IN THE SUPREME COURT OF THE STATE OF OREGON

PEACE RIVER SEED CO-OPERATIVE, LTD., dba Peace River Seed Co-Op, Ltd., a Canadian corporation;
Plaintiff-Appellant, Respondent on Review,

v.

PROSEEDS MARKETING, INC., an Oregon corporation;
Defendant-Respondent, Petitioner on Review.

Marion County Circuit Court:
03C15778

CA: A144564

SC: S060957

AMENDED BRIEF ON THE MERITS OF RESPONDENT ON REVIEW

On Petition for Review of the decision of the Court of Appeals dated December 5, 2012, on appeal from a General Judgment and Money Award dated January 7, 2010, of the Circuit Court for Marion County, The Honorable L.E. Ashcroft, Judge

Before Ortega, P.J., Sercombe, J., Hadlock, J.

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Plaintiff ("Peace River") relies primarily on its briefs in the Court of Appeals and the decision of that court, and asks this court to consider those documents. Peace River responds to the brief Defendant ("Proseeds") filed in this court as follows.

I. SUPPLEMENTS AND CORRECTIONS TO PROSEEDS' STATEMENT OF FACTS.

We join Proseeds in accepting the Court of Appeals' statement of the material facts here. However, we supplement or correct Proseeds' statement of the facts before this court as follows.

1. Peace River is an agricultural cooperative. It purchases seed grown by its members, cleans and packages that seed, and resells it. The trial court correctly found that the Creeping Red Fescue seed in dispute here is a fungible commodity traded on a world market.

2. Proseeds is a sophisticated buyer of seed and, as of trial, it and related entities generally kept 25,000-30,000 acres under "production contracts" at a time. In part, Proseeds mixes the seed with other kinds of grass seed, adds fertilizer or other "value," repackages the seed, and resells it to others. (Tr 435-37, 444; Olson Depo, pp. 18, 20, 24-27, 29, 31-32.) In and around 1999-2000, Peace River entered into a number of individual "production contracts," for delivery of Creeping Red Fescue seed one and two years later, with Proseeds and three other large "production contract buyers." (Ex 3, Tr 286; Wilson Test, pp. 10-14, 39, 47, 52-53.) The industry refers to those contracts and parties as "production contracts" and "production buyers" because the contracts require the purchase off the entire "production" from certain number of acres planted with a specific seed crop. (Wilson Perp. Test., pp. 6-9.) Those contracts are the agricultural equivalent of contracts for the entire output of factories or oil fields, for example, and are the

reverse of "all requirements" contracts. *See Generally*, ORS 72.3060(1) (acknowledging the validity of output or requirements contracts made in good faith). Contracts for future delivery allowed Peace River to plan its purchase obligations in advance and allow the production buyers to protect themselves against future price increases.

3. Under its production contracts with Peace River, Proseeds agreed to buy the full production from specified numbers of acres of land (but not specific land) in specified time periods one and two years after the next planting season. Each of those contracts set a fixed price per pound (mostly 70-72 Cents Canadian). Those prices were below the then current market prices and "very favorable" to Proseeds. In that sense, those contracts were futures contracts that allowed Proseeds to "hedge" against future price increases. (Wong Test, pp. 4-6, 12, 83-84; Wilson Test, pp. 10-12 ;Tr. 192-94, 456-57; Ex 401.)

4. Proseeds asserts that one of Peace River's former employees subjectively thought that Proseeds was obligated to deliver seed actually grown on some specific farms he had in mind, but Proseeds had no knowledge of, and expressed his inadmissible legal conclusion (over my unresolved objection) that the Proseeds' production contracts required that. (Def.'s Sup. Ct. Brief, p. 4.) That former employee's subjective intent and inadmissible legal opinion is immaterial here. The trial court properly rejected Proseeds' largely factual argument that the contracts obligated Peace River to deliver the seed grown on specific fields. Apparently rejecting the testimony Proseeds cites, and accepting Peace River's contrary evidence, the trial court held that Creeping Red Fescue seed was a fungible commodity[1] and Peace River could satisfy its obligations under its contracts by shipping seed from any source. In particular, the trial court held that

[1] ORS 71.2010(2)(r)(A) defines "fungible" goods as "goods . . . of which any unit is, by nature or usage of trade, the equivalent of any other like unit." (App 1.)

Peace River could ship any qualifying seed from its warehouses or buy seed on the market and have it shipped directly from the seller to Proseeds. (Tr 242-43, 266-68, 740; 2/5/09 Op, p. 5, ER 25.) Proseeds eventually conceded that finding. (Tr 628.) ("I certainly have no quarrel with regard to the Court's finding that this – the seed that had to be produced pursuant to these contracts didn't have to come from these specific farmers and I accept that.") Proseeds did not appeal that finding, and it is not in dispute here. Accordingly, this court should reject Proseeds' effort to reopen that now resolved factual issue at this stage of the proceedings.

5. When the time came for Proseeds to accept delivery, the global market was glutted with over production, and the price had dropped dramatically. Accordingly, Proseeds could buy the seed it needed for its resales or other needs on the open market for prices substantially lower than the prices it agreed to pay Peace River in its contracts. In fact, the market essentially "dried up" and sales of any quantity were hard to come by for a number of years after Proseeds' default. (Wong Perp. Test., pp. 4-5; Wilson Test., pp. 53-55, 116, TR 409; Exs. 402, 403.)

6. Proseeds accepted a few truckloads of seed and entered into one "wash" transaction with Peace River, but otherwise repudiated all of its production contracts by 2002. Proseeds refused to take delivery of 1,151,646 pounds of seed. (2/5/09 Opinion, p. 3; ER 23.) Peace River has been trying to collect the amount due for that seed for eleven years.

7. Peace River's other production contract buyers largely joined Proseeds in declining to take delivery of the seed they had agreed to purchase. In accordance with the customs in the industry, the other production buyers entered into "wash" or "wash around" transactions in which they left their seed with Peace River and paid damages measured by the difference between the contract and the market prices. Those defaults left Peace River to try to dispose of millions of pounds of fungible Creeping Red Fescue seed when the market collapsed and

demand essentially disappeared. (Tr 409, Wilson Test, pp. 53-55, 156-57; Exs 267, 331.) Proseeds' assertion here that Peace River did not prove that it was a "lost volume seller" (that it had inventory in its warehouses, or the ability to purchase more seed on the market if necessary, and could have made both the sales to Proseeds and sales to other buyers) is simply false. (Def.'s Sup. Ct. Brief, p. 21). In fact, Proseeds' assertion defies common sense.[2]

8. Peace River initially demanded payment from Proseeds based on the difference between the contract prices and market price at the time of breach. Proseeds refused to pay. In accordance with the NORAMSEED Rules, Peace River demanded arbitration. An arbitrator awarded Peace River the full "market price" damages it sought. (Wilson Test, pp. 86, Ex 342.) Peace River filed this action to enforce that "market price" award. The Court of Appeals reversed the trial court's judgment doing so, held that the arbitration was not binding, and remanded Peace River's claims for trial. *Peace River Seed Co-Op, Ltd. v. Proseeds Marketing, Inc.*, 204 Or App 523, 132 P3d 31 (2006).

9. After the arbitration award and during the resulting litigation, Peace River stored the seed all four of its production contract buyers failed to take. The market remained weak, but Peace River was able to sell some of its large inventory of fungible Creeping Red Fescue Seed over the next four years or so before the seed expired and became a liability. Peace River did not identify any of those sales as relating to Proseeds' breached contracts in any way. They were just sales shipped out of the warehouses in the ordinary course of business. (Wilson Test, pp. 155-58; Tr 227-30.)

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[2] We particularly note that, if Peace River needed some seed make any sale, all it had to do was enter into a purchase contract with some seller near the buyer and have the seller ship the seed directly to Peace River's buyer.

10. Proseeds' repeated assertion that Peace River resold "the same seed" it was obligated to sell to Proseeds before default is incorrect and misleading. The best Proseeds can do is "trace" some seed from certain growers' deliveries to Peace River's seed cleaning facilities (the growers are ones Peace River unilaterally associated with Proseeds' contracts for its internal purposes, but were unknown to Proseeds) to storage in certain "bins" in elevators; through the transfer of seed out of the elevators to be cleaned and bagged, through the transfer of bags to specific locations in a variety of warehouses; and the shipping of some bags of seed from those locations in connection with later sales not identified as relating to Proseeds. Again, the trial court found that the seed was fungible and Peace River could satisfy its obligations to Proseeds from any source, and Proseeds did not appeal that finding. We emphasize that holding because Proseeds' incorrect assertion that it was obligated to accept only seed grown on some specific land it knew nothing about has been the primary cause of this decade of litigation and is the primary incorrect premise behind Proseeds' "windfall" and "fully compensated" arguments here. Proseeds continues to refuse to acknowledge that it lost on that issue at trial.

