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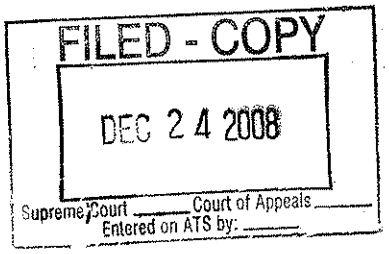
IN THE SUPREME COURT OF THE STATE OF IDAHO

PANIKE & SONS FARMS, INC., Appellant, - vs - FOUR RIVERS PACKING CO., An Idaho Corporation, Respondent.	**SUPREME COURT DOCKET NO. 35062** Case # CV-2006-567 Case # CV-2006-725

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Third Judicial District for Washington County
(Honorable Stephen W. Drescher, District Judge).



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PRELIMINARY STATEMENT

Appellant Panike & Sons Farms, Inc. ("Panike") respectfully submits this Reply Memorandum of Law in further support of its appeal of the District Court of the Third Judicial District of Washington County's January 28, 2008 Judgment in favor of Respondent, Four Rivers Packing Co. ("Four Rivers"). In response to Panike's appellate brief filed with this Court on October 10, 2008 ("Appellant's Brief"), Four Rivers filed a response brief on December 1, 2008 ("Respondent's Brief"). As an initial matter, Panike disputes a number of Four Rivers' assertions which misstate and misinterpret the record.

Four Rivers contracted to purchase from Panike 25,000 hundredweight (cwt) of field run unpacked onions that met a 75% three-inch minimum size threshold. Unknown to Panike at the time, the contract also included a "field selection clause" which stated that the buyer will specify fields. Contrary to Four Rivers' assertion, Panike testified that he did not negotiate, discuss or agree to the field selection clause when he signed the contract and did not discuss the clause with Smith. (Tr. p. 69, L. 17-20 ("Q. Did you at any time ever negotiate, discuss or agree with Mr. Smith as to a field designation in the year 2006? A. No."); Tr. p. 75, L. 7-10 ("[the clause] was not discussed with me prior to the designation of the fields")). Panike tendered onions that conformed to the contract's express size specifications. Four Rivers rejected Panike's tender of conforming onions based solely on the fact that the tendered onions did not originate from the specified fields. (Tr. p. 177, L. 9-18; Tr. p. 182, L. 22 – p. 183, L. 9).

Four Rivers has asserted that it was entitled to utilize the field selection clause to obtain onions of larger size than those contracted for. Throughout Respondent's Brief, Four Rivers states that the contract between Four Rivers and Panike was a contract for a "minimum" size of onion, apparently entitling Four Rivers to require onions of a larger size, if needed. In fact, Four Rivers declared that they were entitled to onions in substantial excess of the "minimum" size

expressed in the contract by exercise of the contract's field selection clause. Four Rivers' contract interpretation ignores the fact that a "minimum" standard was set (by Four Rivers) and, as a result, Four Rivers was obligated to accept onions that met the minimum size threshold expressed in the contract. Under Four Rivers' contract interpretation, contract language other than the field selection clause is superfluous because, no matter what size or quality of onion the express terms provide for, Four Rivers operates under the assumption that it has the authority to exercise the field selection clause in any manner to obtain any onion it may want. Quite simply, Four Rivers has boldly maintained that the field selection clause provides them with the right to demand, at any time, onions of any size, quality, variety, or condition, regardless of the contract's terms.

In Respondent's Brief, Four Rivers repeatedly attempts to justify its exercise of the field selection clause by claiming they needed Panike's onions to meet its own resale obligations with downstream buyers. (Respondent's Brief, p. 1, 6, 7; 12, 16; Tr. p. 51, L. 22-25; p. 157, L. 19-20; p. 177, L. 19 – p. 179, L. 6). Yet, if Four Rivers did in fact need "better" and "bigger" onions as they claimed, just like any other buyer, Four Rivers was free to bargain with Panike or other producers for the necessary onions. (Tr. p. 105, L. 17-24). As the drafter of the form contract, Four Rivers could have chosen to include more stringent size restrictions (i.e. 75% three and three-quarter-inch minimum onions). Instead, Four Rivers utilized the field selection clause to, at a later date, obtain a greater benefit under the contract than the parties initially bargained for. Had Four Rivers sought a higher quality product, the contract should have provided for such and paid Panike accordingly.

