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,

vs.

**PROSEEDS MARKETING, INC., an Oregon corporation,**

Defendant-Respondent,
Petitioner on Review.

Marion County Circuit Court
No. 03C15778

CA A144564

S060957

# REPLY BRIEF ON THE MERITS OF PETITIONER 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.

August, 2013

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## I. INTRODUCTION.

This appeal presents two major issues: (1) the measure of damages under the Uniform Commercial Code in the circumstances of this case, where plaintiff has resold at least some of the goods that were the subject of the breached contract; and (2) whether the parties' contracts allowed the recovery of attorney fees.

Plaintiff Peace River Seed Co-Operative, Ltd. ("Peace River") makes two arguments on the measure of damages. First, according to Peace River, anything but a strict and mechanical application of ORS 72.7080(1) would constitute "rewriting the statute." *See* Peace River's Brief on the Merits ("Respondent's Br.") at 17-18. But as Defendant Proseeds Marketing, Inc. ("Proseeds") explained in its Brief on the Merits, Peace River's position would have this court ignore other sections of the UCC and its commentary that, collectively, instruct courts to administer UCC remedies liberally to put an aggrieved party in as good a position as if the other party had fully performed, but no better. The trial court in this case correctly applied *all* applicable law—rather than a single statute taken out of context—to compensate Peace River fully while denying it a windfall.

Peace River's second argument on the question of damages is that, even if the amount of its damages calculated under ORS 72.7080(1) ordinarily would be reduced by the amount it recovered through the resale of goods, such a

reduction is inappropriate in this case because Peace River is a "lost volume seller." Respondent's Br. at 22-24. That argument fails because, under the standard of review applicable to this case, the trial court is presumed to have found that Peace River was not a lost volume seller. That finding is supported by evidence in the record.

On the question of attorney fees, Peace River mischaracterizes Proseeds' argument as urging the adoption of a "new rule hindering parties' ability to allocate responsibility for attorney fees." Respondent's Br. at 30. That is not Proseeds' position. Rather, Proseeds asks the court to uphold longstanding Oregon law: attorney fees will not be allowed unless expressly authorized by a statute or contract. In context, the contracts' references to "charges for collection of payment" can refer only to the administrative cost of billing. Peace River's attempts to invoke Canadian customs, alleged trade practices and a statutory maxim of construction do not support a different interpretation.

This court should reverse the Court of Appeals' decision and affirm the trial court's judgment, which applied an appropriate measure of damages and denied Peace River's claim for attorney fees.

## II. ARGUMENT.

### A. Standard of review.

Peace River has asserted a lengthy "factual background" in its brief that goes beyond the facts found by the trial court and set out in the Court of

Appeals' decision. The findings of the trial judge on disputed fact issues are treated the same as a jury verdict, and cannot be set aside if supported by any evidence. *Stelts v. State*, 299 Or 252, 255, 701 P2d 1047 (1985) (trial court findings "are binding on [the appellate courts] * * * unless the court can affirmatively say there is no evidence to support them"). When a trial court's ruling depends on contested facts that the trial court did not explicitly resolve, the appellate court will presume that the facts were decided in a manner consistent with the trial court's ultimate conclusion. *Ball v. Gladden*, 250 Or 485, 487, 443 P2d 621 (1968). Peace River's recital of evidence therefore should not be confused with the facts; the standard of review requires that the trial court's findings be sustained if there is any evidence to support them, and there is an assumption that facts were found consistently with the trial court's legal conclusion if there is any evidence to support them.

**B. The trial court applied a proper measure of damages under the UCC.**

In this appeal, this court is asked to decide whether the trial court was obligated to apply ORS 72.7080(1) strictly and mechanically to calculate Peace River's damages as the "difference between the market price at the time and place for tender and the unpaid contract price," or whether it was permissible for the trial court to reduce that amount by the net amount Peace River recovered through resales.

Peace River's primary argument is that Proseeds is asking this court to "rewrite" ORS 72.7080(1) by allowing deductions from the damages calculated under that statute. Respondent's Br. at 17. That is not Proseeds' position. Rather, Proseeds' position is that the trial court properly read ORS 72.7080(1) in the context of other provisions of the UCC and its official commentary that, collectively, instruct trial courts to administer UCC remedies "liberally" to put a party in as good a position as if the party had fully performed, but no better. Those provisions—ORS 71.3050(1), ORS 71.1030(2) and the official commentary to UCC § 1-305—gave the trial court discretion to administer ORS 72.7080(1) in a way that fully compensated Peace River without giving it a windfall.

