STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FRONTIER FRESH OF INDIAN RIVER, LLC,

Petitioner,

vs. Case No. 15-1732

UNITED INDIAN RIVER PACKERS, LLC, AND FIDELITY AND DEPOSIT INSURANCE COMPANY OF MARYLAND, AS SURETY,

Respondents.
_____/

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing in Vero Beach, Florida, on June 16, 2015.

APPEARANCES

For Petitioner: Fred L. Kretschmer, Esquire
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For Respondent United Indian River Packers, LLC:

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For Respondent Fidelity and Deposit Insurance Company of Maryland:

(No appearance)

## STATEMENT OF THE ISSUES

The issues in this case are whether Respondent, a licensed citrus fruit dealer, violated the Florida Citrus Code by failing to pay Petitioner the full purchase price for grapefruit that the dealer had harvested from Petitioner's grove and sold in the ordinary course of business to its (the dealer's) customers; and, if so, the amount of the indebtedness owed by the dealer.

## PRELIMINARY STATEMENT

On February 15, 2015, Petitioner Frontier Fresh of Indian River, LLC, filed a Complaint with the Department of Agriculture and Consumer Services in which it alleged that Respondent United Indian River Packers, LLC, a licensed citrus fruit dealer, had failed to pay Petitioner the sum of $108,670.50 claimed to be due under a contract for the purchase and harvesting of colored grapefruit. Respondent Fidelity and Deposit Insurance Company of Maryland was named in the Complaint as surety.

In its Answer of Respondent, the dealer denied Petitioner's allegations and requested a hearing. Shortly thereafter, the agency forwarded the matter to the Division of Administrative Hearings, which opened a file on March 25, 2015.

The final hearing was conducted on June 16, 2015, at the Indian River County Courthouse in Vero Beach, Florida. Petitioner and United Indian River Packers, LLC, were represented by counsel at the hearing. As witnesses, Petitioner

called Michael Perry, its grove manager; and Chad Durrell, a former employee of the dealer. Petitioner's Exhibits 1 through 7 were received in evidence without objection. Preston Perrone, Thomas P. Kennedy, and Kenneth P. Kennedy testified on behalf of the dealer, of whom each is an officer or employee. Respondent's Exhibit 1 and 2 were admitted into evidence as well.

The two-volume final hearing transcript was filed on July 8, 2015. The parties timely filed proposed recommended orders on the established due date, which (after an extension) was August 3, 2015. These papers were carefully considered in the preparation of this Recommended Order.

Unless otherwise indicated, citations to the official statute law of the state of Florida refer to Florida Statutes 2015.

## FINDINGS OF FACT

1. Petitioner Frontier Fresh of Indian River, LLC ("Seller"), is in the business of growing citrus fruit and hence is a "producer" as that term is defined in the Florida Citrus Code. § 601.03(33), Fla. Stat.

2. Respondent United Indian River Packers, LLC ("Buyer"), is a "citrus fruit dealer" operating within the regulatory jurisdiction of the Department of Agriculture and Consumer Services (the "Department"). See § 601.03(8), Fla. Stat.

3. On September 6, 2013, Seller and Buyer entered into a Production Contract Agreement (the "Contract") under which Buyer agreed to purchase and harvest red and flame grapefruit (both generally called "colored grapefruit") then growing in Seller's "Emerald Grove" in St. Lucie County. Buyer promised to pay Seller $7.75 per box plus "rise" for all colored grapefruit harvested from the Emerald Grove during the 2013/2014 season. ("Rise" is an additional payment due Seller if Buyer's net revenue from marketing the fruit exceeds the Contract price or "floor payment.") The Contract gave Buyer and its "agents, employees and vehicles" the right to "enter upon SELLER'S premises . . . from time to time for the purpose of inspecting, testing and picking fruit, and for the purpose of removing said fruit."

4. Buyer was obligated to make scheduled payments to Seller totaling $250,000 between September and December 2013, with the balance of the floor payment "to be made within 45 days from week of harvest." The deadline for making the final rise payment was June 30, 2014.