Even if the District Court was correct in its finding that Panike breached his contract with Four Rivers, which Panike does not concede, the District Court erroneously calculated the

damages that Four Rivers was entitled to, if any. The record clearly supports an understanding that the market price for unpacked onions of a comparable size and quality as the onions that Panike contracted to provide to Four Rivers was $12.00 per hundredweight. (R. 13; Tr. p. 171, L. 21-24; R. 144). Several months later, when the market price for packed three-inch minimum onions was much higher, in order to fill their resale contracts for larger onions, Four Rivers bought larger, already packed onions for $22.00 and $24.00 per hundredweight. (Tr. p. 216, L. 19-25; p. 160, L. 6-10; p. 166, L. 19 – p. 167, L. 21). Four Rivers' attempt to now claim that the District Court correctly calculated "cover" damages is unsupported by the District Court's findings of fact or law. Because the District Court failed to make the necessary findings of fact and law and erroneously calculated damages under Idaho Code Section 28-2-213, its decision should be reversed.

For the reasons set forth in our Appellate Brief and in this Reply Brief, we respectfully request that this Court reverse the order of the District Court in this matter.

STANDARD OF REVIEW

This Court freely reviews matters of law, including the District Court's interpretation of contracts. *Fisk v. Royal Caribbean Cruises*, 141 Idaho 290, 292, 108 P.3d 990, 992 (2005). The findings of the District Court on damages should be set aside when not based upon substantial and competent evidence. *Trilogy Network Sys., Inc. v. Johnson*, 144 Idaho 844, 846, 172 P.3d 1119, 1121 (2007).

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT PANIKE BREACHED THE CONTRACT

A. The Onions Tendered By Panike Met The Contract's Terms

Four Rivers concedes that "Panike agreed to sell Four Rivers 25,000 hundredweight of 75% three inch minimum field run onions. The Contract sets ***minimum*** size and quality standards which the onions must comply with." (Respondent's Brief, p. 1 (emphasis in original)). By definition, the term "minimum" (which is emphasized by Four Rivers throughout their brief) means that, at the least, Panike must tender 75% three inch minimum field run onions to meet the contract's specifications. Although Panike *may* exceed the minimum size requirements, Panike is not *required* to provide onions in excess of the minimum requirement.[1] (*See* Tr. p. 90, L. 11-14) (Q. Did [Smith] ever indicate that you had to furnish onions of a larger size than three-inch onions? A. No.). In fact, Panike did tender onions in excess of the minimum requirements – the District Court found that Panike tendered onions that were certified 89% three-inch minimum onions that "graded better than the onions called for under the contract." R. 107. (*See also*, R. 106; Tr. p. 60, L. 15-21; p. 132, L. 7-11). It is undisputed Panike was prepared to deliver all of the 25,000 hundredweight of onions to Four Rivers. (Tr. p. 57, L. 25 – p. 58, L. 7; p. 60, L. 1-21).

To support their argument that Panike failed to meet the contract's minimum specifications, Four Rivers continuously asserts that Panike only had 0.33% of the total 25,000 hundredweight of onions inspected. (Respondent's Brief, pp. 6, 11, 13). Four Rivers wrongfully

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[1] If Panike was *required* to provide onions in excess of the minimum size requirements, the "75% three-inch minimum" clause would be rendered meaningless. Because a "minimum" requirement provides the contract's "floor," although the seller *may* exceed the floor, the seller is not required to do so. *See Lickley v. Herbold*, 133 Idaho 209 (1999).

claims that the 8,369 pounds of onions that were inspected were the onions that were rejected by Four Rivers on October 3, 2006 and argues there is no evidence in the record that Panike intended to deliver the full 25,000 hundredweight shipment of onions to Four Rivers. *Id.* at 13. Four Rivers' allegations could not be further from the truth.

Without question, on October 3, 2006, Panike attempted to deliver to Four Rivers two loads of onions. (Tr. p. 57, L. 9-11). Without inspecting the onions, Janine Smith, part owner of Four Rivers, rejected the conforming onions. (Tr. p. 57, L. 9 – 24; p. 57, L. 19-24). Thereafter, Panike hired a federally-licensed state inspector employed by the Idaho Department of Agriculture to inspect, not only the shipment of onions that Panike attempted to deliver to Four Rivers, but the numerous other shipments that Panike was ready to deliver to Four Rivers but, instead, had to divert to Appleton Produce after his tender was rejected. (Tr. p. 54, L. 12-15; p. 59, L. 11-15; p. 60, L. 1-9; p.123, L. 4 – p. 125, L. 2; p. 132, L. 10 - 24).

