janine Smith or Smith in their individual capacities. Following a one day court trial, the Court directed counsel to submit post trial briefs. After receipt of same, the Court issued findings of fact, conclusions of law and an order in which it found that the Contract did allow Four Rivers to specify fields and that by failing to deliver onions from the fields specified by Four Rivers, Panike had breached the Contract thereby damaging Four Rivers.

### B. Course of Proceeding Below

Judgment was entered on January 28, 2008, in favor of Four Rivers in the amount of $311,250.00, with attorney fees in the amount of $16,680.00 and costs in the amount of $1,194.79, for a total Judgment of $329,124.79. Appellant filed a Notice of Appeal on March 7, 2008, and an Amended Notice of Appeal on March 19, 2008. Appellant's attorney David L. Cook was admitted to practice *pro hac vice* before this Court on August 8, 2008.

### C. Statement of Facts

In January 2006, Smith contacted Greg Panike, who owns 48% of the shares of Panike Farms and who is in charge of its day to day operations (Tr. p. 71, L. 11 - p. 72, L. 6). Smith

wanted to purchase onions grown by Panike in 2005 which were then in storage. Panike agreed to sell 2005 onions to Four Rivers on the condition that it would enter into a pre-season contract for the sale of 25,000 cwt field run onions to Four Rivers for the 2006 for the price of $4.75 cwt and 25,000 cwt field run onions from its 2007 crop for a price of $4.50 cwt. (Tr. p. 148, L. 15 - p. 149, L. 1; R. 140). A pre-season contract is one which is entered into between a grower and an onion packer or processor prior to the planting of the onions which will, at harvest, be delivered to fill the terms of the Contract. Smith agreed to execute a contract with Panike's for the purchase of onions from its 2006 and 2007 onion crop. (Tr. p. 148, L. 15 - p. 149, L. 1). The Contract required Panike to deliver 25,000 cwt 75% three inch minimum field run onions to Four Rivers from fields specified by Four Rivers for the price of $4.75 cwt. A "three inch minimum" onion is just that, an onion with a ***minimum*** diameter of three inches. Field run onions are those which are delivered from the grower's field, are of all sizes and quality, and have not been presorted by the grower as to size or quality.

At their January 2006 meeting, Smith reviewed Four Rivers standard pre-season contract form with Greg Panike. (Tr. p. 179, L. 19-23). In addition to the printed provisions on the Contract are portions of the Contract to be completed by the parties at the time of contracting. Appellant correctly states that the Contract allowed for handwritten additions but incorrectly identifies those terms to be added. Smith reviewed the terms of the Contract with Greg Panike who testified that he read the Contract before signing it. Because he disagreed with Paragraph 6 of the Contract, Mr. Panike told Smith that he wanted it deleted. It was lined through at Mr. Panike's request. (Exhibit A to Four Rivers Complaint, R. 140). The Contract was signed by

Smith for Four Rivers and by Mr. Panike for Panike Farms. Mr. Panike, who has a college degree in agricultural science, testified at trial that he read the Contract prepared by Four Rivers and that he believed it to be a binding agreement. (Tr. p. 28, L. 8-18; Tr. p. 72, L. 12-24). Paragraph 1. of the Contract signed by the parties states: "Buyer will specify field(s). The onions described above must meet 75% three inch ***minimum*** requirements. If the onions do not meet the ***minimum*** specifications they will be subject to a one cent per CWT deduction . . . . ." The contract not does specify that 25,000 cwt medium, jumbo, super jumbo, colossal or super colossal onions be delivered by Panike. It specifies only that the onions delivered be "75% three inch minimums". After the Contract was signed there was no further contact between the parties regarding the terms of the pre-season contract until August 2006. Periodically thereafter, Smith looked at Panike's onion fields to assess the quality of onions growing in Panike's fields. (Tr. p. 149, L. 23 - p. 151, L. 25).

In mid-August 2006, Greg Panike contacted Randy Smith who owns adjoining farm land in Malheur County, Oregon, for the purpose of telling him that water leaking from Smith's ditch was running onto Panike's field. During the course of that conversation, Smith told Mr. Panike that he would be designating the fields from which Panike was to deliver the 25,000 cwt onions. Panike told Smith that he would not deliver onions from those fields as he felt they were a different variety and larger than those specified in the Contract. (Tr. p. 50, L. 7 - p. 52, L. 7). The Contract did not specify a specific variety of onion to be delivered nor did it specify a specific size of onion to be delivered. The only Contract provision having to do with size is that which specifies the ***minimum*** size which must be delivered. The following week, Smith wrote a

letter to Panike in which he again made reference to the fields from which the 25,000 cwt onions were to be delivered. (Defendant's Trial Exhibit E). Another letter was written to Panike the following week to which was attached a map specifically designating the fields Panike was to deliver the 25,000 cwt onions from. (Defendant's Trial Exhibit F). Greg Panike testified that the onions grown in fields specified by Four Rivers were to be put in Panike's personal onion storage. (Tr. p. 51, L. 22-25).