Proseeds' argument on statutory interpretation is fully set out in its Brief on the Merits and will not be repeated here. Instead, Proseeds offers the following in reply to specific points argued by Peace River in its Brief on the Merits.

### 1. Peace River resold the goods that were subject to its contracts with Proseeds.

Peace River now denies that it resold the goods that were subject to its contracts with Proseeds. Respondent's Br. at 4-5. That argument is untenable. In its own pleading, Peace River alleged that it "mitigated its damages by selling much of the undelivered seed to others at the then current market

prices." ER-3 (Third Am. Compl. ¶ 10). The Court of Appeals agreed: "Peace River stored the grass seed that its growers had delivered and was eventually able to sell at least some of the seed." *Peace River Seed Co-Op., Ltd. v. Proseeds Mktg., Inc.*, 253 Or App 704, 707, 293 P3d 1058 (2012), *rev allowed*, 353 Or 533 (2013). Evidence in the record supported that conclusion, as described at pages 4-5 of Proseeds' Brief on the Merits. Viewing the evidence consistently with the trial court's conclusions, as is required by the standard of review, Peace River resold at least some of the goods that were subject to its contracts with Proseeds.

**2. Strict application of ORS 72.7080(1) in this case would result in an inappropriate windfall to Peace River.**

Peace River takes offense to the suggestion that it would receive a windfall under ORS 72.7080(1) if the amount it recovered through resales is not deducted from the damages calculated under that statute. Respondent's Br. at 20-21. Peace River seems to misunderstand what it means to receive a windfall. A windfall is not avoided merely by receiving what a statute permits. A windfall is the receipt of more than the benefit of a bargain. *See* BLACK'S LAW DICTIONARY 1594 (7th ed 1999) ("windfall" means an "unexpected benefit, usu. in the form of a profit and not caused by the recipient"). Peace River would receive a windfall— more than the benefit of its bargain—if it is paid twice for the same goods. That is exactly why commentators support the

rule applied by the trial court in this case. *See* Petitioner's Br. at 20-21 and authorities discussed therein.

### 3. Peace River misunderstands the concept of "expectation interest."

In response to the point that contract damages under the common law and the UCC are limited to the expectation interests of the parties, Petitioner's Br. at 9-13, Peace River argues that it had a reasonable expectation that its damages would be measured using a strict and mechanical application of ORS 72.7080(1). Respondent's Br. at 20-21. Peace River misunderstands what is meant by an expectation interest. A party's expectation interest in a contract is not in any particular statutory measure of damages; its expectation interest is the benefit of the bargain.[1] Under the contracts in this case, Peace River legitimately could have expected to be paid once for the seed it procured to fulfill the contracts. It had no expectation of being paid twice for that seed.

### 4. Peace River was not a "lost volume seller."

Peace River argues that Proseeds has ignored the "lost volume seller" exception to the rule for which it advocates. Proseeds did not ignore the "lost

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[1] *See Restatement (Second) of Contracts* § 344 comment a (1981) (courts enforce expectation interests by putting party in as good a position as if there had been no breach); ORS 71.3050(1) ("The remedies provided by the Uniform Commercial Code must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed * * *.").

volume seller" issue; it is discussed at pages 21-24 of Proseeds' Brief on the Merits and pages 30-36 of Proseeds' Answering Brief in the Court of Appeals.

Whether Peace River was a lost volume seller is a question of fact. *See USX Corp. v. Union Pacific Resources Co.*, 753 SW2d 845, 848-49 (Tex 1988) (submitting interrogatories to the jury to determine status as lost volume seller); *Lake Erie Boat Sales, Inc. v. Johnson*, 11 Ohio App 3d 55, 57, 463 NE2d 70 (1983) (reviewing lost volume seller status based on whether it was supported by evidence). Peace River argued in the trial court that its resale of seed should not be considered when calculating damages if it was a lost volume seller, but the trial court chose to account for those resales in calculating damages. Accordingly, under the applicable standard of review, it is presumed that the trial court decided that Peace River was not a lost volume seller. *Ball*, 250 Or at 487.