11. After reversal of its arbitration award based on market prices, Peace River asserted a claim to recover damages based on the difference between the contract prices and the prices at which Peace River was able to sell seed (if at all) in the years after breach. However, after recognizing the complexity of doing so with no specific seed "identified" to Proseeds' contracts, the millions of pounds of seed from multiple sources Peace River held, and other complexities, Peace River amended its complaint to seek damages measured by the difference between the contract prices and market prices under ORS 72.7080(1). Although Proseeds implies that we did something wrong by amending our complaint, it has not appealed the trial court's decision allowing Peace River to do so, and that issue is not before this court. Proseeds similarly incorrectly implies that Peace River did

not disclose its intent to seek damages measured by the difference between the contract price and market price until shortly before trial. (Def.'s Sup. Ct. Brief, p, 16, citing Peace River's trial brief) We could say much more, but reminding Proseeds that we perpetuated our damage evidence with the expert testimony of Mr. Wong on September 12, 2008, nearly three months before trial, should suffice. (Wong Perp. Test.)

12. As is explained in more detail below, Proseeds asserted a "failure to mitigate" affirmative defense that has never made sense in the context of a claim under ORS 72,7080(1).

13. At trial, Proseeds chose not to oppose Peace Rivers' market price evidence with any contrary evidence. Instead, Proseeds made largely unintelligible arguments about "mitigation" and produced a chart its counsel created that purported to list a limited number of sales of Creeping Red Fescue seed Peace River made in the four years or so after Proseeds' breach. Proseeds' counsel based his chart on a number of "assumptions" unsupported by any expert testimony (most of which were wrong). In particular, Proseeds premised its chart on an assumption that the seed is not fungible and Peace River's rights were limited to seed traceable to certain fields. As discussed above, the trial court rejected that premise. Because of its reliance on that incorrect premise, Proseeds included only "grower lots" (not to be confused with the term "lots" defined in ORS 72.1050(5)) of seed, traceable to certain fields, for which Peace River currently had truck weight load records and a testing certificate showing that the individual "lot" met the quality requirements, when it "calculated" Peace River's damages. For obvious reasons, Peace River had trouble coming up with seven-year-old truck weight records and other documents. Accordingly, Proseeds argued, Peace River was not entitled to any damages on some parts of its claim.

14. In addition, Proseeds purported to "trace" bags of seed resold in the years after breach to seed delivered from the specific fields Peace River associated with Proseeds' contracts. Proseeds then claimed that it was entitled to credit for the gross sale price on those sales, despite the fact Peace River had already elected market price damages and had not identified any sale as relating to Proseeds in any way. Proseeds presented no evidence of, and ignored, how Peace River faired on other sales of seed, how much spoiled before it could be sold, or whether Peace River ended up with a profit or loss on its fungible Creeping Red Fescue seed as a whole. Proseeds claimed, however, that Peace River would get a "windfall" if Proseeds did not get a credit for the sales on its chart.

15. As the Court of Appeals explained, the trial court did not agree with the information supposedly summarized in that chart. The trial court ordered me to recalculate Peace River's damages fixing the numerous errors in Proseeds' "calculation," but giving Proseeds a credit for some unspecified "sales." I refused because there was not enough evidence in the record to do so. The trial judge was not happy. He expressly declined to take the time to examine the record and make its own factual findings, and decided that he "had no choice" but to accept Proseeds' summary chart. 253 Or App, at 708. (Peace River's Response to Defendant's Alternative Calculation of Damages, pp. 3-6; 2/5/09 Op, p. 6; 8/28/09 Op, pp. 2-3; ER 26, 35-36; Tr 695, 759-60.) He also made a number of other rulings that both parties admit are incorrect.

16. The trial judge resigned from the bench after suspension by the Bar for improprieties unrelated to this action. Overall, this case has given our friends in Canada substantial reason to doubt Oregon's and the United States' judicial systems.

II. **Summary of Arguments.**

1. The trial court improperly created and used a measure of damages contrary to the plain language of ORS 72.7080(1) and related statutes, unsupported by any significant authority, and contrary to the policies and goals of Uniform Commercial Code ("UCC") § 2-708 and the statutory scheme of which it is a part.

2. Proseeds' request that this court impose a limit on the measure of damages set out in ORS 72.7080(1) is, for all practical purposes, a request to ignore that statute and limit sellers' remedies to the optional remedies set out in ORS 72.2060 and 72.2090 (but without considering the conditions applicable to resort to those remedies) contrary to the clear language of ORS 72.7030, 72.7060, ORS 72.7080, and 72.7090. Courts do not have the power to rewrite statutes to implement a different balance of competing interests.

3. Proseeds' argument primarily relies upon a suggestion for revision Professors White and Summers made many years ago, but Proseeds ignores the limits on that suggestion and burden of proof Professors White and Summers consider to be an essential part of their suggestion. Even if that suggestion had been codified as part of ORS Chapter 72, the exception would not apply here because Proseeds is indisputably a "lost volume seller" who could have made both the sales to Proseeds and the later sales to other buyers.

4. In any event, Proseeds cannot identify any sales of seed after breach that were "direct substitutes for" its breached contracts because Peace River only made sporadic sales of a fungible commodity out of its large inventory, over a period of years, without identifying any sale as relating to Proseeds' breached contracts. In other words, Proseeds' "tracing" theory fails because Peace River could deliver seed from any source to meet its contractual obligations, and Proseeds has no legal relationship to the seed grown on specific.

5. The Court of Appeals correctly determined that the phrase "charges for collection" in the parties' contracts is, under the particular circumstances of this

case, ambiguous. If the unopposed evidence Peace River introduced does not do so, ORS 43.260 requires that ambiguity to be resolved in Peace River's favor.

III. This Court Must Affirm the Decision of the Court of Appeals Enforcing the Plain Language of ORS 72.7080(1).

A. Proseeds Does Not Accurately State the Question Presented.

Proseeds' argument, and the ultimate question the court must answer, has changed several times over the long history of this case. Proseeds pleaded a defense called "failure to mitigate damages" that, frankly, makes no sense in the context of a claim for damages measured by the difference between the contract price and the market price at the time of breach under ORS 72.7080(1).

> Plaintiff claims that they (sic) sold any seed that was subject to contracts with Defendant all at the same time when the market price was at its lowest ebb. Plaintiff refused to sell the contracted seed to Defendant when the Parties disagreed on contract prices, quality of the seed and contract quantities of the seed. After Plaintiff then (sic) refused to sell the contract seed to Defendant, Plaintiff failed to act reasonably diligent (sic) to get the seed sold at market prices, rather (sic) "washed" the seed, using Defendant's term, at below market prices or in some instances made no reasonable effort to sell the seed at all.

(Sec. Amend. Answer, pp. 2-3, ¶ 3; ER 5-6.) As far as we could tell, that defense criticized Peace River for not finding buyers for the seed and for relying on the "market price differential" measure of damages in ORS 72.7080(1). Somehow, without amending its pleading or clearly stating its argument, that defense morphed into the opposite at and after trial. Proseeds began asserting that Peace River sold some fungible seed, at prices higher than the contract prices Proseeds refused to honor, in the four years or so after Proseeds' breach. Apparently in response, the trial court chose to adopt this measure of damages.

> 5. Compensatory damages: The lesser of:
>
> a. The difference between the actual sales price received by Plaintiff upon ultimate sale and the contract price with Defendant; or,
>
> b. The market loss as calculated by Plaintiff (i.e. the difference between the market price and the contract price on the total production, less the seed purchased and paid for by Defendant).

(2/5/09 Op, p. 6.) (ER 26.). Proseeds argued for that measure in the Court of Appeals. That measure does not track any of the statutory language, gives no guidance on which sales of the fungible commodity are to be considered "actual sales," imposes the burden of proof relating to whatever those sales are on Peace River, and does not include any of the limits Professors White and Summers suggest in the comments Proseeds relies upon.

In this court, however, Proseeds proposes an advocatively stated and significantly different measure of damages.

> Under the UCC, an aggrieved seller who resells goods that a buyer wrongfully rejected [Proseeds really means after a buyer repudiates a contract, not "rejected" the goods as that technical term is used in the UCC] may not recover more than the contract price and the resale price, plus the cost of resale [we think that Proseeds would also include the cost of holding the goods in that phrase as well] when that measure puts the seller in as good a position as if the other party had fully performed.