In its Statement of The Facts, Appellant states on page 3: "Moreover, the fields that Four Rivers specified contained better quality and larger onions (more colossal and super colossal onions), while Four Rivers had only contracted for jumbo onions that met the minimum quality requirements as specified in the contract." This assertion has no foundation in the record. The pre-season Contract signed by Panike contains only minimum quality requirements and makes no distinction between onions of minimum quality and those of "better quality". Further, Four Rivers did not contract for jumbo onions only. There was no discussion between the parties regarding the size of the onions Panike was to deliver to meet its contractual obligation and the Contract is devoid of any reference to "jumbo" onions. Onions grown in any given field may run in size from medium to super colossal. Onion packers do not contract for onions of a given size, hence the Contract term specifying minimum sizes only.

Greg Panike was familiar with the onion industry practice of designation of fields and had been familiar with that practice for at least ten years. (Tr. p. 76, L. 9 - p. 77, L 3). Mr. Panike declined to deliver the onions from fields specified by Four Rivers because he believed he could earn more selling the onions on the open market than by complying with the terms of his

Contract. At a later date, Panike was offered $24.00 cwt for the onions which were to have been delivered to Four Rivers. (Tr. p. 79, L. 1 - p. 80, L. 25).

On October 3, 2006, Panike delivered two truck loads of onions to Four Rivers packing shed in Weiser, Idaho. When Mr. Panike arrived he met Janine Smith, part owner and wife of Smith. When Mrs. Smith asked Mr. Panike if these onions were from the specified fields, he stated that they were not. (Tr. p. 217, L. 14 - p. 218, L. 4). As the onions were delivered from fields other than those which had been specified by Four Rivers, they were rejected. Panike then had these truck loads of onions inspected by the Idaho Department of Agriculture. It determined these specific onions were 89% three inch minimum or larger. Greg Panike represented that all of the onions which he intended to deliver to Four Rivers met this same standard, however, Panike presented evidence that only 8,369 pounds of the 2,500,000 pounds to be delivered were inspected. (Plaintiff's Trial Exhibit 3). Panike based its representation that the onions it intended to deliver to Four Rivers conformed to the Contract's minimum specifications based on an inspection of .33% of the total.

Randy Smith inspected Panike's onion fields throughout the growing season and based on his inspection of those onions and based on Four Rivers sales commitments, he specified specific fields to be delivered by Panike to fulfil its contractual obligation. He did so because the onions from the specified fields were better quality onions, better in size and would enable Four Rivers to better meet its obligations in the resale of onions to its buyers.

The selection or designation of fields is one which is well recognized within the onions industry. Mr. Smith testified that he has used onion contracts with a field specification clause for

25 years. (Tr. p. 180, L. 16-18). In addition to his duties as general manager of Four Rivers, Smith acts as its field man, the person who meets with growers to contract for the purchase of onions. As field man he contracts with area onion growers on a pre-season contract basis as well as on an open contract basis. Four Rivers purchased onions from Panike in 2002 on an open contract basis and again in January 2006. Written contracts were not negotiated in either of these instances. Four Rivers has used field designation clauses in its preseason contracts since 1999.

The purpose of waiting until later in the growing season to make the field designation is to enable the buyer to determine which onions will better meet its needs. By specifying fields later in the year, Four Rivers, like other area onion packers, is able to avoid the purchase of onions that are damaged by hail or rain or subject to bug infestations. This practice enables the buyer to obtain that quality of onion it needs to meet its contractual obligations. (Tr. p. 148, L. 1-14). A number of area onion growers and owners of onion packing companies testified. Appellant's own witness, Steve Walker who manages Appleton Produce, testified that his company does, on occasion, use field designation clauses. (Tr. p. 117, L. 20 - p.118, L. 7). George Rodriguez testified that his company, Partner's Produce, uses a contract with a field designation clause. (Tr. p. 195, L. 12-23). His company designates fields in July. (Tr. p. 196, L. 8-11). Floyd Johnson, vice president and manager of Lynn Josephson Produce testified that he has worked for that company for 33 years. (Tr. p. 203, L. 7-20). For 33 years Lynn Josephson Produce has entered into preseason contracts with onion growers, contracts which contain a clause which enables that company to designate or select fields from which the grower is to deliver the contracted onions. The designation of fields is made at harvest time. (Tr. p. 204, L. 6-

23). Dennis Ujiiye, a Fruitland, Idaho farmer since 1976, testified that he has never entered into a preseason contract because he does not want the buyer of his onions designating the fields from which he is to make delivery. (Tr. p. 211, L. 17 - p. 212, L. 7).

The price of onions rose dramatically during late 2006 and 2007. The price of onions on the date Panike breached the Contract was $18.00 per hundred weight. (Tr. p. 216, L. 21-24). The price continued to climb and Four Rivers paid $22.00 to $24.00 per hundred weight at the time it purchased onions to cover those which Panike failed to deliver. (Tr. p. 216, L. 12-22).