Evidence in the record supports the conclusion that Peace River was not a lost volume seller. In order to fulfill its obligations under the contracts, Peace River contracted with various growers for their grass seed production. SSER-10-13 (Excerpts of Perpetuation Depo. of Ernie Kobbert). Peace River understood that the seed had to come from those specific fields and growers. SSER-4-6 (Excerpts of Perpetuation Depo. of Brian Wilson). The seed from each field could be identified because it was stored in a specific numbered bin upon delivery to Peace River's facility. SSER-7-25 (Excerpts of Perpetuation

Depos. of Brian Wilson, Ernie Kobbert, David Wuthrich, and Gordon Hill). Thus, despite Peace River's insistence that seed is a "fungible commodity,"[2] evidence in the record supported the conclusion that the seed sold under these contracts had to be purchased from specific fields and growers (which it could not have done twice) and was identified to specific bins at Peace River's facility. On this record, there is no basis for reversing the trial court's judgment on the ground that Peace River was a lost volume seller.

### 5. Peace River's request for a limited remand should be rejected.

Peace River argues that, should this court reverse the trial court's judgment based on a failure to apply the correct measure of damages, this court should remand with instructions that the trial court add $162,836 to Peace River's money award, plus interest, rather than affirm the Court of Appeals' remand to the trial court for a proper calculation of damages. Respondent's Br. at 27. Proseeds contends that the trial court judgment should be affirmed, but in

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[2] Calling seed a "fungible commodity" does not establish that Peace River as a lost volume seller. Peace River offers no authority for that proposition, and the Ninth Circuit has reached the opposite conclusion: "[A] seller of grain on a commodity market * * * is not a volume seller of the kind contemplated in Section 2-708(2)." *Coast Trading Co. v. Cudahy Co.*, 592 F2d 1074, 1081 (9th Cir 1979). *See also Tesoro Petroleum Corp. v. Holborn Oil Co. Ltd.*, 547 NYS 2d 1012, 145 Misc. 2d 715, 716-17, 721 (1989) (denying seller of oil the status of a lost volume seller).

the event of a reversal the case should be remanded for the trial court to calculate damages.

The record in this case does not permit this court to identify the amount the trial court attributed to Peace River's resales, which presumably is why Peace River did not cite to the record when making this request. Peace River claims that the trial court made a "specific finding accepting Peace River's damages under ORS 72.7080(1)." Respondent's Br. at 27. In fact, the trial court specifically stated in its August 28, 2009, letter opinion that Peace River failed to assist the trial court with the calculation of damages based on the voluminous evidence that had been submitted and was required to proceed based on Proseeds' calculation of damages. ER 35-36. If the general judgment is reversed, it will be necessary to remand this matter to the trial court to calculate damages, as directed by the Court of Appeals.

### C. The parties' contracts do not permit a party to recover its attorney fees in litigation.

It is well established in Oregon that a party may not recover attorney fees in litigation unless expressly provided by statute or contract. Exceptions to this rule are to be "narrowly construed." *Cash Flow Investors, Inc. v. Union Oil Company of California*, 318 Or 88, 91, 862 P2d 501 (1993). Nothing in the UCC compels this court to deviate from that policy. *Hardwick v. Dravo Equipment Co*., 279 Or 619, 628, 569 P2d 588 (1977) (observing that there is

"no persuasive argument" that UCC was intended to change the rule that attorney fees will not be allowed unless expressly authorized by a statute or contract).

Peace River asks this court to interpret the phrase, "charges for collection," as including attorney fees. In support of that argument, Peace River denies that there is a presumption against a right to recover attorney fees in litigation, makes a circular argument that the NORAMSEED Rules are a trade code and therefore should be interpreted as including a right to attorney fees and argues that this court can give Peace River a right to recover its attorney fees in this litigation by taking judicial notice of "the custom in the United States for creditors to include attorney's fees provisions." Proseeds addresses Peace River's points in the following paragraphs.

**1. Peace River is unsuccessful in its attempts to distinguish precedents and persuasive authorities.**

Peace River mistakenly suggests that *Cash Flow Investors*—one of the most-cited cases on attorney fee recovery in Oregon—is of little relevance in this case. Respondent's Br. at 30 n 15. The court's decision contains this court's oft-cited rule regarding the recoverability of attorney fees in Oregon:

> "The right to recover attorney's fees from an opponent in litigation does not exist at common law. The general rule is that such an item of expense is not allowable in the absence of a statute or some agreement expressly authorizing the allowance of attorney's fees."