(Def.'s Sup. Ct. Brief, p. 3.) That proposed limitation on the statutory measure of damages is also contrary to the unambiguous language of ORS 72.7080(1) and inconsistent with related statutes. It is a measure Proseeds has not previously proposed. It is different from the measure of damages used by the trial court. It is a measure that does not deal with the critical burden of proving other sales, tracing, timing, and other critical issues here. It is also a measure that assumes facts not

shown by the record when it asserts that the trial court's award put Peace River "in as good a position as if [Proseeds] had fully performed." It is a measure that ignores the critical status of the seed here as a fungible commodity traded on markets, and Peace River's status as a "lost volume seller" who was not "put in as good a position as if [Proseeds] had performed." The "if" in that measure is bigger than the measure itself and is so vague that adopting such a rule would generate far more disputes than it would prevent.

The real question here is whether the trial court's measure of damages was appropriate. Alternatively, the question here is whether ORS 72.7080 must be enforced in accordance with its plain language or rewritten to include an exception the Legislative Assembly chose not to enact.

B. The Statutory Context Does Not Support, and Actually Rejects, Proseeds' Argument.

The analysis here must include an acknowledgement of the statutory scheme and its purposes. *E.g.*, *State v. Gains*, 346 Or 160, 170-72, 206 P3d 1042 (2009). The drafters of the Uniform Commercial Code created Article 2 to provide a clearer, and simpler, guide for buyers and sellers of goods than the common law.

> **71.1030 Construction to promote purposes and policies; applicability of supplemental principles of law.** (1) The Uniform Commercial Code must be liberally construed and applied to promote its underlying purposes and policies, which are:
>
> (a) To simplify, clarify and modernize the law governing commercial transactions;
>
> (b) To permit the continued expansion of commercial practices through custom, usage and agreement of the parties; and

(c) To make uniform the law among the various jurisdictions.[3]

To achieve those goals, the drafters had to balance competing interests and adopt provisions that, although not ideal for all parties, make appropriate compromises in the interest of promoting the overall goal of simplicity and practicality. Accordingly, Article 2 must viewed practically and those goals in mind.

Proseeds correctly points out that the drafters of the UCC and the Legislative Assembly intended the remedies provided by Article 2 to make aggrieved parties whole upon breach and protect the benefit of their bargains. ORS 71.3050.

Article 2 accomplishes its goal of protecting the benefit of aggrieved parties' bargains, in part, by allowing aggrieved sellers to choose from a limited set of remedies. ORS 73.7030. Official Comment 1 to that section clarifies that the drafters rejected any notion of election of remedies and all remedies are cumulative. Note that Article 2 gives options only to the aggrieved parties-no provision even suggests that breaching buyers can force a seller to choose the remedy best for the breaching buyer.

The UCC sets out three alternate measures of damages for a buyer's repudiation and failure to take delivery of goods. First, ORS 72.7060 provides that a "seller may resell the goods concerned" in a commercially reasonable private or public sale. ORS 72.7060(1), (2). If the seller complies with a number of requirements, including the requirement that "the resale must be reasonably identified as referring to the broken contract," the seller may recover damages measured by the difference between the contract price and the sale price, if lower, plus incidental damages.[4]

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[3] This court must reject Proseeds' assertion of different goals, implied from comments, to the extent they are contrary to the Legislative Assembly's official statement of its goals in ORS 71.1030.

[4] The aggrieved seller does not have to give the breaching buyer any profit if the seller is able to sell the goods for a price higher than the contract price. ORS

ORS 72.7060 does not directly apply here because (1) Peace River did not identify any post-breach sales of seed from its inventory as relating to any of Proseeds' breached contracts (2) the evidence otherwise does not support application of that measure; and (3) Proseeds did not assert that ORS 72.7060 constitutes a mandatory measure below (if an aggrieved seller engages in transactions involving the same fungible commodity after beach or otherwise). Proseeds does not argue that ORS 72.7060 directly applies here.

Second, ORS 72.090 allows a seller to recover the full purchase price and, in essence, hold the goods for the buyer to deal with if (1) the goods were "identified" to the breached contract, and (2) the seller was unable to resell the goods at a reasonable price within a reasonable time. Under that measure, a seller "may" re-sell all or some of the goods at a later time if circumstances allow. If the seller does sell, it must credit the breaching purchaser with the net sale price. ORS 72.7090(2). If a seller fails to meet the requirements of that statute, it "shall nonetheless be awarded damages for nonacceptance under ORS 72.7080." ORS 72.7090(3). That statute is not applicable here because Peace River did not "identify" any seed as the subject of Proseeds' contracts and did not seek to recover the full purchase price.[5] Proseeds does not argue that ORS 72.7090 directly applies here.

Third, the Code sets out a clear measure of damages for goods that have a market price.

72.7060(6). Although not directly applicable here, the policy expressed by that provision is directly contrary to the "breaching buyer gets any profit on resale" rule Proseeds proposes.

[5] ORS 72.5010(1) defines "identified" or "identification" as used in ORS 72.7090. Proseeds did not argue below that Peace River "identified" any seed or sales as related to Proseeds' contracts. On the contrary, Peace River elected to pursue its "market price" damages immediately after default and treated all the seed it had as its seed.

> **72.7080 Seller's damages for nonacceptance or repudiation.** (1) [T]he measure of damages for nonacceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in ORS 72.7100, but less expenses saved in consequence of the buyer's breach.

ORS 72.7080(1). That language generally carries forward the language of the prior Uniform Sales Act "in setting the current market price at that time and place for tender as the standard by which damages for non-acceptance are to be determined." UCC 2-708, comment 1. The market price measure set out in subsection (1) is "the standard measure of damages," particularly with "actions for the price" set out in UCC §2-709 limited to situations "where resale is impractical . . .." UCC §2-708, comment 2. Together with subsection (2), the market price measure of damages sets out what many commentators have called "the fundamental rules for the assessment of the seller's damages." T. Quinn, *Uniform Commercial Code Commentary and Law Digest,* p. 2-428 (1978, later supplemented without change).

To avoid uncertainty and expensive disputes, the drafters set out what is either a mandatory measure of damages, or a safe harbor measure sellers may use, for fungible goods sold on established markets like the seed in dispute here.[6] ORS 72.7080(1) treats the parties as though the seller had resold the goods at the "market price" on the date of breach. Since there is an established market price, there is no need to worry about how, when, or why the seller conducts any actual sales or identifies the sales as referring to the breached contracts, as ORS 72.7060 requires. Similarly, there is no reason to worry about whether the goods

[6] The question of whether UCC § 2-708 is mandatory when the goods are commodities sold on markets and have readily determinable market prices is not before this court. We do note, however, that 2-708 uses mandatory language ("The measure of damages for nonacceptance or repudiation by the buyer is . . ." rather than the non-mandatory "may" used in many other sections of Article 2.

themselves were "identified" to the contract as ORS 72.7090 requires. To the extent a seller has any obligation to "mitigate its damages" under those statutes, ORS 72.7080(1) eliminates that duty by treating the seller as if it had "mitigated" by immediately reselling.

In a nutshell, the difference between the contract and market price gives the seller the benefit of its bargain because (1) the seller gets to keep the goods (worth, and that it can sell at, the "market price"); and (2) the breaching buyer must pay the shortfall between the contract price and market price. That measure gives the seller the benefit of its bargain, but no more. By definition, it cannot give a seller a "windfall." On the breaching buyer's side, that measure requires the breaching buyer to pay exactly what it agreed, and distributes the market risk precisely in accordance with the parties' allocation of market risk in their contracts. That measure also eliminates a breaching buyer's exposure to potentially large consequential damages. In short, that measure of damages is more than fair and furthers the general goals behind the statutory scheme.

Proseeds fails to acknowledge the most important part of that measure of damages. The Court of Appeals did a good job of describing the basic purpose of the statute at 253 Or App, 716-17, quoting from or citing a number of authorities, but we attempt to explain in our words. Under UCC §2-708(1), if a seller elects to use the market price measure of damages, the law treats the contract as terminated or "canceled" as of the time of breach (for the purposes of this case, "tender" is the same as breach). As a result, the parties' ongoing obligations to each other end upon breach. The buyer does not need to take delivery, and is not responsible for risk of loss, storage costs, or other potential problems because ownership stays with the seller. The seller's decision to use §2-708(1) similarly frees the seller from any obligation to sell for the breaching buyer's benefit, otherwise "mitigate"

damages, or be at risk to the breaching buyer for casualty or other problems.[7] Because the law treats the contract as terminated without any transfer of ownership, the seller remains the owner of the goods. The seller may deal with the goods as it sees fit. The seller may sell the commodities immediately at the "market price" and take the cash. Alternatively, the seller may keep the goods for its own use; hold the commodities for later sale hoping that the price will go up, but taking the risk that the price will go down; or (as Peace River apparently did in part here) largely hold them until they lose all their value).[8]

In brief, ORS 72.7080(1) sets out a remedy that very practically separates the rights of a seller and a breaching buyer, and eliminates many potential disputes. That measure of damages is also consistent with the customs in the seed industry.[9]

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[7] As the Court of Appeals noted, the UCC rejects any idea that a seller must deal with goods as a breaching buyer's agent. 253 Or App, at 717 (quoting UCC 2-706, comm. 2).