Onion packing sheds, such as Four Rivers, sell onions in fifty pound bags as well as in bulk, either in bins by truck or rail car.

## IV. ISSUES PRESENTED ON APPEAL

**A. The District Court Erred in Finding that Four Rivers Properly Rejected Onions Tendered by Panike from Non-Specified Fields**

**B. Four Rivers Use of a Field Selection Clause Was a Breach of its Duty To Deal In Good Faith**

**C. There Did Not Exist a Sufficient Meeting of the Minds Between Panike and Four Rivers to Form a Valid, Enforceable Contract**

**D. The District Court Erred in Calculating Damages**

**E. Panike is Entitled to an Award of Fees and Costs on Appeal**

## V. STANDARD OF REVIEW

This Court will set aside a trial court's findings of fact only if they are clearly erroneous. I.R.C.P. 52(a); *Neider v. Shaw,* 138 Idaho 503, 506, 65 P.3d 525, 528 (2003). In deciding whether findings of fact are clearly erroneous, this Court determines whether the findings are

supported by substantial, competent evidence. *Id.*, citing *In re Williamson v. City of McCall,* 135 Idaho 452, 454, 19 P.3d 766, 768 (2001). Evidence is substantial if a reasonable trier of fact would accept it and rely on it. *Id.* Findings based on substantial, competent evidence, although conflicting, will not be disturbed on appeal. *Id.*, citing *Bolger v. Lance,* 137 Idaho 792, 794, 53 P.3d 1211, 1213 (2002). A trial court's findings of fact in a court-tried case will be liberally construed on appeal in favor of the judgment entered, in view of the trial court's role as trier of fact. *Johnson v. Newport,* 131 Idaho 521, **523,** 960 P.2d 742, 744 (1998). Over questions of law, in contrast, this Court exercises free review. *Neider,* 138 Idaho at 506, 65 P.3d at 528. When review of a trial court's decision involves entwined questions of law and fact, we exercise free review over questions of law, and uphold factual findings supported by substantial and competent evidence. *Marshall v. Blair,* 130 Idaho 675, 679, 946 P.2d 975, 979 (1997).

## VI. ARGUMENT

### A. The District Court Did Not Err in Finding that Four Rivers Properly Rejected Onions Tendered by Panike from Non-Specified Fields

Panike's argument that the District Court erred in holding that Four Rivers properly rejected onions from non-specified fields is based on the allegation that Panike delivered onions conforming to the quality and size requirements of the Contract. Panike further alleges that the Uniform Commercial Code as adopted by the State of Idaho allows for rejection of goods only if they do not conform to the express quality or size requirements of the contract of sale. Panike cites Idaho Code 28-2-106(2) which states: "Goods or conduct including any part of a

performance are "conforming" or conform to the contract when they are in accordance with the obligations under the contract." One of Panike's obligations under the terms of the parties' Contract was to deliver from fields specified by Four Rivers. Panike goes on to allege that Four Rivers is prohibited from rejecting goods which it did not inspect but cites no authority to support that assertion.

Panike repeatedly asserts throughout its brief that it met the quality and size requirements of the Contract. Its repeated focus in on the phrase "75% three inch minimum onions". It does not, however, acknowledge that this language refers to the ***minimum*** size of onions to be delivered under the terms of the Contract. Likewise, the Contract speaks in terms of minimum quality requirements and deductions from the Contract price if those minimum requirements are not met. Panike would very much like to ignore the field designation clause of the Contract, however, the Contract must be viewed in its entirety. All contract clauses must be considered in ascertaining the parties respective rights and obligations.

Panike argues that allowing that clause permitting Four Rivers to specify fields will cause an "impossible" situation for growers by allowing buyers to arbitrarily reject conforming goods. Dennis Ujiiye, co-owner of Four Rivers, testified at trial that he had grown onions since 1976. (Tr. p, 209, L. 5-11).

When asked about field designation clauses, Mr. Ujiiye testified that he was aware of the practice of designating fields but that he has never signed a contract with a field designation clause because he did not want the buyer of his onions to specify the fields from which he had to tender delivery. (Tr. p. 211, L. 17 - p. 212, L. 7). Growers may easily avoid the "impossible

situation" suggested by Panike by not signing a contract with a designation clause, an option that was open to Greg Panike.

Panike refers to the District Judge's finding that the onions delivered by Panike to Four Rivers conformed to the terms of the Contract. Those onions were rejected by Four Rivers because they were not from specified fields. Panike's assertion that the onions delivered conformed with the terms of the Contract is based on the inspection of 8,369 pounds of onions, less that 4/10ths of one percent of the total volume of onions Panike contracted to deliver. No evidence was presented at trial regarding inspection of the remaining 25,000 cwt Panike intended to deliver.