The inspector testified that an inspection involves taking approximately "25-30-pound trays from all different parts of the truck so that [the inspection is] representative of what is on that truck." (Tr. p. 127, L. 15-22). Then, the trays are inspected and graded, under the supervision of a federally-licensed state inspector. (Tr. p.127, L. 3 – p. 129. L. 6). The inspector testified that she took samples from "all the trucks" that went to Appleton Produce over the course of four days – October 3, 4, 5 and 6. (Tr. p. 130, L. 6-8; p. 133, L. 15-20; p. 129, L. 21-23). The inspector certified that she inspected over 8,369 pounds of onions, which was the total weight of the representative samples taken from each of Panike's trucks delivered to Appleton Produce that were intended to fulfill Panike's contract with Four Rivers. (Tr. p. 129, L. 21-23). The total weight of all of the onions delivered to Appleton Produce (34,590 hundredweight)

exceeded the 25,000 hundredweight amount that Panike agreed to sell to Four Rivers. (Tr. p. 59, L. 22 – p. 60, L. 20).

The inspector found that the onions were 89% three-inch and larger U.S. Number 1 onions, 14% above the contract specifications. (Tr. p. 60, L. 13-22; p. 132, L. 10). The District Court agreed that the onions exceeded the contract's specifications. (R. 106-107). Four Rivers' assertion that only 0.33% of the onions were inspected is incorrect and misleading; the 89% certification applied to all of the onions Panike was prepared to deliver to Four Rivers.

Furthermore, Four Rivers' assertion that "[o]nion packers do not contract for onions of a given size, hence the Contract term specifying minimum sizes only" illustrates Respondent's erroneous interpretation of its own form contract. (Respondent's Brief, pp. 1, 5). Remarkably, Four Rivers argues that "Panike's arguments regarding size of onion consistently ignore contractual language regarding minimum size." (Respondent's Brief, p. 12). On its face, the contract's terms provide that Panike and Four Rivers contracted for a specific *size* of onion – onions that were, at a minimum, three-inches in diameter. (R. 104). Although Four Rivers also attempts to claim that the contract does not actually specify "three-inch onions" because it is a field run contract and thus not presorted by the grower, the express terms of the contract do, in fact, provide for 75% three-inch minimum sized onions. (See Respondent's Brief, p. 12). The testimony of several witnesses confirm that, under the terms of the contact at issue, Panike was required to tender 75% three-inch minimum onions or face a reduced payment under the contract's quality provisions, and Four Rivers was required to accept onions that met those minimum specifications. (Tr. p. 42, L. 23 – p. 43, L.2; Plaintiff's Trial Ex. 1 ¶¶ 1, 2, 3, 11; Tr. p. 104, L. 18-23).

As the drafter of the form contract, Four Rivers could have increased the minimum size of onion that it contracted for or omitted any reference to the size of onion required under the contract. Four Rivers did neither. Four Rivers' claim that the contract did not specify a size is false and contrary to the express terms of the contract. The District Court erroneously held that Panike breached the contract when it provided onions that exceeded the minimum size requirement as expressed in the contract and the District Court's decision should be reversed.

B. The District Court's Interpretation of the Field Selection Clause Renders the Express Terms of the Contract Meaningless

The District Court erroneously failed to interpret the field selection clause as being limited to the terms of the contract. Four Rivers argues that although Panike urged the Court to look at the contract as a whole, Panike refused to acknowledge the field specification clause. (Respondent's Brief, p. 22). Yet, Four Rivers claims that "[i]n 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 choose those fields from which onions were to be delivered." (*Id.*). Four Rivers conveniently ignores the express language of the contract relating to "75% three-inch minimum" field run onions, which directly contradicts their claim to this Court that "the Contract must be viewed in its entirety." (*Id.* at 10). Four Rivers simply cannot deny that the contract includes a size provision. (R. 104).

The manner in which Four Rivers exercised the field selection clause rendered futile the express contract provisions relating to size. And, although Four Rivers claimed that field selection clauses are utilized in the onion industry, Four Rivers was unable to provide any support for their argument that the field selection clause should take precedence over the other express provisions of the contract. In fact, testimony in the District Court demonstrated the opposite (*See* Tr. p. 198, L. 18 – p. 199, L. 20; p. 196, L. 14 –p. 197, L. 2). Quite simply, Four

Rivers cannot have it both ways. Interpreting the contract as a whole reveals that Panike was obligated to deliver three-inch minimum field run onions. Four Rivers' attempt to exercise the field selection clause, several months after the parties entered into the contract, which by its own admission would have resulted in obtaining Panike's "better quality" and "better in size" onions was in complete disregard for Panike's express obligations to provide 75% three-inch minimum onions and was a breach of the contract's express terms. The District Court erroneously interpreted the contract's express terms and incorrectly found Panike to be in breach of the contract.