[8] As one of the commentators Proseeds relies upon has explained:

> In some cases the seller resells the goods that he would have delivered to the buyer if the latter had not breached or repudiated, but without identifying these goods as the ones that apply to that broken contract, or without complying with some other requirement of Section 2-706 that the resale be conducted in a commercially reasonable manner. In these cases, it is not appropriate to use the difference between the resale and contract prices as the measure of the seller's loss, and the seller usually is relegated to the measure stated in Section 2-708. This protects the benefit of the bargain by awarding the seller damages measured by the difference between the market and contract prices. . . .
>
> . . . In rare cases, the seller may wish to keep the goods after they have been rejected or repudiated by the buyer. Section 2-708 permits him to do so, and this election does not amount to a rescission barring damages. Damages are computed in such a case by the difference between the contract and market prices, . .. (Footnotes omitted.)

Hawkland, *Uniform Commercial Code Series* § 2-708; pp. 2-426-427 (1998, supplemented 2002).

[9] Peace River presented unopposed testimony that the custom in the industry

It balances competing interests, is practical, makes perfect sense, and fits well with the statutory scheme.

C. The Courts May Not Rewrite the Statute.

As we all know, a court simply may not rewrite a statute, or add provisions the Legislative Assembly chose not to add, no matter how good an idea that might be. Courts must enforce the Legislative Assembly's apparent intent shown by unambiguous statutes and, where possible, construe statutes as consistent with each other. The courts may consider legislative history, but legislative history is of little value in challenging clear statutory language, especially in the context of a comprehensive statutory scheme. That is particularly the case where, as here, the legislative history specifically supports the unambiguous statutory language and the challenger can only cite to general statements of intent that are not inconsistent with the balancing of interests shown by the statutory language. ORS 174.020. *E.g., State v. Gains*, 346 Or, at 170-72. Proseeds refers to that methodology as "plaintiff's mechanical approach." (Def.'s Sup. Ct. Brief, p. 17.) That process may be "mechanical," but this court says it is the law. The drafters of the UCC and the Legislative Assembly chose to adopt and enact ORS 72.7080(1). That statute sets out an unequivocal, and highly practical, measure of damages that applies to the repudiation of contracts for the sale of fungible goods with a "market price." It does not conflict with any other statute, irreconcilably or otherwise. It is not

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allowed parties to similar contracts to enter into "wash" transactions under which the seller pretends that it ships the seed and gets the contract price, and the breaching buyer resells the seed to the seller at the current market price. In essence, they "wash" the obligation to ship both ways and the breaching buyer pays just the difference between the contract and market price, plus incidental damages. UCC §2-708(1) precisely matches that custom. Proseeds itself entered into a three-way "wash" transaction that gave Peace River the difference between its contract price and market price. Doing so acknowledges the custom Peace River's evidence established.

ambiguous. It does not give sellers any undue recovery. Proseeds simply disagrees with the balance between competing public policies the Legislative Assembly chose. Proseeds wants this court to rewrite that statute to say that, if an aggrieved seller engages in sales of the same commodity after breach, the seller must give the benefit of any "upside" it was able to produce (but apparently no "downside") to benefit the breaching buyer. This court simply does not have the constitutional power to rewrite the statue even if there was a good reason to do so. In short, Proseeds' arguments about public policy and fairness are ones to direct to the Legislative Assembly, not this court.

D. **The Statute is Not Inequitable.**

As it did below, Proseeds premises all or most of its argument on its assertion that ORS 72.080, if applied literally, would lead to sellers getting "windfalls." Proseeds interweaves that argument with assertions that application of the statute as written would be contrary to sellers' "duty to mitigate" their damages. As is discussed above and below, Proseeds is wrong on both counts.

Proseeds continues to ignore the fact that ORS 72.7080 applies only to the breach of contracts for the purchase of commodities-goods with a "market price." *See,* ORS 72.7240 (allowing the introduction of publications with information relating to an "established commodity market" to prove market price.) The ability to either buy or sell fungible goods at any time for a readily ascertainable price is critical to understanding that statute's effect. More specifically, the court must keep in mind that the seed in dispute was fungible, and both Proseeds and Peace River could have bought and sold an unlimited amount of seed on the open market at the relevant "market price" at any time.

As is discussed above, ORS 72.7080(1) ends the relationship between the breaching buyer and the seller, and fixes their rights as of the date of tender. If the

seller chooses to sell all of the contracted for commodity on that date, the statutory measure of damages works perfectly to give the seller the benefit of its bargain in cash. However, a seller may decide that, independent of the contract breach, that it wants to hold more of the commodity. To do that, it may sell the disputed commodity and repurchase the same kind of commodity, presumably at or near the same "market price." Alternatively, the seller may choose to avoid any administrative fees or commissions and just keep the commodity it already has. Either way, the result is the same. If the price goes down, only the seller suffers (just as it would if it purchased the commodity on that date at the market price) because that arbitrage loss does not affect the damages the breaching buyer must pay. The limitation of sellers' damages to the difference between the contract price and the market price on the date of breach or tender in ORS 72.7080(1) accomplishes that result.

On the other hand, any profit the seller earns by holding on to the commodity is the result of the seller's independent investment and acceptance of continued market risk. Fairness requires that the investing seller get the benefit of that investment, not the breaching buyer. That is particularly the case if the breaching buyer does not bear any of the downside market risk. ORS 72.7080(1) similarly accomplishes that result by requiring the breaching buyer to pay the difference between the contract and market prices on the date of breach or tender, without any deduction for the seller's independent profits.

Please keep in mind that the breaching buyer ultimately controls the allocation of future market risk. It always has the choice to honor its contract and purchase the commodity. If it does so, the buyer bears the future market risk and gets the benefit of any price increase. A breaching buyer presumably refuses to complete the purchase because it believes that the market price is too high and it does not want to bear future market risk. The breaching buyer prefers to put the

future market risk on the aggrieved seller. In essence, Proseeds argues for a rule that would allow breaching buyers to unilaterally shift that future market risk by breach, avoid any expense or downside market risk, but reap the benefits if the seller retains the commodities (by choice or lack of options) and manages to sell some of the commodities at a profit in the future. Of course, such a rule would violate several of the policies behind Article 2.

In short, ORS 72.7080(1) works fairly for all concerned and, even if it this court had the power to rewrite the statute, it has no reason to do so.

E. Enforcement of ORS 72.7080(1) is necessary to give Peace River the Benefit of its Bargain.

At the risk of repetition, we make three comments in response to Proseeds' assertions that enforcing ORS 72.7080(1) gives Peace River more that the benefit of its bargain or its legitimate "expectation interest." First, we note that the parties negotiated their contracts knowing that the UCC gives sellers the right to recover damages based upon the difference between contract and market price under ORS 72.7080(1) and its counterparts in other states (and Alberta). That is just one of the allocations of risks parties accept when they enter into contracts for the future sale of fungible commodities at fixed prices. Accordingly, recovering damages measured by ORS 72.7080(1) does not give Peace River anything, or impose any obligation on Proseeds, outside of their "reasonable expectations" at the time they entered into the contracts. *E.g., Trans World Metals, Inc. v. Southwire Co*, 769 F2d 907, 907-09 (2nd Cir. 1985) (discussed in detail at pages 31 -34 of Peace River's Opening Brief).

Second, as is discussed above, ORS 72.7080(1) requires a seller to retain ownership of the commodities and makes the seller responsible for the problems of dealing with them. Although we object to Proseeds' repeated use of the

inflammatory conclusion "windfall," we acknowledge that sometimes the market will go up and sellers who chose to hold the commodities will receive the benefit of the rising market. However, statistically, as often as not, the market will decline and a seller who chooses to hold will end up selling the commodity at a net price, after holding costs, less than the "market price" credit given to the breaching party under ORS 72.7080. The drafters of the UCC and the Legislative Assembly must have known that sellers would have to sell the commodities eventually (or discard them), and prices would vary up and down, because it is an inevitable consequence of the rule they chose. In short, the drafters of the UCC and the Legislative Assembly chose a simple measure of damages, based upon the price at the time of breach, that places both the risk of loss and potential for gains arising from holding the commodities on the aggrieved seller. That is a policy choice that the courts may not second-guess.