Panike argues that the field designation clause must not trump those contractual provisions having to do with size and quality and that the Contract must be viewed as a whole. The District Court did not look merely at the minimum size and quality specifications of the Contract signed by the parties but instead looked at all provisions of the Contract. In other words, the District Court did look at the parties agreement as a whole. Panike now erroneously argues that the terms of the Contract having to do with size and quality terms supercede or take precedence over the field designation clause.

Appellant cites the testimony presented by George Rodriguez at trial for the proposition that the field selection or designation clause is limited to the terms of the Contract. Rodriguez testified that if he does not specify a variety, he does not specify fields. (Tr. p. 201, L. 16-18). Based on this testimony, Panike now argues that because Four Rivers did not specify a specific variety of onions to be grown by Panike it is prohibited from designating fields. This argument

lacks factual or legal basis.

In addition to the testimony cited by Panike, Mr. Rodriguez testified that he always specifies the variety of onion to be delivered to his preseason onion contracts. (Tr. p. 195, L. 12-23). Hence, he always specifies fields. He did not testify that it is the practice in the onion trade to specify fields only if the preseason contract signed by the parties specifies the variety of onions to be delivered. The Contract signed by Panike and Four Rivers refers to field run onions and does not specify a variety. Accordingly, Four Rivers retained control of the variety and quality of the "field run" onions being delivered by use of the field designation clause. The preseason contract used by Mr. Rodriguez was not introduced into evidence at trial and the language of that contract cannot now be used to construe the meaning of the Contract breached by Panike.

Panike now suggests that if Four Rivers rejected Panike's onions because it needed larger and higher quality onions to meet its presold contracts, it should have contracted for a specific variety, size or higher quality onion. Panike's arguments regarding size of onion consistently ignore contractual language regarding minimum size. The Contract did not specify that "three inch onions" be delivered as it is not possible to specify a specific size unless they are presorted by the grower. Field run onions are not presorted prior to delivery to the buyer. The Contract speaks to minimum quality terms. The purpose of the designation clause is to enable Four Rivers to inspect fields during the growing season and to specify delivery from those fields that will meet its contractual needs. (Tr. p. 148, L. 1-14; p. 178, L. 13-16). If Panike did not want to sell onions which exceed the minimum standards set forth in the Contract to Four Rivers from specified fields, it had the option of requesting that the designation clause be deleted or of not

signing the Contract. Greg Panike was an experienced grower, aware of the practice of designating fields. He read and understood the Contract presented by Four Rivers. He knowingly and voluntarily signed the Contract.

Panike argues that Four Rivers improperly rejected onions conforming as to kind, quality, condition and amount, however, this assertion ignores all essential terms of the parties Contract. It ignores the contractual right of Four Rivers to specify fields. The assertion that allowing the District Court's decision to stand will have a devastating impact on Idaho onion growers and on the economic stability of the agriculture industry is not supported in the record. Panike's onions did not conform because they were not tendered from fields specified by Four Rivers. The onions had to conform with all essential elements of the parties' Contract. The assertion that Panike tendered onions conforming as to kind, quality, condition and amount is without foundation. 8,369 pounds of onions were delivered to and rejected by Four Rivers. They were subsequently inspected at Panike's request. These onions met the minimum size requirements of the Contract. However, this 8,369 pounds constitutes less than 4/10ths of one percent of the total volume of onions to be delivered. Panike presented no evidence at trial that the remaining onions it intended to deliver to Four Rivers met any of the specifications set forth in Paragraph 1. and 2. of the Contract.

Four Rivers was contractually entitled to specify those fields from which Panike was to deliver 25,000 cwt onions. Panike advances no argument which challenges the validity of the Contract phrase "Buyer shall specify field(s)". It is important to note that the field designation clause was not hidden among obscure language contained within the body of the Contract but was

the very first clause within the Contract. At trial, Panike elected to focus his challenge not on the validity of the designation clause but on the time of the designation. Panike attempted to establish that because the Contract didn't specify fields at the time of its making or because it didn't state when the Four Rivers would make the designation, Four Rivers had no right to specify fields. At trial, Plaintiff's counsel, on cross examination, attempted unsuccessfully to get Smith to admit that the Contract did not give Defendant the right to specify fields in August. (Tr. p. 172, L. 17 - p. 173, L. 13). As Smith testified, the Contract does not state when the specification or designation must take place. The provisions of Idaho Code § 28-2-311 (1) clarify this issue:

> An agreement for sale which is otherwise sufficiently definite . . . to be a contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties. Any such specification must be made in good faith and within limits set by commercial reasonableness. (Emphasis added).

The Contract signed by the parties was sufficiently definite and it left a particular of performance, the designation of fields, to be specified by the Defendant. In so doing, however, the Defendant had the obligation to act in good faith and within limits set by commercial reasonableness. Defendant complied with both obligations. The letters written to Greg Panike by Smith, (Defendant's Trial Exhibits E and F), demonstrate Four Rivers' good faith. Panike was not willing to discuss the specification clause of the Contract with Four Rivers at any time. When the topic was first raised by Smith in mid-August 2006, Greg Panike "refused" to deliver onions from the specified fields. By his absolute refusal to comply with the terms of the Contract, Panike acted in bad faith. He didn't inquire of Smith why those specific fields had been specified; further, he made no effort to resolve the impasse that had arisen between the parties.