C. The Fact that Four Rivers Needed Panike's "Better Quality" and "Better in Size" Onions To Meet Its Own Subsequent Sales Contract Is Irrelevant To The Interpretation Of The Contract's Express Terms and Demonstrates Bad Faith

During the District Court proceedings, Four Rivers argued that it rejected Panike's onions because it needed larger and higher quality onions to meet presold contracts with other buyers. (Tr. p. 155, L. 25 – p. 156, L. 6; p. 177, L, 19 – p. 179, L. 6). In its Response Brief, Four Rivers attempted to justify the field selection clause with the same rationale. (Respondent's Brief, p. 1) ("The use of the field selection clause enables Four Rivers to obtain onions that best meet the needs of the business entities which it sells packed onions to."). Moreover, Four Rivers explained that it exercised the field selection clause "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." (Respondent's Brief, p. 6). Panike was unaware of any reliance by Four Rivers on "better quality, better in size" onions for Four Rivers' own sales. (Tr. p. 90, L. 7-10) ("Q. Did [Smith] ever indicate that he had contracted – forward-contracted onions of a larger size then he was relying on from your contract? A. No.").

Beyond question, the fact that Four Rivers had resale contracts with subsequent onion buyers that required "better" and "bigger" onions is entirely irrelevant to the express duties bargained for between Panike and Four Rivers. If Four Rivers wanted "better" and "bigger" onions – *they could have bargained for it*. (*See* Tr. p. 90, L. 4-6) ("Q. Did [Smith] offer to pay you anything for the larger onions? A. No.). Instead, Four Rivers relied on their form contract that specified 75% three-inch minimum onions. It should not have to be explained that *if* Four Rivers needed better onions to meet its contracts, it could have negotiated a different contract with Panike or proposed a different form contract. (*See* Tr. p. 105, L. 14-24 (general manager of Appleton Produce states that if a packer wanted a certain percentage of larger onions, "you'd probably have to specify something in your contract that you would want to have...that size onion.")). *See also D.J. Carpenter v. C. P. Grogan*, 18 Cal. App. 505, 508 (2nd App. Div. 1912) ("If the defendant expected to insist upon a certain standard of size, ripeness, or other quality, to be possessed by the fruit at the time it was delivered, then that matter should have been expressed in the written agreement of sale; otherwise the vendor could not be bound by it."). The notion that the field selection clause allows any buyer to simply take a grower's "better" and "bigger" crop – regardless of the contract's express size and quality provisions – without compensating the grower for obtaining the "better" and "bigger" crop is not commercially reasonable and is not supported by the District Court's findings of fact or law.

II. FOUR RIVERS BREACHED ITS DUTY OF GOOD FAITH BY ATTEMPTING TO OBTAIN ONIONS OF A LARGER SIZE THAN THE CONTRACT PROVIDED FOR

A. Four Rivers Breached Its Duty of Good Faith and Commercial Reasonableness In Its Exercise of the Field Selection Clause

The District Court erred in holding that Four Rivers' exercise of the field selection clause was in good faith and within the limits of commercial reasonableness.[2] In reaching its decision, the District Court relied on Idaho Code § 28-2-311, which states that a contract which is otherwise sufficiently definite is not made invalid by the fact that particulars of performance are to be specified by one of the parties. (R. 108); I.C. § 28-2-311(1). However, the remainder of Idaho Code Section 28-2-311(1) requires that "any such specification must be made in good faith and within limits set by commercial reasonableness." I.C. § 28-2-311(1).

The Supreme Court of Idaho has held that the covenant of good faith is violated when "action by either party ... violates, nullifies or significantly impairs any benefit of the ... contract." *Metcalf v. Intermountain Gas Co.*, 116 Idaho 622, 627, 778 P.2d 744, 749 (1989). Here, Four Rivers failed to exercise good faith by attempting to use the field selection clause to obtain Panike's largest onions – onions of a size that exceeded the required and agreed-upon contract size – for a drastically reduced price, thereby significantly reducing Panike's benefit under the contract.

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[2] Four Rivers incorrectly alleges that the duty of good faith was not raised in the District Court proceedings and, as such, cannot be addressed by this Court. (Respondent's Brief, p. 17). Four Rivers raised the issue itself when it relied on Idaho Code Section 28-2-311 in its closing argument brief for the premise the particulars of performance did not have to be specified at the contract's formation. (R. 87) ("Any such specification must be made in good faith and within limits set by commercial reasonableness."). The District Court relied on this argument in reaching its decision. (R. 108). Panike also raised Four Rivers' duty of good faith in its post-trial brief. (R. 99). As such, the issue of Four Rivers' duty of good faith is properly before this Court.