Third, Proseeds misstates the record in this case. As is discussed above, the trail court did not make factual findings on the alleged "resales." The record, even considered in Proseeds' favor, does not even come close to showing that Peace River received any "windfall." The best Proseeds can say is that Peace River was able to sell limited quantities, out of the millions of pounds of fungible seed Peace River had in its inventory, at gross sales prices higher than the prices in Proseeds' contracts over the four years or so after breach. That tells us nothing about how Peace River fared overall as to either Proseeds' breached contracts or all of Peace River's Creeping Red Fescue seed. Whether you consider Peace River's retention of seed for resale an intentional choice or an unfortunate circumstance forced on it, the result is the same. Peace River appears to have come out very badly overall. The rule Proseeds argues for would give Proseeds an undue benefit and make Peace River's overall economic loss on its seed contracts even worse. Accordingly, to the extent any equities are relevant here, it is Peace River who

needs its statutory rights enforced to avoid a big loss, not Proseeds who needs a reduction of its statutory liability.

F. Proseeds' Proposed Rule Ignores the Law Protecting "Lost Volume Sellers" and the Burden of Proof.

The law has long recognized that sellers need additional protection when buyers breach contracts for sales at or near the market price of a good. More specifically, the law has recognized that a measure of damages based on the difference between contract and market price will not fully compensate a "lost volume seller" (one who can supply more goods than it can sell and, if a buyer breaches, will lose one or more sales in its overall market). To give "lost volume sellers" the benefit of their bargains, both the common law and Article 2 allow aggrieved sellers to recover lost profits. Article 2 does so in §2-708(2), codified in Oregon in ORS 72.7080(2) ("If [the market price measure of damages] is inadequate to put the seller in as good a position as performance would have done then the damages is the profit (including reasonable overhead) which the seller would have made by full performance by the buyer . . ."). By definition, a trader in fungible commodities is a "lost volume seller" because it can purchase an unlimited quantity of the commodity on the market and, as a result, make any sale it find a buyer for. In addition, Peace River presented evidence that it had large quantities of seed in its warehouses after all four of its production buyers repudiated their contracts, and that the market's collapses left it with substantial seed it could not sell. As a result, there is no dispute about the fact that it was a "lost volume seller."

That label is not important here. However, Proseeds' attempt to redefine the rule it argues for as one that applies only "when that measure puts the seller in as good a position as if the other party had fully performed" makes the substance of

the "lost volume seller" rule material. In other words, by now arguing that Peace River obtained more than the benefit of its bargain, Proseeds raises that factual question. Because the undisputed evidence shows that Peace River was a "lost volume seller," and did not end up in the same position it would have had if Proseeds had not breached, the legal question posed here will not affect the outcome of this case and is not appropriate for decision here.

Peace River's status as a "lost volume seller" also deserves mention because Proseeds relied heavily at trial on a suggestion for revision of UCC 2-708 made by Professors White and Summers more than 30 years ago and not acted on by any legislature or the American Law Institute. Proseeds also relies on one old federal case that purports to recognize Professors White's and Summers' suggestion, although perhaps in dicta.[10] As the quotations in Peace River's opening brief show, both authorities emphasized that, if any legislature adopts the rule they advocate for, the rule should not apply to "lost volume sellers." They go on to explain that the breaching buyer should have the burden of pleading and proving that the case did not involve a "lost volume seller," and that the second sale was a true "substitute" for the breached contract sale. In particular, professors White and Summers, more recently joined by Professor Hillman, categorically recommend

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[10] Below, Proseeds asserted that *Coast Trading* Co. v. Cudahy Co., 952 F2d 1074 (1970), was the definitive statement of Oregon law. It now acknowledges that it is not, but continues to place substantial emphasis on that case. *Coast Trading* did not apply the current version of ORS 174.020 or this court's rules for statutory interpretation, was decided early in the history of the UCC, appears to involve substantially different facts (a non-lost volume seller), and is so poorly written that it is almost useless. It does cite Professors White's and Summers' suggestion that any recovery under ORS 72.7080(1) be limited by the amounts of any resale with favor, but its application of that suggestion to the facts there is unclear. In addition, that decision clearly acknowledges that the rule Professors White and Summers advocate for should not apply to "[lost] volume sellers," and the breaching buyer should bear the burden of pleading and proving the sale or truly "substitute" goods. All in all, *Coast Trading* is interesting, but provides no guidance in helping this court interpret ORS 72.7080 under its current rules for statutory construction.

against applying any limitation based on sales "from inventory" or of fungible commodities that can be purchased on a market. For the court's convenience, we repeat Professors White's, Summers', and Hillman's words in their latest treatise.

> [W]e would not cast the burden on the seller who sues under 2-708(1) to prove that 2-706 was less advantageous. Rather we would make it the buyer's burden to show that the seller had in fact resold, that this was not a lost volume case, and that 2-708(1) recovery would be greater than 2-706 recovery. Of course, this burden may be so heavy that every seller will have the option to use 2-706 or 2-708 because the buyer will be unable to prove the facts necessary to keep the seller out of 2-708.
>
> All of the foregoing discussion assumes that the buyer who wishes to limit the seller to the difference between the contract and the resale price can show that the goods resold were the goods contracted for. If the seller could have fulfilled the buyer's contract by its own purchase on the market or by a choice among a variety of fungible goods in inventory, the buyer will be unable to limit the seller to 2-706 damages. The buyer will not be able to prove that any resale is "reasonably identified as referring to the broken contract." Put another way, the difference between the contract and a specific resale price is not the proper measure of the seller's expectation damages unless that resale is a substitute for the one actually conducted.

J. White, R. Summers, R. Hillman, *Uniform Commercial Code*, § 8-7, pp. 364-65 (6th Ed., 2010) (Proseeds' Appendix, p. 13).

Proseeds argues for the benefits of the suggested rule, but ignores its limits and burden of proof. If this court were to rewrite the statute as Professors White, Summers, and Hillman suggest, Proseeds would still lose because it neither pleaded nor met its burden of proving that Peace River was not a lost volume seller. On the contrary, the evidence indisputably established that Peace River was

a trader in fungible commodities sold on world markets and, in any event, held more than enough fungible seed in inventory to be a lost volume seller.[11]

G. **Proseeds' "Mitigation" Arguments are Misplaced.**

As it did below, Proseeds confuses the issues by asserting that Peace River had a duty to "mitigate its damages." As we all know, the defense of "failure to mitigate," or more precisely the doctrine of "avoidable consequences," is a causation issue in Oregon. Damages caused only by a party's failure to exercise reasonable care after breach are not "caused" by the breach. In general, a plaintiff has the burden of showing damage or injury, and the defendant has the burden of showing that the plaintiff failed to exercise reasonable care to mitigate its loss. *Hansen v. Bussman*, 274 Or 757, 775, 549 P2d 1265 (1976).

We acknowledge that the common law of causation applies to claims for incidental and consequential damages. A similar requirement of good faith, and perhaps reasonable care, applies to public or private sales under the alternate

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[11] Proseeds tries to avoid the consequences of the burden of proof and recommended limitations of the rule it proposes, by arguing that Peace River did not use the phrase "lost volume seller" until after the factual part of the trial was complete. Even if correct, that assertion does not help Proseeds because Proseeds did not plead any defense, and made no intelligible argument, that directly made Peace River's status as a "lost volume seller" relevant until after trial. As is discussed above, it pleaded only the immaterial, and essentially opposite, "defense" that Peace River "failed to mitigate its damages" by reselling at below market prices or entering into "wash" transactions with Proseeds (meaning that Peace River exercised its right to recover market price damages and keep the seed). In addition, use of the short-hand label "lost volume seller" itself is of no consequence here. Peace River introduced evidence that it was, as a matter of fact, a lost volume seller without objection (it is a trader of fungible commodities on world markets, it had millions of pounds of seed in inventory after Proseeds and three other purchasers breached their purchase agreements, and it could buy any amount of seed it needed to make any resales). Proseeds cannot avoid the logical consequences of its current argument by asserting that we did not anticipate that argument, and use a particular shorthand term, before Proseeds could articulate its argument.

measures of damages set out in ORS 72.7060 and 72.7090. However, the concepts of causation and mitigation simply do not apply to ORS 72.7080(1).

As Proseeds admits, the provisions of the UCC supersede contrary common law rules. ORS 72.7080(1) provides a simple rule for the repudiation of contracts to buy commodities having established "market prices." That statute provides that an aggrieved seller may recover the difference between the contract price and market price (plus incidental damages and less any costs avoided) upon proof of only (1) the contract, (2) breach (repudiation and failure to accept delivery), (3) the contract price, and (4) the market price. A seller need not prove separate causation because the statute does not require anything more. In other words, the law provides that mere repudiation and refusal to take delivery is sufficient to collect market price damages.