Testimony from other area onion packers who themselves specify fields in mid-summer

or at harvest clearly indicates that an August specification of fields is commercially reasonable. The very terms of the Contract - "Buyer shall specify field(s)" - when viewed in light of the prevailing trade practice indicates that Smith's August specification of fields was reasonable.

In determining the meaning of the Contract, the Court must consider the provisions of Idaho Code § 28-1-303 (c) and (d) which state:

> A "usage of trade" is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage must be proved as facts. If it is established that such a usage is embodied in a trade code or similar record, the interpretation of the record is a question of law.
>
> A . . . usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement. A usage of trade applicable in the place in which part of the performance under the agreement is to occur may be so utilized as to that part of the performance.

Designation of onion fields is a method of dealing having such regularity of observance in the onion trade as to justify an expectation that it would be observed with respect to the transaction in question. Greg Panike testified he had been aware of the practice for five to ten years. Considering his knowledge of the practice within the onion trade and based on the terms of the parties' agreement, Panike had to have known and expected that Four Rivers would specify the fields from which it was to deliver onions. The trade usage of designating fields must be considered in giving particular meaning to the specific terms of the Contract. Any assertion that failure to specify fields at the time of contracting or failure to specify when designation would take place is without merit. The District Court addressed the trade practice of specification of fields by stating:

> Four Rivers established through the combined testimony of Steve Walker, George Rodriguez, Floyd Johnson, Dennis Ujiiye and Randy Smith that the designation of fields in mid to late summer is the normal practice in the industry. See § 28-2-311. As a result, they had the right to designate the fields from which their onions would come. When Panike attempted delivery of onions that did not come from fields 5 and/or 7, the onions did not conform to the terms of the contract and Four Rivers rightfully rejected the onions.

(T. p. 108). Panike does not dispute this finding. Idaho Code § 28-2-601, which speaks of the buyer's rights on the delivery of goods which do not conform to the contract, reads as follows:

> Subject to the provisions of this chapter on breach in instalment contracts (section 28-2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (sections 28-2-718 and 28-2-719), if the goods or the tender of delivery fail ***in any respect to conform to the contract***, the buyer may
>
> (a) reject the whole; or
> (b) accept the whole; or
> (c) accept any commercial unit or units and reject the rest.

(Emphasis added). Clearly, while Four Rivers had the right to accept non-conforming goods, onions from non-specified fields, it had an absolute right to reject onions which were "not in accordance with the obligations under the contract."

Smith inspected the Plaintiff's fields throughout the growing season and determined that certain of Plaintiff's onion fields would better meet Four Rivers contractual obligations. Smith specified these fields in his August 25, 2006 letter to Panike. Quality, not value, was the basis of Four Rivers designation of fields.

Citing § 28-2-601, the Idaho Supreme Court stated that "If the goods fail in any respect to conform to the contract, the buyer may reject them." *Keller v. Inland Metals All Weather Conditioning, Inc.*, 139 Idaho 233; 76 P.3d 977. In *Figueroa v. Kit-San Company*, 123 Idaho 149; 845 P.2d 567 (1992 Ida. App.) the Court cited § 28-2-601 when it said: "If the goods or the

tender of delivery in a contract for the sale of goods fail to conform to the contract, the buyer may reject or accept the whole, or may accept any commercial unit or units and reject the remainder."

*Hoff Cos. v. Danner*, 121 Idaho 39, 822 P.2d 558 (Ct. App. 1991) demonstrates the strict manner in which § 28-2-601 is to be interpreted and applied. In *Hoff*, the contract entered into between the parties required that the seller deliver not only goods but documents. The seller delivered goods and some but not all of the documents identified in the contract. The Court stated:

> The fact that a transaction was simple, or that the dispute concerned the failure to tender specified documents rather than a failure to deliver conforming goods, does not exempt a case from the UCC's provisions but rather, the Code specifically provides that where parties agree that tender requires the seller to deliver documents, the seller must tender all such documents in correct form and further, tender of delivery is a condition to the buyer's duty to accept goods and to his duty to pay for them.

Panike delivered several truck loads of onions which met only the minimum Contract size requirement of 75% three inch minimum. Panike totally disregards the clear and unambiguous contractual right of Four Rivers to specify fields. Panike's tender of onions from non-specified fields was as defective as would have been a tender of onions which did not meet any other Contract specification. The tender of non-conforming onions gave Four Rivers the absolute right to reject.

### B. Four Rivers Use of a Field Selection Clause Was Not a Breach of its Duty To Deal In Good Faith

The issue of breach of duty to deal in good faith was not raised before the District Court and should not be considered on appeal. In *Leader v. Reiner,* 143 Idaho 635, 151 P.3d 831 (2007), the Idaho Supreme Court stated:

> The longstanding rule of this Court is that we will not consider issues that are raised for the first time on appeal." *Murray v. Spalding*, 141 Idaho 99, 101, 106 P.3d 425, 427 (2005). We have made an exception for constitutional issues if their consideration is necessary for subsequent proceedings in the case. *Id.* That exception does not apply here. Therefore we will not consider this issue.