In Respondent's Brief, Four Rivers claims "there is no evidence in the record to support the argument that Four Rivers was seeking to obtain more valuable onions" and that, although Randy Smith's own testimony states as much, "the value of those onions was unknown to either party." (Respondent's Brief, p. 18). This is patently false. By letter dated September 15, 2006 to Mr. Panike from Four Rivers' counsel, Four Rivers informed Panike that, should he fail to deliver onions from the requested fields, Four Rivers "is entitled to recover from [Panike] the difference between the contract price of $4.75 per cwt. and $12.00 to $15.00 per cwt., the market price for onions comparable in size and quality to those you agreed to deliver." (R. 144). Clearly, Four Rivers was aware, at the time Smith specified the fields, that they were seeking to obtain onions of a greater value then they contracted for. In addition, there were indications that the market price might significantly increase at the time of designation and Mr. Panike testified that "[the onions from the requested fields], in any marketing year, would be more valuable, regardless of the price, then before....The onions were just of a size and quality that would have brought more money regardless of the price, you know.... They were better onions." (Tr. p. 80, L. 20-21; Tr. p. 81, L. 5-11). For Four Rivers to now claim that they had no idea that the onions they selected were more valuable is disingenuous – certainly their actions subsequent to Panike's attempt to tender conforming onions indicated that it was important to Four Rivers that they obtain onions from the specified fields.

In defense of their alleged breach of good faith, Four Rivers argues that Panike could not have been surprised by the field selection because such a clause was common in the industry and Panike "understood and agreed to it." (Respondent's Brief, p. 18, 19). Both of these statements are unsupported by the record. Contrary to Four Rivers' claim, Mr. Panike did not knowingly agree to the field selection clause. In fact, Panike testified that he did not negotiate, discuss or

agree to the field selection clause, did not recall seeing the field selection clause when the parties entered into the contract, and did not discuss that clause with Smith. (Tr. p. 69, L. 17-20 ("Q. Did you at any time ever negotiate, discuss or agree with Mr. Smith as to a field designation in the year 2006? A. No."); Tr. p. 98, L. 17-18 ("I do not remember those specific words."); Tr. p. 75, L. 7-10 ("[the clause] was not discussed with me prior to the designation of the fields"). Moreover, Panike testified that *never* has *he* agreed to a contract with a field selection clause, including in his prior dealings with Four Rivers. (Tr. p. 33, L. 18-24 – p. 34, L. 2; p. 36, L. 20 – p. 37, L. 7-10.). And, although Panike was aware that some packers used field selection clauses, he testified that he believed any designation of fields was to take place when the contract was signed. (Tr. p. 86, L. 13-18; Tr. p. 74, L. 12-16).

Further, although Four Rivers claims the way it exercised the field selection clause was common in the industry, Four Rivers' own witnesses imply that onion packers cannot make a unilateral decision regarding the field selection. (Tr. p. 206, L. 19-22; p. 207, L. 20 – p. 208, L. 2). Further, Panike's testimony regarding his ongoing agreement with Appleton Produce indicates he did not anticipate selling onions from those fields to Four Rivers. (Tr. p. 82, L. 3-21; p. 51, L. 19-20; p. 157, L. 16-17).

Four Rivers' abuse of the field selection clause constitutes a violation of the duty to act with good faith and commercial reasonableness as required under Idaho Code Section 28-2-311(1). Four Rivers exercised the field selection clause in order to substantially increase its bargain and drastically reduce the benefit of the contract to Panike. Thus, the District Court erred in its holding that Four Rivers' exercise of the field selection clause was not a breach of its duty of good faith and commercial reasonableness.

B. There Was No Meeting Of The Minds At Contract Formation Because, Although Panike Contracted To Provide Onions of a Certain Size and Quality, Four Rivers Contracted For Onions of an Unknown Size and Quality That Would Meet Its Own Contracts With Subsequent Buyers

In defense of their exercise of the field selection clause, Four Rivers explains that "[b]y exercise of the specification clause Four Rivers is able to obtain onions which exceeded the minimum size set forth in the Contract." (Respondent's Brief, p. 22). Moreover, Four Rivers claims that, although Panike testified that he did not recall seeing the field selection clause, the District Court did not commit clear error in determining there was a sufficient meeting of the minds to form a contract. (*Id.*). Four Rivers fails to also recognize that Panike testified that he did not negotiate, discuss or agree to the field selection clause when he signed the contract and did not discuss the clause with Smith. (Tr. p. 69, L. 17-20; Tr. p. 75, L. 7-10).

Parties to a contract must have a "mutual understanding or meeting of the minds regarding essential contract terms in order for the contract to be binding." *Figueroa v. Kit-San Co.*, 123 Idaho 149, 156, 845 P.2d 567, 570 (Ct. App. 1992). Panike entered into the contract with Four Rivers with the sole understanding that he had agreed to provide 25,000 hundredweight of 75% three-inch minimum field run onions. (Tr. p. 44, L. 18 – p. 48, L. 7). Based on Four Rivers' own testimony, it was always their intention to utilize the field selection clause to obtain onions of any size and quality necessary to fulfill their own resale contracts. (Tr. p. 181, L. 5-15).