5. The Contract described the Seller's duties as follows:

> SELLER agrees to maintain the crop merchantable and free from Citrus Canker, Mediterranean fruit fly, Caribbean fruit fly, and any and all impairments which would alter the ability to market the crop. It is further agreed that in the event of such happening BUYER has the option to

> renegotiate with SELLER within 10 days of such find, or terminate contract and receive any monies that may be remaining from deposit.
>
> It is understood and agreed that the word "merchantable" as herein used, shall mean fruit that has not become damaged by cold, hail, fire, windstorm, insects, drought, disease or any other hazards to the extent it cannot meet all applicable requirements of the laws of the State of Florida and the Federal Government, including without limitation those relating to pesticides, and the regulations of the Florida Department of Citrus relating to grade and quality.

6. With regard to default, the Contract provided:

> It is further agreed that in case of default by either the BUYER or SELLER the opposite party may, at his option, take legal action to enforce this contract or may enter into negotiations to carry out the terms and provisions thereof, in which event the party found to be in default shall pay reasonable costs in connection with either negotiation or litigation, such cost to include a reasonable attorney's fee to party prevailing in such controversy.

The Contract acknowledged the existence of a "Citrus Fruit Dealers Bond" posted with the Department but cautioned that the bond "is not insurance against total 1iabilities that may be incurred if a citrus fruit dealer should default" and "does not necessarily insure full payment of claims for any nonperformance under this contract."

7. Buyer began picking colored grapefruit from the Emerald Grove on October 17, 2013, and initially things went well. For

the first month, Buyer achieved encouraging packout percentages of between 60% and 90%. (The packout percentage expresses the ratio of fruit deemed acceptable for the fresh market to the total fruit in the run. A higher packout percentage means fewer "eliminations" for the juice processing plant and thus a more valuable run.) On November 13, 2013, however, the packout rate plunged to around 38%. Although there were some good runs after that date, for the rest of the season the packout percentages of grapefruit picked from the Emerald Grove mostly remained mired in the 30% to 50% range, which is considered undesirably low. Everyone agrees that the 2013/2014 grapefruit crop in the Emerald Grove was disappointing.

8. Representatives of Buyer and Seller met at the Emerald Grove in mid-November to discuss the reduced packout percentages. Mild disagreement about the exact reason or reasons for the drop-off in quality arose, but some combination of damage by rust mites and a citrus disease known as greasy spot is the likeliest culprit.[1/] The problems were not unique to Emerald Grove, as the 2013/2014 citrus season was generally poor in the state of Florida. Seller's grapefruit crop was consistent with the statewide crop for that year.

9. Despite the low packout percentages, and being fully aware of the crop's condition, Buyer continued to harvest colored grapefruit from the Emerald Grove, which it packed and

exported for sale to its customers in Europe, Japan, and Southeast Asia. After picking fruit on February 3, 2014, however, Buyer repudiated the Contract and left the colored grapefruit remaining in the Emerald Grove to Seller. As a result, Seller sold the rest of the crop to another purchaser.[2/]

10. At no time did Buyer notify Seller that it was rejecting any of the grapefruit which Buyer had picked and removed from the Emerald Grove pursuant to the Contract.

11. For months after Buyer stopped performing under the Contract, Seller endeavored to collect the amounts due for all the fruit that Buyer had harvested. By mid-April, however, Buyer still owed several hundred thousand dollars. At a meeting between the parties on April 22, 2014, Buyer proposed that Seller discount the purchase price given the disappointing nature of the crop, which Buyer claimed had caused it to lose some $200,000 in all. Buyer requested that Seller forgive around $100,000 of the debt owed to Buyer, so that Seller, in effect, would absorb half of Seller's losses.

12. Buyer expected that Seller would agree to the proposed reduction in price and maintains that the parties did, in fact, come to a meeting of the minds in this regard, but the greater weight of the evidence shows otherwise. Seller politely but firmly——and unequivocally——rejected Buyer's proposal, although Seller agreed to accept installment payments under a schedule

that would extinguish the *full debt* by August 31, 2014. This response disappointed Buyer, but Buyer continued to make payments to Seller on the agreed upon payment schedule.

13. By email dated June 4, 2014, Buyer's accountant asked Seller if Seller agreed that the final balance due to Seller was $108,670.50. Seller agreed that this was the amount owing. After that, Buyer tried again to persuade Seller to lower the price, but Seller refused. Buyer made no further payments.

14. At no time did Buyer notify Seller that it was revoking its acceptance of any of the fruit harvested from the Emerald Grove during the 2013/2014 season. Having taken physical possession of the fruit, Buyer never attempted to return the goods or demanded that Seller retrieve the fruit. Rather, exercising ownership of the goods, Buyer sold all the colored grapefruit obtained under the Contract to its customers for its own account.