Idaho's appellate courts have stated: "This argument was not raised below, however, and we will not consider it on appeal for the first time." *Sanchez v. Arave*, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991), *In The Interest of: S.W. v. State of Idaho, Department of Health and Welfare,* 127 Idaho 513, 903 P.2d 102 (1995 Ida. App.).

Panike's argues that Four Rivers breached its duty to act in good faith and that an analysis of its action compels the conclusion that it acted in bad faith. Panike argues that Four Rivers actions constitute a blatant attempt to obtain larger and more valuable onions than it contracted for. This argument lacks merit as Panike is unable to point to any action taken by Four Rivers which is not supported by the terms of the parties' Contract. There is no evidence in the record to support the argument that Four Rivers was seeking to obtain more valuable onions. Smith's testimony clearly establishes that he was looking for onions of better quality, however, at the time he specified the fields from which Panike was to tender delivery, the value of those onions was unknown to either party. (Tr. p. 79, L. 6-9). At no time did Four Rivers take any action that was inconsistent with the terms of the Contract signed by the parties. From that moment in time when the parties signed the Contract, Four Rivers had the right to specify the fields from which Panike was to deliver 25,000 cwt field run onions. Panike now argues that Four Rivers acted in bad faith, "surprising" Panike by the exercise of the designation clause which is common within the trade, Panike understood and agreed to. There simply is no merit to this argument.

§ 28-2-103 (1) defines good faith as follows: "Good faith in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." Clearly, Four Rivers was honest in its dealings with Panike. Greg Panike and Smith both testified that they discussed the terms of the Contract before it was signed. In exercising its right to specify fields, Four Rivers observed "reasonable commercial standards of fair dealing in the trade."

Panike argues that Four Rivers attempted to modify the terms of the parties Contract by exercising the field designation clause. The assertion that Four Rivers attempted to modify the Contract was not raised before the District Court and should not be considered on appeal. This argument would have merit only if the express terms of the Contract provided for a specific variety of onions or onions of a specific size, e.g., 3 ½ to 4 ½ inches. The Contract speaks only in terms of minimum size. (Tr. p. 189, L. 8-9). Panike cites § 28-2-207 in support of its argument that Four Rivers exercise of the field specification clause was an attempt to modify which Panike rejected. § 28-2-207 provides:

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
>
> (a) the offer expressly limits acceptance to the terms of the offer;
>
> (b) they materially alter it; or
>
> (c) notification of objection to them has already been given or is given within a

reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this act.

§ 28-2-207 deals with circumstances in which an acceptance contains terms contradictory to those of the offer. *Southern Idaho Pipe & Steel Co. v. Cal-Cut Pipe & Supply, Inc.*, 98 Idaho 495, 567 P.2d 1246 (1977), cert. denied and appeal dismissed, 434 U.S. 1056, 98 S. Ct. 1225, 55 L. Ed. 2d 757 (1978). It is applicable as to a purported acceptance with terms which differ from the offer which is sometimes construed as a counter-offer. *Essex Crane Rental Corp. v. Weyher/Livsey Constructors, Inc.*, 713 F. Supp. 1350 (D. Idaho 1989), rev'd on other grounds, 940 F.2d 1253 (9th Cir. 1991). This statute is specifically applicable in those instances in which a contract is formed by conflicting documents. *Southern Idaho Pipe & Steel Co. v. Cal-Cut Pipe & Supply, Inc., supra.*

There is no evidence in the record supporting Panike's modification argument. Panike's acceptance does not contain terms contradictory to those of Four Rivers offer. The Contract was not formed by contradictory or conflicting documents or memoranda.

### C. There Existed a Meeting of the Minds Between Panike and Four Rivers Forming a Valid, Enforceable Contract

The question of whether there was a sufficient meeting of the minds to form an agreement is to be determined by the trier of fact. *Jensen v. Westberg*, 115 Idaho 1021, 772 P.2d 228 (1988 Ida. App.), *Rasmussen v. Martin*, 104 Idaho 401, 659 P.2d 155 (Ct.App.1983) Findings of fact

by a trial court will not be disturbed on appeal unless they are clearly erroneous. *I.R.C.P. 52(a).* Clear error, in turn, will not be deemed to exist if the findings are supported by substantial and competent, though conflicting, evidence. *Rasmussen v. Martin, supra.*

In *Griffith v. Clear Lakes Trout Co.*, 143 Idaho 733, 152 P.3d 604 (2007), the Supreme Court stated:

> The law does not favor, but leans against, the destruction of contracts because of uncertainty . . . ." *Id.* Mere disagreement between the parties as to the meaning of a term is not enough to invalidate a contract entirely; the applicable standard is reasonable certainty as to the material terms of a contract, not absolute certainty relative to every detail. *Id.* Under the Uniform Commercial Code, "a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy." I.C. § 28-2-204(3). Thus, "[i]n order to have an enforceable contract, the UCC does not require a document itemizing all the specific terms of the agreement. Rather, the UCC requires a determination whether the circumstances of the case, including the parties' conduct, are 'sufficient to show agreement.'