In no way did Panike intend to allow Four Rivers an unrestricted ability to choose from Panike's onion fields as it wished, just prior to Panike's harvest. Instead, Panike intended to contract with Four Rivers for 75% three-inch minimum field run onions. Because there was no meeting of the minds, no contract was formed and the District Court erred in its conclusion that Panike breached its contract with Four Rivers.

III. EVEN IF PANIKE DID BREACH THE CONTRACT, THE DISTRICT COURT ERRED IN CALCULATING DAMAGES

Even if this Court finds that Panike breached the contract because he did not provide onions from the fields requested by Four Rivers, the District Court's damages calculation was clearly erroneous and must be overturned.

A. The District Court Erroneously Allowed Four Rivers to Recover for the Cost of Packed Onions When Four Rivers Only Contracted with Panike for Unpacked Onions

The District Court erred in its calculation of damages by *adding* the cost of packing to the market price of packed onions when it should have *subtracted* the cost of packing to arrive at the market price for the unpacked, field run onions that the contract clearly provided for. (Plaintiff's Trial Ex. 1 ¶ 4). During the trial, Four Rivers conceded that it sought damages only reflecting the cost of unpacked onions. (Tr. p 26, L. 6-7; p. 216, L. 16 – p. 217, L. 5). By calculating damages to include the cost of packed onions, the District Court credited Four Rivers with a substantially greater benefit than the parties had bargained for in the contract, resulting in a windfall to Four Rivers. As such, the District court's damages calculation was erroneous and should be reversed.

1. Four Rivers Sought Damages For the Difference Between the Market Price and the Contract Price as Provided for in Idaho Code § 28-2-713

Four Rivers now claims that, although the District Court referred to damages under Idaho Code 28-2-713, the court actually calculated the damages under the "cover" provisions of Idaho Code 28-2-712. This assertion is not supported by the record, the District Court's findings or the testimony of Four Rivers' own witnesses.

Although Four Rivers correctly states that a buyer is free to choose between cover (as outlined in Idaho Code 28-2-712) and damages for non-delivery (as outlined in Idaho Code 28-2-713), Four Rivers fails to acknowledge that it made its choice clear in the District Court

proceedings – Four Rivers sought damages under Idaho Code 28-2-713. (R. 144; Tr. p. 171, L. 21-24).[3] The District Court recognized Four Rivers' choice to seek damages under Idaho Code 28-2-713, which provides for damages that are equal to "the difference between the market price at the time when the buyer learned of the breach and the contract price ...." by citing to and attempting to arrive at the appropriate calculation of damages under that section of the Idaho Code. I. C. § 28-2-713(1); (R.109).

Randy Smith, the manager of Four Rivers, conceded during his direct testimony that Four Rivers sought damages under Idaho Code 28-2-713 when he informed the District Court that Four Rivers sought damages based on the difference between the $12.00 per hundredweight market price on October 3, 2006 and the contract price. (Tr. p. 171, L. 21-24). Smith's testimony regarding damages directly equates with the damages calculation provided for in Idaho Code 28-2-713. Similarly, before Panike attempted to deliver onions to Four Rivers, Four Rivers informed him that, should he fail to deliver onions from the requested fields, Four Rivers was "entitled to recover from [Panike] the difference between the contract price of $4.75 per cwt. and $12.00 to $15.00 per cwt., the market price for onions comparable in size and quality to those you agreed to deliver." (R. 144). Finally, in filing the agricultural lien, Four Rivers stated it "replaced the onions... at a cost to Buyer of $12.00 per cwt." (R. 13).

Contrary to Four Rivers' assertion, there is no support in the record for their claim that the District Court correctly calculated damages under the "cover" provisions of Idaho Code 28-2-712. Instead, the District Court's record supports Panike's claim that, although attempting to

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[3] Presumably, Four Rivers sought damages under Idaho Code 28-2-713(1), and not Idaho Code 28-2-712, because Four Rivers recognized that it did not effect "cover" purchases within a reasonable time, as required by Idaho Code 28-2-712.

calculate damages under Idaho Code 28-2-713, the District Court's erred in its analysis of the market price of unpacked onions on the date of breach. Again, the District Court *added* the cost of packing to the market price of packed onions when it should have *subtracted* the cost of packing to arrive at the market price for the unpacked onions that the contract provided for.