The lack of a causation element or a duty to mitigate makes perfect sense. A seller relying on ORS 72.7080(1) has no ability to affect the amount of damages by either action or inaction. It cannot change the contract price, because that price is fixed, and it cannot affect the market price at the time of breach, because it is set by a market. Other courts agree that a seller like Peace River has no duty to "mitigate" by reselling, including two cited by Proseeds below. *Collins Entertainment Corp. v. Coats and Coats Rental Amusement*, 629 SE2d 635, 637-40 and n. 5 (S.C. 2006) ("[B]y definition, a lost volume seller cannot mitigate damages through resale. Resale does not reduce a lost volume seller's damages because the breach still resulted in its losing one sale and a corresponding profit," quoting *Storage Technology Corp. v. Trust Co.*, 842 F2d 54, 56 n. 2 (2nd Cir. 1988) and citing other authorities); *R.E. Davis Chemical Corporation v. Diasonsonics, Inc.*, 826 F2d. 678, 683 n. 7 (7th Cir. 1987) (same). Accordingly, Proseeds' premise that sellers relying on ORS 72.7080(1) have a duty to "mitigate"

their damages, by holding commodities and reselling for the breaching buyer's benefit when the price rises, is simply wrong under the circumstances here.[12]

H. This Court Should Remand With Instructions to Award Peace River an Additional $162,836 (Canadian), Plus Interest.

The normal remedy for a trial judge's use of the wrong measure of damages is a remand for a new trial on damages. However, the trial judge here made a specific finding accepting Peace River's damages under ORS 72.7080(1), but then incorrectly deducted $162,836 from that amount as an offset for what Proseeds claimed was the amount of Peace River's resales. Because a retrial would be very expensive, and evidence of transactions more than a decade old is hard to marshal, we request that this court remand with instructions to award Peace River the wrongfully deducted principle amount, plus prejudgment interest, instead of a new trial on damages.

IV. This Court Should Resolve the Attorney's Fees Issue in Peace River's Favor.

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[12] Please note that the legislative decision to allow sellers to recover market price damages without a duty to "mitigate" its damages under ORS 72.7080(1) is consistent with the common law in Oregon. The duty to mitigate damages does not apply if the defendant had an equal opportunity to do so. *E.g., Schafer v. Sunset packing Co.,* 256 Or 539, 543, 432 P2d 519 (1970) ("Where a defendant has an equal opportunity for performance of a contract, and equal knowledge of the consequences of nonperformance, such defendant cannot avoid damages by claiming that the injured party should have performed for him," quoting *Enco, Inc. v. F C. Russell Co.,* 240 Or 324, 340 (1957); *Parker v. Harris Pine Mills, Inc.*, 206 Or 187, 205, 291 P2d 709 (1955) (same). Proseeds had an equal opportunity to "mitigate" Peace River's damages by not breaching its contracts and reselling the seed itself, on the open market or privately, either with or without taking physical possession of it. (Wilson Test, pp. 81-82.) Had Proseeds done so, it would have paid Peace River the contract price and received the market price, and its loss would have been exactly the same as the measure of damages set out in ORS 72.7080. That opportunity for buyers to control the amount of damages always exists with respect to commodities traded on markets.

Proseeds acknowledges that the trial court did not properly resolve Peace River's claims based upon the provisions of the NORAMSEED Rules that require a breaching buyer to pay the seller's "charges for collection." (Def.'s Sup. Ct. Brief, p. 26.) Proseeds challenges only the portion of the Court of Appeals' decision holding that the phase "charges for collection" could include attorney's fees. This court should affirm the Court of Appeals' determination that the phrase is ambiguous, but resolve that ambiguity in Peace River's favor, for at least the following reasons.

A. Proseeds' Argument that the Ambiguous Phrase Must be Resolved in Its Favor, as a matter of law, has No Merit.

Proseeds argues that Oregon has a public policy against attorney's fees provisions and, as a result, ambiguous contract provisions are "presumed" not to allow awards of fees. Proseeds goes on to argue that, because Peace River's evidence of the parties' intent was weak, that issue must be resolved in its favor as a matter of law. This court must reject that argument for at least the following reasons.

1. Oregon Does Not have a Public Policy Against Agreements to Pay Attorney's Fees.

Proseeds argues that no reasonable finder of fact could interpret the phrase "charges for collection" to include attorneys' fees based on two assertions.[13] First, Proseeds asserts that Oregon has a public policy against agreements to pay attorney's fees and they are "disfavored in the law." That assertion is simply incorrect. Although Oregon follows the "American Rule" and requires an agreement or statute for an award of fees in most cases, no authority suggests that

[13] We do not believe that Proseeds preserved that issue before the trial court, and challenge it to show that it properly did so.

the public policy of Oregon discourages parties, particularly sophisticated business entities, from agreeing that the prevailing party in any litigation may recover its attorney's fees. On the contrary, Article 2 evidences a general policy of allowing parties to allocate risks as they see fit. *See,* ORS 72.3030 ("Where this chapter allocates a risk or burden as between parties 'unless otherwise agreed,' the agreement may not only shift the allocation but may also divide the risk or burden.") In addition, the Legislative Assembly has shown its support of parties' right to include attorney's fees provisions in contracts, and the court's ability to award fees when authorized by a statute, in enacting many mandatory and discretionary statutes. We particularly note that the Legislative Assembly has shown its support of parties' right to recover attorney's fees in a number of circumstances in ORS Chapter 20.

In addition, as is discussed above, ORS 71.1030 (1) (b) requires courts to liberally construe and apply the Uniform Commercial Code to promote its purposes and policies, including "[t]o permit the continued expansion of commercial practices through custom, usage and agreement of the parties." Creating a special rule making it harder for parties to agree to pay attorney's fees would fly in the face of that policy.

In short, no statute or rule of common law invalidates or discourages parties' right to allocate the risk of litigation between them and include attorney's fees provisions in contracts.[14] Proseeds has not articulated any practical or public

[14] Proseeds cited to *Gleason v. Thornton*, 210 Or 666, 674, 313 P2d 776 (1957) as authority for its alleged public policy against agreements to pay attorney's fees. That case does not help Proseeds because it deals only with the interpretation of a 1947 statute requiring counties to pay prosecutors' salaries in certain circumstances. Although *Gleason* confirms that the word "costs" has a statutory definition that does not include the salaries of special prosecutors, and the word "expense" by itself is not normally considered to include the salaries of attorneys, the court specifically noted that the phrase "costs, fees and other expense" could include attorney's compensation depending on the statutory context and purpose. The court also noted that "cases dealing with recovery of attorneys' fees from an adverse party are of course subject to considerations not involved here . . .." 210

policy reason for treating ambiguous agreements to pay attorney's fees any differently that ambiguous provisions on any other topic (not covered by a statute). Accordingly, this court should resolve contractual ambiguities relating to attorney's fees just the same as it resolves any other contractual ambiguities (or, at least, any in a contract for the sale of goods subject to ORS Chapter 72), and decline Proseeds' invitation to adopt some unspecified new rule hindering parties' ability to allocate responsibility for attorney's fees.

2. No Law Requires Attorney's Fee Provisions to be "Express" or Unambiguous.

Second, Proseeds cites *dicta* in a decision of this court, interpreting a statute, for the proposition that a contractual attorney's provision must be "express" to be enforceable.[15] Citing a twice overruled Michigan Court of Appeals decision on a statutory interpretation issue, Proseeds goes on to assert that "express" means "unambiguous."[16] To the extent Proseeds asserts that attorney's fees provisions

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Or, at 674. Accordingly, that decision does not support the public policy Proseeds argues for.

[15] Proseeds cites to *Cash Flow Investors, Inc. v. Union Oil Company of California,* 318 Or 88, 91, 862 P2d 501(1993) That case involved only a certified question as to the meaning of the words "remedial actions" as used in certain provisions of the Hazardous Waste and Hazardous Materials Act, ORS Chapter 465. Accordingly, it has little or no relevance here.

[16] Proseeds cites to *Kenner v. Watha*, 115 Mich. App. 521, 529-30, 323 NW2d 8 (1982), a decision interpreting a Michigan paternity statute, for the proposition that attorney's fees provisions in contracts must be unambiguous. That citation is inappropriate for several reasons. First, the decision in *Kenner* did not even involve a contact-it involved only the interpretation of a general phrase in the Michigan Paternity Act. Second, that decision created a two-to-two split between panels of that court, one group holding that a general phrase in the statute did allow awards of attorney's fees and the other group holding that the statutory language needed to specifically mention attorney's fees to allow an award. Two later decisions rejected the holding Proseeds relied upon and held that the general language of the statute did permit an award of attorney's fees. *Thompson v. Merritt,* 192 Mich. App., 412, 481 NWS2d 735(1991); *Bessmertna* v. Schwager, 191 Mich. App. 151, 157, 477 NW2d 126 (1991). In short, Proseeds' authority does not support its argument.

may not be simply implied, we agree. However, Proseeds is incorrect when asserts that attorney's fees agreements must be both written and unambiguous to be enforceable. The general Statute of Frauds, ORS 41.580, does not require agreements relating to attorney's fees to be in writing, and no other statute invalidates agreements to pay attorney's fees made orally or by conduct. On the contrary, the UCC specifically permits parties to agree to any terms involving the sale of goods orally in the absence of an integrated writing. ORS 72.2020 also allows terms to become part of the parties' contract through course of performance, course of dealing, or usage of trade.[17] Those statutes contain no exception for

[17] The UCC's parol evidence rule, ORS 72.2020, says that contracts for the sales of goods may be supplemented by oral agreements if there is no integrated writing and, in any event, by course of performance, course of dealing, or usage of trade as provided in ORS 71.3030. The definition of "Agreement" in ORS 71.2010(2)(c) confirms parties' ability to make agreements other than through signed writings.