15. On October 14, 2014, Seller brought suit against Buyer in the Circuit Court of the Nineteenth Judicial Circuit, in and for Indian River County, Florida, initiating Case Number 31-2014-CA-001046. Buyer filed a counterclaim against Seller for breach of contract. On February 4, 2015, Seller filed a Notice of Voluntary Dismissal of its judicial complaint, opting to take advantage of available administrative remedies instead, which it is pursuing in this proceeding. As of the final

hearing, Buyer's counterclaim remained pending in the circuit court.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings ("DOAH") has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

17. Chapter 601 of the Florida Statutes is known as the Florida Citrus Code (the "Code"). See § 601.01, Fla. Stat. "Citrus fruit" is defined in section 601.03(7) as

> all varieties and regulated hybrids of citrus fruit and also . . . processed citrus products containing 20 percent or more citrus fruit or citrus fruit juice. The term does not, for purposes of this chapter, mean limes, lemons, marmalade, jellies, preserves, candies, or citrus hybrids for which specific standards have not been established by the department.

Additionally, the term "grapefruit" is defined to mean "the fruit *Citrus paradisi Macf.*, commonly called grapefruit. The term includes the white, red, and pink meated varieties of grapefruit." § 601.03(24), Fla. Stat.

18. The term "citrus fruit dealer" is defined in section 601.03(8) to mean:

> any consignor, commission merchant, consignment shipper, cash buyer, broker, association, cooperative association, express or gift fruit shipper, or person who in any manner makes or attempts to make money or other thing of value on citrus fruit in any manner whatsoever, other than

> of growing or producing citrus fruit. The term does not include retail establishments whose sales are direct to consumers and not for resale or persons or firms trading solely in citrus futures contracts on a regulated commodity exchange.

Buyer is a citrus fruit dealer under this definition.

19. Citrus fruit dealers are required to be licensed by the Department in order to transact business in Florida. See § 601.55(1), Fla. Stat. As a condition of obtaining a license, such dealers are required to provide a cash bond or a certificate of deposit or a surety bond "for the use and benefit of every producer and of every citrus fruit dealer with whom the dealer deals in the purchase, handling, sale, and accounting of purchases and sales of citrus fruit." § 601.61(3), Fla. Stat.

20. Section 601.65 provides that "[i]f any licensed citrus fruit dealer violates any provision of this chapter, such dealer shall be liable to the person allegedly injured thereby for the full amount of damages sustained in consequence of such violation." This liability may be enforced in an administrative action brought before the Department or in a "judicial suit at law in a court of competent jurisdiction." Id. The citrus dealer's bond, however, cannot be called upon to satisfy a judgment "or other legal process issuing out of or from" a court of law should the aggrieved person pursue judicial remedies. This is because the legislature intended "that such citrus

dealer's bond . . . shall be applicable and liable only for the payment of claims duly adjudicated by order of the Department." Id.

21. Section 601.64(4), Florida Statutes, provides that it is "unlawful in, or in connection with, any transaction relative to the purchase, handling, sale, and accounting of sales of citrus fruit" for any dealer

> to fail or refuse truly and correctly to account and make full payment promptly in respect of any such transaction in any such citrus fruit to the person with whom such transaction is had, or to fail or refuse on such account to make full payment of such amounts as may be due thereon, or to fail without reasonable cause to perform any specification or duty express or implied arising out of any undertaking in connection with any such transaction.

22. Any person may file a complaint with the Department alleging a violation of the Code by a citrus fruit dealer. See § 601.66(1), Fla. Stat.[3/] The Department is charged with the responsibilities of determining whether the allegations of the complaint have been established and, if so, of adjudicating the amount of indebtedness or damages owed by the citrus fruit dealer. See § 601.66(5), Fla. Stat. If the dealer is found liable, the Department order shall "fix a reasonable time within which said indebtedness shall be paid by the dealer," and, if the dealer does not pay within the time specified by the Department, the Department shall obtain payment of the damages

from the dealer's surety company, up to the amount of the bond. See § 601.66(5) and (6), Fla. Stat.