2. If Four Rivers Is Able To Recover Any Damages, The Relevant Calculation Is The Difference Between the Market Price and the Contract Price of Unpacked Onions

Without question, the market price mentioned in Idaho Code 28-2-713(1) refers to goods "of the same kind." *Keller v. Inland Metals All Weather Conditioning, Inc.*, 139 Idaho 233, 239 (2003). Four Rivers does not dispute that the contract provides that the "the onions will be packed at Four Rivers Packing, Inc., Weiser, Idaho." (Plaintiff's Trial Ex. 1 ¶ 4). By calculating the market price of the contracted for onions to include the cost of packing, the District Court allowed Four Rivers to collect damages for more expensive goods than required under the contract. Such a calculation is clearly not supportable under Idaho law. *Keller*, 139 Idaho at 240 (finding that cover damages are not available for the purchase of "more expensive goods than the ones called for by the original contract").

3. Four Rivers' Conceded That The Market Price of Unpacked Onions For the Purposes of Any Damages Calculation Was $12.00 Per Hundredweight

Although Four Rivers claims that Panike's assertion that the market price of *packed* onions was $18.00 per hundredweight is not supported by the record, it was Four Rivers' own witnesses that explained that the market price of *unpacked* onions was $12.00 per hundredweight ($18.00 per hundredweight was the market price of *packed* onions, minus $6.00 per hundredweight for the cost of packing the onions, equals a market value of *unpacked onions* of $12.00 per hundredweight). Further, the District Court credited Janice Smith's testimony that

the market price of *packed* three-inch minimum yellow onions on the alleged date of breach, October 3, 2006, was $18 per hundredweight. (R. 109; Tr. p. 216, L. 16 – p. 217, L. 5).

Randy Smith conceded that any damages should be calculated using $12.00 as the market price of unpacked onions. (Tr. p. 171, L. 21-24) ("the amount that we're asking for was based off of the **onion market on October 2nd and 3rd, which would equate to about $12 per hundredweight**") (emphasis added). Notably, $12.00 per hundredweight was also the amount Four Rivers used as an estimate when filing their lien. (R. 13 ("Buyer replaced the onions which Grower failed to deliver at a **cost to Buyer of $12.00 per cwt.**"); Tr. p. 188, L. 1-6). Finally, Smith conceded to Panike, before the alleged breach, that Four Rivers would be entitled to recover "the difference between the contract price of $4.75 per cwt. and $12.00 to $15.00 per cwt., the market price for onions comparable in size and quality to those you agreed to deliver." (R. 144).

Four Rivers' claim, that the testimony by its own witnesses in the District Court proceeding referred only to the *net value* of onions to Four Rivers, is entirely disingenuous. Yet again, Four Rivers is attempting to obtain additional benefits under the contract that it did not bargain for. Four Rivers contracted for unpacked onions and, should this Court find Panike breached the contract, Four Rivers is only entitled to recover the difference between the market price of unpacked onions and the contract price. Unmistakably, by adding the cost of packing to the market price of packed onions when it should have *subtracted* the cost of packing to arrive at the market price for unpacked onions, the District Court erroneously provided Four Rivers with far more than it bargained for.

4. Four Rivers' Claim that the District Court Correctly Calculated Its Cost to Cover Under Idaho Code § 28-2-712 Is Erroneous and Unsupported by the District Court's Findings

If the District Court was actually attempting to calculate cover damages under Idaho Code 28-2-712, the District Court failed to make any findings of fact or law regarding the essential elements required to assert a claim for cover damages, namely a cover in "good faith... without unreasonable delay" and a "reasonable purchase ... of goods in substitution for those due from the seller." I.C. § 28-2-712(1). The record is devoid of any of the necessary facts upon which the District Court would have had to rely on to make a valid finding of cover damages.

To the contrary, the record reflects that Four Rivers could not have met the "cover" provisions of Idaho Code 28-2-712. For example, despite the fact that Idaho Code Section 28-2-712 requires that any purchase to cover be made "without unreasonable delay," Four Rivers entered into its alleged cover contracts over three and five months after the date that Four Rivers claims to be the date of breach. (*See* Defendant's Trial Ex. H, I). This delay alone would prevent Four Rivers from claiming damages for its cost to cover. It is undisputed that the cost to Four Rivers to acquire onions to "cover" the amount of onions that Panike attempted to tender increased with time. (*See* R. 13 ("Buyer replaced the onions which Grower failed to deliver at a cost to Buyer of $12.00 per cwt"); R. 44 (market price at time of breach (October 2006) was $12.00-$15.00 per cwt); Tr. p. 166, L. 13-16 – p. 167, L. 10-12 (cost to purchase onions from Ujiiye was $22 per cwt in January 2007 and from Peterson, $24 per cwt in December 2006-February 2007) (the trial exhibits detailing Four Rivers' purchase from Ujiiye and Peterson have apparently been omitted from the record).