It is undisputed that Panike intended to contract with Four Rivers for the sale of onions but the District Court found, as a matter of fact, that Panike did contract with Four Rivers:

> On January 13, 2006, Panike and Four Rivers ***entered into a contract*** under which Panike agreed to deliver 25,000 hundred weight [cwt] of 75% three-inch minimum yellow onions to Four Rivers during the 2006-2007 season at 5.75 per hundred weight, and a like amount at a minimum of $4.50 per hundred weight in the 2007-2008 season. ***Prior to signing the contract, the parties reviewed the contract together and mutually agreed to delete paragraph 6.*** (Emphasis added)

(T. p. 106) Panike does not argue that these findings are clearly erroneous nor does it argue that these findings are not supported by substantial and competent evidence. Instead, Panike argues that Greg Panike did not understand the terms of the Contract that he signed. At trial, Mr. Panike testified that he read and understood the Contract. He later testified that he didn't remember

reading that clause regarding specification of fields. Smith testified, and the District Court found as a matter of fact, that he reviewed the Contract with Greg Panike. Though somewhat conflicting, the evidence presented establishes a meeting of the minds between the parties.

Panike's arguments are based solely on its assertion that Four Rivers failed to accept onions meeting specifications set forth in the Contract and in doing so continues to recognize that the size specifications set forth in the Contract are *minimum* size specifications. By exercise of the specification clause Four Rivers is able to obtain onions which exceeded the minimum size set forth in the Contract. Panike goes so far as to suggest that the Contract calls for delivery of three inch onions. Panike urges the Court to look at the Contract as a whole and yet refuses to acknowledge the purpose and meaning of the specification clause in light of the practice of specifying fields in the onion industry. In a contract calling for delivery of field run onions - onions which have not been sorted by the grower as to size - the specification clause allowed Four Rivers to inspect Panike's fields and to choose those fields from which onions were to be delivered.

### D. The District Court Did Not Err in Calculating Damages

#### I.

Panike refers to the testimony of Randy Smith and Janine Smith in support of its argument that the District Court erroneously calculated damages. While the District Court's Findings of Fact, Conclusions of Law and Order clearly indicate that Judge Drescher relied on the testimony of the Smiths, it is also evident that he calculated damages differently than did Mr. and Mrs. Smith.

When a buyer rightfully rejects goods, as did Four Rivers, it can either (1) cover and recover as damages the difference between the cost of cover and the contract price with any incidental or consequential damages, but less expenses saved in consequence of the seller's breach, or, (2) recover as damages the difference between the market price and the contract price, together with any incidental and consequential damages provided in this chapter (section 28-2-715), but less expenses saved in consequence of the seller's breach. These are alternative remedies intended to place the buyer in the same position. As stated in Comment 3 to the official text of Idaho Code § 28-2-712, "The buyer is always free to choose between cover and damages for non-delivery under the next section [Idaho Code § 28-2-713]." "The damage remedy provided by Section 2-713 ideally should yield the same recovery as the cover remedy of Section 2-712, because the cover price is simply another way of conclusively stating what the market price is." 2 WILLIAM D. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-713.3 (2002). *Keller v. Inland Metals All Weather Conditioning, Inc., supra.*

The testimony presented by Randy and Janine Smith at trial established that the market price of onions on the day of Panike's breach, $18.00 per hundred weight. Panike's assertion that the market price of *packed* onions was $18.00 per hundred weight on the date of breach is not supported by the record. To the contrary, Mrs. Smith testified that on October 3, 2006, the date of Panike's breach, the Market New price for a jumbo onion was $18.00 per hundred weight. (Tr. p. 216, L. 22 - 24). The net value *to Four Rivers* of $12.00 per hundred weight after subtraction of packing costs cannot be confused with the market price on that date.

A proper analysis of this issue must consider the fact that at trial Four Rivers presented

evidence of the cost to cover, i.e., the price it paid to purchase onions in substitution for those Panike was to have delivered. Accordingly, the District Court had the option of calculating damages either under § 28-2-712 or § 28-2-713. While the lower court refers to § 28-2-713 in its decision, it appears to have relied on the provisions of § 28-2-712 in the actual calculation of damages.

