COURT OF APPEALS
DECISION
DATED AND FILED

July 14, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2079 **Cir. Ct. No. 2013CV217**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

WISCONSIN CRANBERRY COOPERATIVE,

PLAINTIFF-RESPONDENT,

V.

GROUPE ALIMONCO, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Wood County: GREGORY J. POTTER, Judge. *Affirmed*.

Before Kloppenburg, P.J, Sherman, and Blanchard, JJ.

¶1 BLANCHARD, J. This case involves a dispute regarding the application of a Uniform Commercial Code (U.C.C.) provision, adopted in Wisconsin, that provides a remedy for sellers who are aggrieved when buyers reject ordered goods. The remedy at issue generally allows an aggrieved seller to

recoup the difference between (1) the amount that the seller would have received if a buyer who had ordered goods had not rejected them and (2) the amount that the seller receives, following the buyer's rejection, in a commercially reasonable, good-faith resale of goods that are reasonably conforming to the rejected goods. *See* WIS. STAT. § 402.706 (2013-14).[1]

¶2 Wisconsin Cranberry Cooperative (the Seller) entered into contracts to sell cranberries to Groupe Alimonco, Inc. (the Buyer), at a price of 65 cents per pound. The Buyer took delivery of two of ten orders, but later rejected the remaining eight orders. Approximately four months after the Buyer's rejection, the Seller sold to Graceland Fruit a greater volume of cranberries than the Buyer had rejected, at 40 cents per pound, for a purported loss to the Seller of 25 cents per pound. The Seller filed this action for breach of contract. The only disputed issue is the measure of damages, if any, under the seller's resale remedy contained in WIS. STAT. § 402.706.

¶3 Following a bench trial, the circuit court agreed with the Seller's position that the Seller was entitled to damages equal to the difference between the original contract price of the rejected cranberries and the Graceland sale price, multiplied by the volume of cranberries rejected by the Buyer, because the Graceland sale was a resale of the rejected cranberries. That is, the court determined that the Graceland sale involved cranberries that sufficiently conformed to the cranberries identified in the eight contracts breached by the Buyer, and was made "in good faith and in a commercially reasonable manner."

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

In a decision on incidental damages arising from the same eight breaches, the court awarded the Seller its freezer-storage costs for storing the volume of cranberries rejected by the Buyer. *See* WIS. STAT. §§ 402.706(1) and 402.710.

¶4 The Buyer appeals, arguing that the court improperly allowed the Seller to recover any damages, either based on the statutory seller's resale remedy or the freezer-storage costs. For the following reasons, we disagree and accordingly affirm.

BACKGROUND

¶5 The circuit court made the following findings of fact. In October 2011, the parties entered into ten contracts. Each contract obligated the Seller to provide the Buyer with 40,320 pounds of "whole" cranberries, "USDA Grade A," at 65 cents per pound. Each contract referred to the cranberries being packed in 40-pound containers.

¶6 While all ten contracts shared the above common terms, they can be divided into two, five-unit sets:

- Each of five contracts provided that: the Seller would provide 2011 cranberries;[2] the Seller would charge a freezer-storage fee of one cent per pound, commencing in January 2012;[3] and shipment of the 2011 cranberries would be

[2] The record reflects that cranberries are harvested over the course of about 60 days each September—November, and as shorthand annual harvests are often referred to as "[Year X] cranberries." Accordingly, we use the phrase "2011 cranberries" for those harvested in or around October 2011 and "2012 cranberries" for those harvested in or around October 2012.

[3] The contracts do not state a time period that applied to this one-cent-per-pound freezer-storage charge, but the record reflects that these were understood to be monthly charges, and neither party disputes the point.

either in October 2011 (one contract), or "Evenly spread Nov/May 2012" (four contracts);

- Each of the other five contracts: made no reference to which year's crop the cranberries would be from; made no reference to freezer-storage fees or costs; and stated that shipment would be "Nov/Dec" (there is no dispute that this contemplated shipment in November-December 2011).

¶7 Despite the terms quoted above in all ten contracts regarding timing of shipments, the Buyer did not take any shipments during fall-winter 2011-12. In February 2012, a representative of the Seller contacted the Buyer about the Buyer's failure to have taken any shipments. In May and June 2012, the Buyer took shipments of two contracts.

¶8 In July 2012, a Seller's representative asked the Buyer when it would take shipment of the remaining eight orders, totaling 322,240 pounds. In August 2012, the Buyer confirmed that it would take the remaining orders. In November 2012, the Seller gave the Buyer a choice of taking the final eight orders in 2011 cranberries or 2012 cranberries.