23. The Contract between Seller and Buyer was for the sale of goods. Thus, the transaction at issue is governed by chapter 672, Florida Statutes, which is known as the Uniform Commercial Code—Sales ("Article 2"). See § 672.101, Fla. Stat. Article 2 "applies to transactions in goods." The term "goods" includes "growing crops" as described in section 672.107(2), which states:

> A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto . . . is a contract for the sale of goods within this chapter whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

Article 2 controls the question of whether Buyer failed to make full payment of amounts allegedly due Seller——and thereby committed an administrative offense as defined in section 601.64(4)——"because the transaction falls within [chapter 672's] scope and definition." Cent. Fla. Antenna Serv., Inc. v. Crabtree, 503 So. 2d 1351, 1353 (Fla. 5th DCA 1987).

24. Seller bore the burden of proving the allegations in its Complaint against Buyer by a preponderance of the evidence. See Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778,

788 (Fla. 1st DCA 1981); Fla. Dept. of HRS v. Career Serv. Comm'n, 289 So. 2d 412, 415 (Fla. 4th DCA 1974); § 120.57(1)(j), Fla. Stat.

25. Under Article 2, the "buyer must pay at the contract rate for any goods accepted." § 672.607(1), Fla. Stat. Section 672.606(1) provides that acceptance occurs when the buyer:

> (a) After a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that the buyer will take or retain them in spite of their nonconformity; or
>
> (b) Fails to make an effective rejection [after having] had a reasonable opportunity to inspect [the goods]; or
>
> (c) Does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by her or him.

26. To make an effective rejection of goods, the buyer must "seasonably notif[y] the seller" that the goods are rejected. § 672.602(1). "After rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller." § 672.602(2)(a). "If the buyer has before rejection taken physical possession of goods . . . , the buyer is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time

sufficient to permit the seller to remove them." § 672.602(2)(b).

27. As found above, Buyer exercised ownership of the grapefruit it harvested from Seller's Emerald Grove, notwithstanding any blemishes on the fruit, and used the goods as product for sale to its own customers. Like the purchaser in H.P. Development and Management Corp. v. P. Lafer Enterprises, Inc., 538 So. 2d 1379, 1381 (Fla. 5th DCA 1989), whose conduct was found clearly to establish acceptance, Buyer "kept the delivered goods, used them [as intended] and, at most, wanted a lower price because of their alleged non-conformity." Buyer accepted the colored grapefruit, and it failed to make an effective rejection of the goods.

28. When Buyer accepted the fruit, it likely assumed that any nonconformity would be seasonably cured through an adjustment of the price. Therefore, Buyer might have been within its rights to revoke its acceptance of the goods without breaching the Contract. See § 672.608(1)(a), Fla. Stat. Such revocation, however,

> must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

§ 672.608(2). Buyer never provided Seller notice of revocation, and its sale of the grapefruit to others in the ordinary course of Buyer's business is inconsistent with revocation in any event. See H.P. Dev. & Mgmt. Corp., 538 So. 2d at 1381. Buyer, in short, did not revoke its acceptance of the goods.

29. Seller therefore is entitled to recover from Buyer the full contract price for the goods accepted, together with incidental damages. § 672.709(1)(a), Fla. Stat. Buyer's failure or refusal to pay Seller the balance due under the Contract, which is $108,670.50, is an unlawful act as defined in section 601.64 and hence constitutes a violation of the Code, giving rise to an indebtedness which the Department is authorized to adjudicate, and reduce to final order, pursuant to section 601.66.

30. In addition to demanding repayment of the debt, Seller seeks to recover interest, attorney's fees, and costs. Seller is entitled to recover simple interest on the outstanding principal balance of $108,670.50 at the statutory rate from June 4, 2014. See § 687.01, Fla. Stat.; § 55.03, Fla. Stat.; see also United Servs. Auto. Ass'n v. Smith, 527 So. 2d 281, 283-84 (Fla. 1st DCA 1988)(improper to award compound statutory interest). It is a ministerial duty of the Department to add the appropriate amount of prejudgment interest to the principal

amount of damages awarded in the final order. See Argonaut Ins. Co. v. May Plumbing Co., 474 So. 2d 212, 215 (Fla. 1985).

31. Seller's claim for attorney's fees and costs is another matter. Under Article 2, recoverable incidental damages "include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach." § 672.710, Fla. Stat. Attorney's fees, however, are not awardable under section 672.710 as incidental damages. Fla. Nat'l Bank v. Alfred & Ann Goldstein Found., Inc., 327 So. 2d 110, 111 (Fla. 1st DCA 1976). Seller has not sought to recover any incidental damages as defined in the statute.