Moreover, the record contains no evidence that the onions Four Rivers purchased for alleged cover were of the same size and quality as the onions that these were purchased to replace. Instead, Randy Smith admitted that the onions that Four Rivers later purchased for the

alleged "cover" were much larger than those called for by the original contract with Panike.[4] (Tr. p. 188, L. 7 – p. 189, L. 13; *see also* Defendant's Trial Ex. H, I).

If the District Court was correctly calculating cover damages, the market price at the time of breach would have been irrelevant. (*See* R. 109). Idaho Code 28-2-712 allows for damages of the difference between "the cost of the cover and the contract price." Thus, the District Court's inclusion of the market price at the time of the breach would have been entirely irrelevant. (*See* R. 109). What would have mattered if the District Court was correctly calculating damages was the price it paid for the replacement onions. Significantly, Four Rivers has declared that "**Buyer replaced the onions which Grower failed to deliver at a cost to Buyer of $12.00 per cwt.**" (R. 13) (emphasis added). Four Rivers' alleged "cover" that occurred via the purchase of onions from Ujiiye and Peterson, months after the date of alleged breach and of larger onions than the contract provided for, did not meet the provisions of Idaho Code 28-2-712. Four Rivers' assertion that such purchases were cover purchases is blatantly false – Four Rivers filed notice with the State of Idaho declaring that they replaced Panike's onions at a cost to Four Rivers of $12.00 per cwt. (R. 13).

For these reasons, Panike respectfully requests that this Court reverse the finding of the District Court as to the damages due to Four Rivers and, at most, award a maximum of $181,250.00 less the offsets discussed below.

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[4] The fact that Four Rivers claims they "covered" with larger onions is not surprising. If they had covered with the "75% three-inch minimum" size onions that Panike contracted to provide, it would beg the question why Four Rivers rejected Panike's onions in the first place.

B. Even If Panike Did Breach the Contract, Panike is Entitled to an Offset of Damages for Amounts Previously Taken by Four Rivers

Because Four Rivers has failed provide its signature on a $2,800.00 check to Panike from Weiser Feed and Storage (as payment for Panike's delivery of wheat), Panike should receive a credit for the check's amount. The check requires Four Rivers' signature because of the lien they filed against Panike. Panike testified that the check was provided to Four Rivers' counsel. (Tr. p. 68, L. 2-12). Although Four Rivers seeks "evidence that Four Rivers negotiated any such check," the only evidence available is Panike's testimony. (*Id.*) Notably, Four Rivers does not deny that Panike presented the check to Four Rivers' counsel. Four Rivers remains in possession of the check and has failed to provide the necessary signature to release the payment of $2,800.00 to Panike. As such, Panike should receive credit for $2,800.00.

C. Panike Is Entitled to Damages for Four Rivers' Wrongful Exercise of the Lien

Four Rivers exercised an agricultural lien against Panike before Panike was in alleged breach of his contract with Four Rivers. Thus, Panike is entitled to damages for the improper exercise of the lien. Even if this Court affirms the District Court's finding that Panike breached the contract, Panike is entitled to damages due to Four Rivers premature filing of the lien. (Plaintiff's Trial Ex. 1 ¶ 9; Tr. p. 159, L. 15-21). Panike established with sufficient certainty that over $140,000 in receivables were delayed because of this improper lien, forcing Panike to delay $140,000 in paying down an operating loan for 60 days. (Tr. p. 67, L. 4-16). Panike was charged 9% interest per annum on the loan over 60 days, for a total damage of $2,100.00. The District Court erred in not awarding Panike an offset in damages in the amount of $2,100.00.

IV. FOUR RIVERS IS NOT ENTITLED TO AN AWARD OF ATTORNEY'S FEES OR COSTS ON APPEAL

Under Idaho Code Section 12-120, the prevailing party in a dispute over a commercial transaction is entitled to attorney's fees. Here, Panike has established that the District Court erred in ruling that Panike breached his contract with Four Rivers. Four Rivers should not be awarded its attorney's fees and costs from the District Court proceeding and in no way should Four Rivers be awarded attorney's fees and costs on appeal. Instead, it is Panike who is entitled to the same as the prevailing party.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the Judgment of the District Court in its entirety.

Respectfully submitted the 23rd day of December, 2008.

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Resident Counsel for Appellant on Appeal
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Of Counsel:
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CERTIFICATE OF SERVICE

I DO HEREBY certify that on the 23rd day of December 2008, I caused to be served on the following a true and correct copy of the foregoing document by the method indicated below:

Bruce H. Birch
P.O. Box 157
Payette, ID 83661

☐ By U.S. Mail, postage prepaid
☐ By Overnight
☐ By Hand
☒ By Facsimile 642-9072

Delton Walker for:
Lary C. Walker