ORS 71.3030(3) broadly defines a "usage of trade."

> **71.3030 Course of performance, course of dealing and usage of trade.**
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> (3) 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 the practice or method will be observed with respect to the transaction in question. The existence and scope of the usage must be proved as fact. If it is established that the usage is embodied in a trade code or similar record, the interpretation of the record is a question of law.
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> (4) A course of performance or course of dealing between the parties or usage of trade in the vocation or trade in which the parties 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. * * *

Peace River's evidence of the custom requiring breaching buyers to pay the seller's

attorney's fees provisions. Article 2 also allows attorney's fees provisions to become part of contracts for the sale of goods through the "battle of the forms" provision, ORS 72.2070. Although not in the record, we all know from experience that one or both of the "standard forms" merchants routinely exchange contain attorney's fees provisions.

Similarly, no authority that we have found requires that agreements to pay attorney's fees be unambiguous. In other words, no statute or principle of common law requires courts to treat ambiguities in agreements relating to attorney's fees any differently than ambiguities relating to any other subject.

3. The Agreement Here is Express.

Proseeds' argument is circular and misses the point. The parties' contracts expressly provide that the breaching buyer is obligated to pay the seller's "charges for collection." As the Court of Appeals explained, that term is ambiguous. If, when interpreted under the rules for interpretation of ambiguities, the term does not include attorney's fees, Peace River loses because the parties did not agree that Proseeds would have to pay fees. If, when properly interpreted, the phrase does include attorney's fees, the parties did "expressly" agree that Proseeds must pay Peace River's attorney's fees in the event Peace River had to sue to collect the amounts owed.

4. The Law Does Not Impose an Evidentiary Presumption Against Attorney's Fees Provisions.

Proseeds leaps from the general "American Rule" (a rule of substantive law), using its incorrect arguments about attorney's fees provisions needing to be in writing and clear, to conclude that the law of evidence imposes a "presumption"

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attorney's fees shows just such a usage of trade.

that a disputed contract provision was not intended to include attorney's fees. Because of that "presumption," Proseeds argues, Peace River has the burden of proving that the parties intended to include attorney's fees in the phrase "charges for collection." Although Proseeds confuses the issue with incorrect statements about evidentiary presumptions, that ultimate conclusion is correct.[18] As the proponent of the agreement, Peace River bears the burden presenting some evidence to move forward and bears the burden of persuasion. Peace River met those burdens in the ways discussed below.

5. Even if the claimed "Presumption" Exists, Peace River Met Its Burden of Proof.

As is discussed above and below, Peace River presented substantial evidence that the parties objectively intended the phrase "charges for collection" to include attorney's fees. Proseeds presented no contrary evidence. As a result, Peace River at least raised a question of fact as to that intent that must be resolved in the ordinary way.

B. This Court Should Resolve the Question of the Parties' Intent in Peace River's Favor.

1. The Standard of Review.

[18] Proseeds does not appear to understand that the only presumptions recognized in Oregon are those set out in OEC 311, ORS 40.135 (listing presumptions). That statute does not recognize any "presumption" relating to ambiguous contract provisions. Proseeds also does not appear to understand the effect of a presumption. A presumption only shifts the burden of proving the non-existence of the presumed fact to the other party, and does not affect the "preponderance of the evidence" standard, the rules for interpreting contracts, or any other relevant matter. OEC 308, ORS 40.125. Accordingly, Proseeds' "presumption" assertions add nothing to the analysis here.

Normally, questions of intent are for the finder of fact. However, ORS 71.3030(3) says this.

> (3) 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 the practice or method will be observed with respect to the transaction in question. The existence and scope of the usage must be proved as fact. If it is established that the usage is embodied in a trade code or similar record, the interpretation of the record is a question of law.

Because the NORAMSEED Rules are a trade code, it appears that the last two sentences of that statute require some court to resolve the meaning of the phrase "charges for collection" as a question of law based on the existing record. As the Court of Appeals noted, only Peace River presented evidence of the parties' objective intent. 253 Or App, at 725. The Court of Appeals remanded the question of the parties' intent to the trial court for determination on the existing record. *Id.* Because this case has gone on so long, and because we do not want a third appeal, we ask this court to make that decision, based on the evidence discussed below, without a remand.

2. The Court Should Interpret "Charges for Collection" Broadly to Include Attorney's Fees Under the Unusual Circumstances and On the Limited Record Here.

Proseeds incorrectly asserts that "there is no extrinsic evidence in the record that sheds light on the parties' intent." (Def.'s Sup. Ct. Brief, p. 32.) However, as the Court of Appeals noted, Peace River presented substantial evidence that the custom in the industry includes attorney's fees in the phrase "charges for collection" and allows for the recovery of fees in similar circumstances. 253 Or App, at 725. Proseeds attempts to avoid that evidence by mischaracterizing it as only evidence of subjective intent. However, it is evidence of a usage of trade. As

pointed out above, ORS 71.3030 provides that any "usage of trade" that Proseeds knew or should have known of supplements the terms of the contracts.[19] Because sellers' recovery of attorney's fees under the NORAMSEED Rules was customary when buyers breached, and Proseeds was a big player in the industry, Proseeds should have known of that usage of trade. Accordingly, that evidence was admissible and directly supports the conclusion that the phrase "charges for collection" includes attorney's fees. [20]

Peace River also presented evidence of the general custom, law, and expectation in Alberta, outside of the NORAMSEED Rules, that the prevailing party will recover attorney's fees in a collection action such as this one. Although not directly controlling here, the law of one of the party's jurisdiction is a fact relevant to determining the parties' objective intent.[21]

Equally importantly, Proseeds did not deny Peace River's assertions that it was entitled to recover attorneys' fees until well into this litigation, and then asserted its own right to recover fees, albeit in a way that preserved Proceeds' options. (Sec. Amend. Answer, p. 8; ER 7; Ex 237; Olson Depo, pp. 125-26.)

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[19] Note that Proseeds did not object to the admission of that testimony when it was presented on any grounds, and may not object to its admission now.

[20] Similarly, Article 9(1) of the United Nations Convention for the International Sale of Goods (App 7) binds parties to any usage or practice the parties knew or should have known of. That provision tracks and supports UCC 1-303 and ORS 71.3030 in general, and the use of Peace River's usage of trade evidence here.

[21] Peace River presented evidence of both the facts that the recovery of attorneys' fees was customary and that Peace River subjectively expected to recover fees in accordance with that custom. (Wilson Test, pp. 67-68, 71-72.) *See Generally, Rocky Six5 Ranch Ltd v. Toronto Dominion Bank*, 2002 ABQB 804 (holding that the word "disbursements" unequivocally included attorneys' fees). Although Oregon law only considers objective intent relevant, Article 8(1) of the United Nations Convention for the International Sale of Goods (App 6-7) permits consideration of subjective intent in interpreting contracts if one party "knew or could not have been unaware [of] what [the other party's] intent was." *Mc C-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.P.A.*, 144 F3d 1384, 1387 (11th Cir 1998). That provision is consistent with the first part of ORS 42.260 discussed below.

Particularly in view of Proseeds' inability to otherwise explain its conduct, doing so was an evidentiary admission that the contracts required (or at least permitted) the prevailing party to recover its attorney's fees. OEC 801, ORS 40.450.