Four Rivers paid $22.00 per hundred weight for 10,000 hundred weight of replacement onions purchased from Dennis Ujiiye, at a cost of $220,000.00, and $24.00 per hundred weight for 15,000 hundred weight of onions purchased from Peterson Farms, at a cost of $360,000.00. The combined total paid to replace onions Panike was to have delivered was $580,000.00. (Tr. p. 215, L. 17-22). A proper calculation of damages requires that the contract price which would have been paid to Panike, $118,750, be subtracted from the cost of cover as well as any expenses which Four Rivers saved in consequence of Panike's breach. The District Court's calculation was quite simple:

| | |
|---|---|
| $580,000.00 | Cost of cover |
| - 118,750.00 | Contract price which would have been paid to Panike |
| - 150,000.00 | Packing expenses saved in consequence of Panike's breach ($6 x 25,000) |
| $311,250.00 | Total Damages recoverable |

While the calculation of damages under § 28-2-712 or § 28-2-713 should normally result in a similar figure, such does not hold true when the cost of cover exceeds that of the market price at the time of breach. The testimony at trial indicated that the price of onions rose significantly over the Contract price of $4.75. Greg Panike testified that he was offered $25.00 per hundred weight

for those onions that he was to have delivered to Four Rivers. Given the rising market value of onions during the fall of 2006, it is only reasonable that the amount of damages calculated based on the cost of cover exceed those based on the market price as of the date of the breach.

## II.

Panike suggests that damages awarded Four Rivers should be offset for amounts previously taken by Four Rivers. Panike goes so far as to argue: "At trial, Mr. Panike gave uncontroverted testimony that approximately $2,800.00 of Panike's money was still being held by Four Rivers." Mr. Panike testified that a check from Weiser Feed and Storage in the amount of $2,800.00 was made payable to Four Rivers and that he presented that check to his attorney, Lary Walker. He then testified "we presented it to Mr. Birch". (Tr. p. 68, L. 5-12). The evidence establishes only that Mr. Panike gave the check to his attorney. There is no evidence that it was thereafter tendered to Four Rivers or its attorney. Panike did not present evidence that Four Rivers negotiated any such check. There is no basis for the requested offset.

## III.

Panike claims it is entitled to damages in the amount of $2,100.00 for wrongful exercise of a lien filed by Four Rivers. The District Court did not find that Four Rivers wrongfully filed a lien.

The Contract signed by the parties specifically gave Four Rivers to file a lien in the event of Panike's breach. ( R. 140, Par. 9). Accordingly, the filing of the lien was not wrongful but

was a right contractually conferred on Four Rivers by the terms of the parties Contract. Greg Panike testified that with the exception of the language which allows Defendant to specify fields, the Contract is valid and binding. Panike contractually granted Defendant a lien on its crops and crop proceeds in the event of its breach and is now estopped from disputing the validity of that lien or claiming that the lien was wrongfully filed by Four Rivers.

Panike presented no trial testimony which supports an award of damages. Panike argues in its brief that as a result of Four Rivers lien, it was "charged 9% interest on the loan over 60 days, for a total damage of $2,100.00." (Appellant's Brief, p. 23) At trial, Greg Panike did not testify that he had a "loan" but instead testified that the lien "tied up ***somewhere around $140,000*** that I had to pay interest on because I could not turn that money in to my financial institution." (Emphasis added) When asked what interest rate he paid, Mr. Panike testified: "It's a variable rate. It's based on prime rate, and ***I think*** I pay a percent or percent and a half over what prime rate is. And ***I think approximately at that time*** it was about 9 percent, ***if I remember right.***" (Tr. p. 67, L. 6-16) No testimony was presented that Panike paid 9% interest for 60 days. Even had the District Court determined that the filing of the lien was wrongful, Panike failed to establish damages with sufficient certainty. To do so, Panike would have had to present evidence as to the exact amount of the loan, the exact number of days the lien caused Panike to pay interest on the loan and the exact interest rate charged Panike. In addition, Panike would have to have proven that it did in fact have the funds to pay on its loan.

### E. Four Rivers is Entitled to an Award of Fees and Costs on Appeal

As Four Rivers is the prevailing party in this commercial litigation, it was properly awarded its fees and costs pursuant to I. C. Section 12-120(3). The District Court did not err in finding Panike in breach, hence its award of attorney fees and costs was proper. Likewise, Four Rivers should be awarded attorney fees and costs on appeal.

## VII. CONCLUSION

For those reasons set forth above, Four Rivers respectfully asks the Court to affirm the District Court's order finding that Panike breached its preseason onion Contract with Four Rivers and upholding the award of damages and attorney fees awarded by the District Court. Four Rivers requests an award of attorney's fees and costs on appeal. Four Rivers further requests that Panike's request for an offset of damages and award of damages be denied.

Dated this 26th day of November, 2008.

Bruce H. Birch
Attorney for Defendant/Respondent

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on November 26, 2008, I caused a true and correct copy of the within and foregoing Respondent's Reply Brief to be served upon Lary Walker, Resident Counsel for Appellant on Appeal and on Of Counsel, David L. Cook, Esq., Counsel for Appellant on Appeal by mailing the same to P. O. Box 828, Weiser, Idaho 83672 by United States mail, first class postage prepaid.

Bruce H. Birch
Attorney for Defendant/Respondent