*Id.* at 91. *Cash Flow Investors* also recognizes that exceptions to the general rule are "narrowly construed." *Id.* at 91.

Peace River is dismissive of *Gleason v. Thornton*, 210 Or 666, 674, 313 P2d 776 (1957)." Respondent's Br. at 29-30. Although *Gleason* deals with a statute, rather than a contract, it restates the general rule that generic terms like "costs" or "expenses" do not include attorney fees. *Gleason*, 210 Or at 674, citing *Garrett v. Hunt*, 117 Or 673, 676, 245 P 321 (1926). Here, similar generic words with no connection to litigation—"charges for collection"—do not reasonably include recovery of attorney fees.

Peace River also argues that *Kenner v. Watha*, 115 Mich App 521, 529-30, 323 NW 2d 8 (1982), does not support Proseeds' argument and was "twice overruled." Respondent's Br. at 30. That is not correct. *Kenner*, a decision of a panel of the Michigan Court of Appeals, has never been overruled by the Michigan Supreme Court, much less twice overruled. *Kenner* has been followed by other intermediate appellate panels, *Baumgardner v. Balmer*, 157 Mich App 159, 161, 403 NW2d 525, 526 (1987); *In re Fishbeck Trust*, No. 208585, 1999 WL 33435360 (Mich Ct App Oct. 5, 1999), *rem'd in part, appeal den in part sub nom. Fishbeck v. Braun*, 463 Mich 940, 620 NW2d 851 (2000), and disregarded by another intermediate appellate panel. *Bessmertna v. Schwager*, 191 Mich App 151, 157, 477 NW2d 126 (1991).

Proseeds' point is that the reasoning of *Kenner* is persuasive. If there is no general right to recover attorney fees in litigation and exceptions are to be narrowly construed, it stands to reason that a contractual right to attorney fees, to be enforceable, should be express and unambiguous.

**2. The text and context of the NORAMSEED Rules do not allow the recovery of attorney fees.**

Peace River does not rebut Proseeds' argument that the text of the NORAMSEED Rules, in context, can only be construed to mean the administrative costs of billing, rather than attorney fees resulting from disputes or litigation.[3] In addition to the textual and contextual analysis in Proseeds' Brief on the Merits, Proseeds notes that the "charges for collection" provision on which Peace River relies is separate from the NORAMSEED Rules regarding recovery in the event of a breach. *Compare* NORAMSEED Rule XIV (section on "Payment" that mentions "charges for collection" in subsections (3) and (4)(a)) (ER-15, SER-6) with NORAMSEED Rules XI(2) and XII(2) (sections on "Defaults on Shipping Instructions" and "Defaults of Shipment" that contemplate payment of "direct and indirect damages, interest, warehouse costs, price differences, etc.," but not attorney fees) (SER-5). The

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[3] Proseeds properly raised arguments to the trial court that Peace River was not entitled to recover attorney fees under the NORAMSEED Rules. *See, e.g.,* Def's ORCP 68 Resp to Pl's Attorney/Cost Claims and Def's Denial of the Validity of Those Claims, filed May 27, 2009.

fact that the "charges for collection" term appears separate from the NORAMSEED Rules regarding default and damages supports the conclusion that "charges for collection" do not relate at all to attorney fees or other remedies flowing from a breach, and instead can only refer to administrative costs of billing.

Even if the court determined that "charges for collection" is ambiguous, it should not accept Peace River's characterization of the extrinsic evidence in the record in analyzing the parties' intent. The record contains no evidence of the parties' objective manifestations of intent in connection with the incorporation of the NORAMSEED Rules, much less the specific term at issue in this case. Peace River cites no evidence that Proseeds knew of Peace River's purported interpretation of the phrase, "charges for collection."