As experienced lawyers, the members of this court can also take judicial notice of the custom in the United States for creditors to include attorney's fees provisions, allowing recovery in the event the creditor must sue to collect amounts due, in contracts. OEC 201, ORS 40.060 *et sec.*

On the other side of the equation, Proseeds chose not to present any evidence of a different intent. In particular, Proseeds had several months to think about Peace River's perpetuated testimony before trial, and had the opportunity to present evidence of a different usage of trade or custom in the industry through its witnesses. Proseeds apparently chose not to present any contrary evidence because it had none and agreed with the usage of trade. Alternatively, Proseeds may have chosen not to offer any contrary evidence as a strategy, perhaps thinking that it would prevail and be able to recover fees under the contracts. Under other circumstances, particularly if these were not international transactions covered by what is essentially a North American trade agreement involving both "American Rule" and "English Rule" countries, the decision here would be hard. However, because the evidence is totally one sided, and the practical reason for including attorney's fees in the seller's "charges for collection" is so clear, the question presented by that evidence is whether the court must find an objective intent in accordance with Peace River's unopposed evidence, not the opposite.[22] We urge this court to find that, on the limited evidence in this record, the parties objectively

[22] Technically, Proseeds argues only that Peace River's evidence was insufficient to "establish" the parties' intent. (Def.'s Sup. Ct. Brief, p. 32.) That, however, is not in issue here. The question before the court is whether, on the record here, this court should hold that no reasonable fact finder could agree with Peace River's unopposed evidence. The answer to that question is obvious.

intended that Peace River would be able to recover all of the expense it incurred in collecting the amount due from Proseeds, including attorney's fees.

C. If the Evidence Does Not Resolve the Interpretation Question, ORS 42.260 Does So.

Proseeds alternatively argues that, if the factual question of intent cannot be answered, a maxim of construction will control the outcome here. Proseeds seems to imply that this court should adopt a new maxim stating, using my words: "if an ambiguity involves attorney's fees, it must be resolved against finding an agreement to pay fees." Proseeds does not explain why this court should adopt a special rule for attorney's fees. Common sense tells us that there is no significant public policy reason to create a new common law rule for agreements to pay attorney's fees.

In any event, ORS 42.260 provides the answer to that argument and controls here. That statute applies to all ambiguities, with no exception for agreements about attorney's fees.

> **42.260. Ambiguous Terms.** When the terms of an agreement have been intended in a different sense by the parties, that sense is to prevail, against either party, in which the party supposed the other understood it. When different constructions of a provision are otherwise equally proper, that construction is to be taken which is most favorable to the party in whose favor the provision was made.

The first sentence of that statute applies here against Proseeds because the uncontroverted evidence showed that recovery of attorney's fees under the NORAMSEED Rules was customary if a buyer refused to pay. The "English Rule" applicable in Alberta also suggests that Peace River expected to be able to

recover fees under the relevant rules. As a result, Proseeds must have known that Peace River intended "charges of collection" to include fees. Note that the first sentence at least appears to apply to subjective intent. Although cumbersome in its language, that sentence appears to codify the rule that, if one party knows the other is mistaken or has a different intent, but does not disclose the difference in intent, the party aware of the difference and with the opportunity to clarify, loses. *E.g.*, *Restatement (Second) of Contracts,* §201 (1981) (stating rule of interpretation against party who know the other party intended a different meaning for a term and failed to raise the issue). Proseeds does not claim that it alerted Peace River to the issue or otherwise clarified that Proseeds did not intend "charges for collection" to include attorney's fees.

If the first sentence of that statute does not apply, the second does. It requires ambiguities to be resolved in favor of the party the provision was intended to benefit. There can be no dispute about which party the obligation to pay "charges for collection" upon the buyer's breach was intended to benefit. Accordingly, if the contract interpretation issue gets to the "maxim of construction" stage, the question must be resolved in Peace River's favor.[23]

In short, Peace River argued that ORS 42.260 should require resolution of the ambiguity in its favor if the extrinsic evidence did not do so. Proseeds acknowledged the rules set out in that statute. [24] Instead of following that statute,

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[23] This court's decision in *Yogman v. Parrott*, 325 Or 358, 361, 937 P.2d 1019 (1997), is not to the contrary. There, this court set out the three steps for interpretation of contract provisions: (1) determination of whether the provision is ambiguous under the circumstances; (2) examination of extrinsic evidence of intent; and (3), if not resolved by the earlier steps, resolution by "maxims of construction." The *Yogman* court acknowledged the applicability of other sections in ORS Chapter 42, but did not discuss ORS 42.260. We invite this court to clarify *Yogman* by confirming that, where applicable, statutes (including ORS 42.260) apply, at least ahead of common law "maxims of construction."

[24] Proseeds also argued for application of that statute below at page 28 of Defendant's Trial Memorandum.

the trial court used the common law "maxim" requiring ambiguities to be resolved against the drafter, without explanation or recognition of the undisputed fact that neither party drafted the NORAMSEED Rules or the contracts incorporating those rules. Neither side knows why the trial court did that. Peace River again raised that issue in the Court of Appeals. The Court of Appeals ducked that issue, remanding to let the trial court choose a new "maxim." Because this issue is one of substantial importance to the bench, bar, and public; and because we do not want another three year delay and a third appeal; we ask this court to (1) supplement *Yogman* by explaining that ORS 42.260 is the appropriate "maxim" to use when it applies, (2) hold that ORS 42.260 does apply here, (3) hold that the phrase "charges for collection" includes reasonable attorney's fees, and (4) remand for determination of the amount Peace River is entitled to recover under that part of its contracts.

V. **Summary.**

The measure of damages issue is relatively simple. By entering into contracts for the delivery of seed in the future at fixed prices, both parties hedged against, and accepted, market risk. Doing so is a common commercial practice. Proseeds gambled that the market would go up and the fixed prices in the contracts would be a bargain when the time for delivery came. Proseeds guessed wrong and lost that gamble. When the time for delivery came (or, more precisely, when Proseeds repudiated all the contracts), Peace River was entitled to the benefit of its bargain. That benefit was the above market contract prices for the seed. Proseeds was obligated to honor its contracts and pay the contract prices despite the market's retreat, but it refused.

The drafters of the UCC drafted §2-708, and the Legislative Assembly adopted ORS 72.7080(1), to provide the measure of damages in just that

circumstance. ORS 72.7080(1) expressly applies on the undisputed facts here, it unambiguously sets the measure of damages, and is mandatory (although a seller may be able to choose an alternative remedy). That statute balances the interests of all concerned fairly, practically, and in accordance with the customs in the industry and the policies behind Article 2 of the Uniform Commercial Code. Applied here, ORS 72.7080(1) gives Peace River the benefit of its bargain and no more, and requires Proseeds to pay only what it agreed to pay. Although Peace River was able to sell some fungible seed in the four years or so after Proseeds and three other production contract buyers defaulted, with some sales after the market price had increased, Peace River did not receive a "windfall" in any way, shape, or form. In contrast, Proseeds' proposed rule is contrary to ORS 72.7080(1) and the statutory scheme of which it is an integral part, raises far more issues than it tries to resolve, and has no basis outside of Proseeds' desire to pay less in damages. That rule also ignores the practicalities of selling fungible commodities on markets; ignores most of the advice the advice Professors White, Summers, and Hillman give; and makes little practical sense.

This court simply has neither the authority, nor any reason, to create an exception to that statute to balance the conflicting policies behind it in a way more favorably to breaching buyers. Accordingly, the court should affirm the Court of Appeals' decision to the extent it enforces the plain language of ORS 72.7080(1), reject Proseeds' proposed new measure of damages, and reverse the trial court's $162,836 deduction from Peace Rivers' "contract-market price differential" damages.

The contract interpretation issue is more complex. However, it all boils down to this. Industry members in North America negotiated a set of rules to facilitate international sales of seed on this continent. Like many international agreements negotiated in several languages, the wording in any one language has

some ambiguities. The English version of the NORAMSEED Rules entitle a seller to recover its "charges for collection" of the amount due after a buyer breaches by refusing to take delivery of seed. By itself, that language does not clearly say whether sellers can recover attorney's fees incurred in collecting amounts due from breaching buyers, but common sense and common experience tell us that a creditor trying to collect damages from a breaching debtor would expect to recover all of the expenses of collection, including attorney's fees.

To resolve that ambiguity, Peace River presented evidence that recovery of attorney's fees under that provision is customary and a "usage of trade." ORS 71.3030 expressly provides that any usage of trade that an opposing party knew or should have known about clarifies ambiguities and supplements agreements covered by the UCC. Peace River also presented evidence that Canadians expect to recover their attorney's fees because Canada follows the "English Rule." As a big player in the industry, Proseeds must have known of that expectation. For much of this litigation, Proseeds asserted its own claims for attorney's fees (although it did so in a way that hedged its bets). On the other side, Proseeds chose not to present any evidence about that ambiguous phrase. In particular, it chose not to present any evidence relating to that usage of trade. That one-sided evidence requires a finding that the parties objectively intended "charges of collection" to include attorney's fees. To the extent the court is not required to find in Peace River's favor with that unopposed evidence, ORS 42.260 requires the court to resolve that ambiguity in Peace River's favor. The courts do not have the discretion to use some other "maxim of construction" if ORS 42.260 applies. Accordingly, this court should hold that Peace River is entitled to recover its

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reasonable attorney's fees here and remand its claims for a determination of the amount Peace River is entitled to recover.

Date: July 26, 2013.

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