32. The Contract provides for an award of attorney's fees and litigation costs to the party who prevails in any action for breach, but section 601.66 does not clearly authorize the Department to enforce such a contractual provision in determining the "amount of indebtedness or damages due to be paid by the dealer to the complainant." The undersigned need not resolve the jurisdictional issue, however, because it is not ripe until a prevailing party is identified. The Department may remand this matter to DOAH for an evidentiary hearing on the amount of reasonable fees and costs to be included in the final

order if it interprets the statute as allowing an award of prevailing-party attorney's fees and costs to be made pursuant to a fee-shifting agreement.

33. Buyer's failure to properly reject, or revoke acceptance of, the grapefruit purchased under the Contract does not itself preclude Buyer from making a claim for breach of warranty. See U.S. Fid. & Guar. Co. v. N. Am. Steel Corp., 335 So. 2d 18, 22 (Fla. 2d DCA 1976); Crabtree, 503 So. 2d at 1353-54.[4/] Buyer, in fact, has brought an action for breach against Seller, which as mentioned above remained pending in circuit court when this case came to hearing.

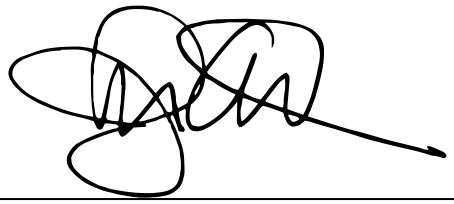
34. Section 601.66 does not specifically authorize a citrus fruit dealer to pursue a counterclaim against a complainant who has alleged that the dealer violated the Code. It is not necessary in this case, however, to decide whether the Department has jurisdiction to entertain a dealer's counterclaim for breach of warranty,[5/] or to make findings and conclusions relevant exclusively to Buyer's claim against Seller, because Buyer has not sought to recover damages in this forum.

## RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Agriculture and Consumer Services enter a final order awarding Frontier Fresh of Indian River, LLC, the sum of $108,670.50, together with

pre-award interest at the statutory rate from June 4, 2014, to the date of the final order, and establishing a reasonable time within which said indebtedness shall be paid by United Indian River Packers, LLC.

DONE AND ENTERED this 27th day of August, 2015, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of August, 2015.

ENDNOTES

[1/] For reasons that will be made clear, it is not necessary for the undersigned to make detailed findings regarding the cause(s) of the relatively low yield of fresh-fruit quality grapefruit from the Emerald Grove in 2013/2014. No finding is made or implied here, one way or the other, on the question of whether the grapefruit sold under the Contract were nonconforming or whether Seller breached, e.g., the warranty of merchantability.

[2/] Seller is not seeking to recover damages for the losses, if any, sustained from this resale of the remaining crop.

[3/] A complainant need not be a licensee to travel under section 601.66. Rather, any person who claims to have been damaged by a

dealer's violation of the Code has standing to maintain this type of administrative action. Accordingly, Buyer's Motion for Involuntary Dismissal, included in its Proposed Findings of Fact and Conclusions of Law, is denied.

[4/] After having accepted the goods, however, the purchaser "must within a reasonable time after he or she discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." § 672.607(3)(a), Fla. Stat.

[5/] To elaborate, a proceeding under section 601.66 is not a suit for breach of contract even though it resembles a civil action of that nature. Rather, a complaint filed pursuant to section 601.66 invokes the Department's regulatory jurisdiction to determine whether a licensed dealer subject to agency oversight has violated the Code, and if so to remedy such violation. In an administrative proceeding such as this one, a breach of contract by the licensed dealer amounts to a regulatory violation because section 601.64(4) makes it so, but what is being enforced administratively is the Code, not a contract. A dealer's counterclaim for breach of contract, in contrast, would be an action to enforce the contract, not the Code. A claim for "breach of contract is ordinarily a matter for judicial rather than administrative or quasi-judicial consideration." Vincent J. Fasano, Inc. v. Sch. Bd. of Palm Beach Cnty., Fla., 436 So. 2d 201, 202-03 (Fla. 4th DCA 1983). Therefore, if Buyer were seeking to enforce the Contract administratively by asserting before the Department a claim for breach of warranty, for example, then a question involving subject matter jurisdiction would be presented.

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## NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.