As discussed in Proseeds' Brief on the Merits at pages 32-33, the extrinsic evidence in the record reflects nothing more than the fact that a Peace River manager testified that it was "customary" to recover attorney fees after litigation. *Peace River Seed Co-Op., Ltd.*, 253 Or App at 725. That is not evidence of what a particular term in the NORAMSEED Rules means; it is a description of the law where Peace River is based—Alberta, Canada. In this case, however, it has been determined (and Peace River apparently no longer disputes) that Oregon law applies to the contracts at issue. In Oregon, it is not "customary" to recover attorney fees after litigation. Thus, there is no basis for

looking to a Peace River manager's opinion on local custom to interpret these contracts.

### 3. This court should not add a right to recover attorney fees when the parties' contracts did not provide one.

Perhaps this goes without saying, but this court should decline Peace River's invitation to create a right to recover attorney fees under these contracts based on its bald assertion that merchants usually include such clauses in their contracts. Peace River suggests that this Court take notice of something that "we all know from experience": that merchants routinely exchange forms that contain attorney fee provisions. Respondent's Br. at 32. It goes on to ask the court to take "judicial notice of the custom in the United States for creditors to include attorney fee provisions." Respondent's Br. at 36.

This court does not insert terms in contracts that have been omitted by the parties. ORS 42.230. Nor is it a typical approach of appellate courts to consider facts outside the record. *See State v. Brewton*, 220 Or 266, 279, 344 P2d 744 (1959), *vac'd on other grounds*, 238 Or 590 (1964) (court would not consider statements in lawyer's brief that were outside record). There is no basis for granting Peace River a right to recover its attorney fees based on the bald assertion that other merchants include such terms in their contracts or that creditors customarily seek attorney fees.

### 4. ORS 42.260 does not support Peace River's interpretation of "charges for collection."

Peace River failed to preserve an argument that ORS 42.260 governed the interpretation of the parties' contracts. *See* Proseeds' Answering Brief in the Court of Appeals at 36-38, 45. That statute does not support Peace River's interpretation of the NORAMSEED Rules in any event.

For the convenience of the court, ORS 42.260 provides as follows:

> "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."

Under the first sentence of ORS 42.260, Peace River's interpretation prevails only if it is proved that Proseeds "supposed" that Peace River understood the NORAMSEED Rules to include attorney fees. As described above, the NORAMSEED Rules were incorporated by reference in the parties' contracts, and there is no evidence that the parties discussed, much less negotiated, the "charges for collection" term. There is no evidence that Proseeds "supposed" that "charges for collection" meant anything to Peace River, let alone the interpretation claimed by Peace River.

Under the second sentence of ORS 42.260, Peace River's interpretation prevails only if (1) the different interpretations are "otherwise equally proper,"

and (2) the parties made the "charges for collection" provision to favor Peace River alone. Neither condition is satisfied here. First, as discussed above, the parties' constructions of the "charges for collection" provisions are not equally proper. The text and context of the NORAMSEED Rules supports Proseeds' interpretation. Second, there is no evidence that the "provision was made" to favor one party or the other. Under NORAMSEED Rule XIV(3), the "charges for collection of payment shall be for the Seller's account unless the Buyer does not pay in full and immediately when due, in which case they shall be for the Buyer's account." Thus, the "charges for collection" provisions were made for both parties, if at all, because they are sometimes assessed against the seller, and sometimes against the buyer. Therefore, ORS 42.260 does not support Peace River's argument.

## III. CONCLUSION.

The trial court correctly read all applicable provisions of the UCC to measure Peace River's damages in a way that put it in the position it would have occupied had the contracts been performed. The Court of Appeals erred in concluding that the trial court was required to measure Peace River's damages by strictly applying ORS 72.7080(1).

The trial court also reached the correct conclusion that the parties' contracts do not allow them to recover attorney fees in litigation, albeit for the wrong reason. This court can and should determine that the term, "charges for

collection," read in context, cannot allow for attorney fee recovery. This court should reverse the Court of Appeals' decision and affirm the trial court's judgment.

Respectfully submitted this 12th day of August, 2013.

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**CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(D)**

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b), and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 3,932 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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## CERTIFICATE OF FILING AND SERVICE

I certify that on August 12, 2013, I caused to be electronically filed the foregoing **REPLY BRIEF ON THE MERITS OF PETITIONER ON REVIEW** with the Appellate Court Administrator by using the eFiling system.

I further certify that on said date I served two true and correct copies of said document on the party or parties listed below, via first class mail, postage prepaid, at Portland, Oregon, and addressed as follows:

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