¶9 The Buyer rejected all further orders the next day. Specifically, on November 27, 2012, at the end of the 2012 harvest season and approximately six months after the last of the orders were to have been shipped under the contracts, the Buyer notified the Seller that the Buyer would not be taking any more orders. The Seller responded with a notice of resale, informing the Buyer that the Seller would attempt to resell the rejected cranberries to others.

¶10 Thereafter, the circuit court found, a representative of the Seller "made attempts to resell the balance of the contracted cranberries, both

domestically and internationally[,] through its standard marketing efforts, which included contract and spot sales, through its websites, directly to customers and through various brokers."[4]

¶11 Between the time of the Buyer's rejection of the eight orders on November 27, 2012, and March 15, 2013, the Seller made various sales of cranberries to various purchasers at a range of prices. Because details regarding these November 2012—March 2013 cranberry sales are central to multiple arguments made on appeal, we summarize them in addressing specific arguments in discussion below, beginning at ¶28.

¶12 On March 15, 2013, the Seller sold 606,002 pounds of whole cranberries to Graceland. This sale occurred after the market price of cranberries had fallen in late 2012 and into 2013, and was made at the price of 40 cents per pound. This was 25 cents lower than the 65 cents set in the original October 2011 contracts between the Seller and the Buyer.

¶13 It is the Graceland sale that the Seller sought to use to fix its damages from the breaches of the eight contracts. More specifically, citing WIS. STAT. § 402.706, the terms of which we address in the Discussion section below, the Seller sought damages based on what the Seller characterized as the resale to Graceland of the cranberries rejected by the Buyer (322,240 pounds x $0.25= $80,560). In addition, also citing § 402.706, the Seller sought $48,336 in

[4] While the details of how the Seller conducted "spot" trading do not matter to any argument made on appeal by either party, for general context we note that "spot" trading of a commodity typically involves "cash sales for immediate delivery in contrast to trading in futures." *See Spot trading*, BLACK'S LAW DICTIONARY (6th ed., 1990).

incidental damages for freezer-storage costs arising from the same breaches, at the rate stated in five of the contracts, as summarized above—one cent per pound per month—for the volume of cranberries that the Seller had held in storage, from January 1, 2012 to March 15, 2013, when the Graceland sale occurred.

¶14 Following a bench trial, the circuit court concluded that the Seller was entitled to all of the above-referenced damages. First, the court concluded that the March 2013 sale to Graceland was of cranberries that reasonably conformed to the cranberries in the contracts rejected by the Buyer, and that the Graceland sale occurred within a reasonable time following the November 2012 breaches, at the highest possible price. Second, the court concluded that the Seller is entitled to the $48,336 in incidental damages for freezer-storage costs. We address specific additional findings of the circuit court in the Discussion section below as pertinent to the parties' arguments.

DISCUSSION

I. STANDARDS OF REVIEW

¶15 We review a circuit court's factual determinations at a bench trial under the clearly erroneous standard. WIS. STAT. § 805.17(2) ("Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."); *see also* ***J.K. v. Peters***, 2011 WI App 149, ¶32, 337 Wis. 2d 504, 808 N.W.2d 141 ("We will not reverse the trial court's findings of fact on damages unless they are clearly erroneous.").

¶16 We are presented with questions of law in determining whether, under WIS. STAT. § 402.706 and the facts found by the circuit court, the

cranberries that the Seller sold to Graceland in March 2013 were reasonably conforming to the cranberries ordered but not accepted by the Buyer, and whether the Seller undertook reasonable efforts to resell its cranberries at the highest possible price. The interpretation and application of a statute to an undisputed set of facts presents a question of law that we review de novo. ***John Doe 56 v. Mayo Clinic Health System***, 2016 WI 48, ¶14, ___ Wis. 2d ___, ___ N.W.2d ___.

II. THE SELLER'S RESALE DAMAGES BASED ON THE GRACELAND SALE

¶17 The Buyer makes three arguments in challenging the circuit court's determination that the Graceland sale provides a reasonable basis for the calculation of damages under WIS. STAT. § 402.706. The first two arguments are based on the Buyer's interpretation of the meaning of the seller's resale remedy under § 402.706. The third is that the circuit court committed clear error in finding that the Seller did not sell its entire stock of 2011 cranberries before the Buyer's November 2012 breaches. We first briefly describe § 402.706, then address the three arguments in turn.

A. WISCONSIN STAT. § 402.706

¶18 The U.C.C., generally codified in Wisconsin, provides remedies available to sellers after buyers breach contracts for the sales of goods. An aggrieved seller has various options when a buyer wrongfully rejects goods, including reselling the rejected goods and relying on the price of the resale as a reasonable approximation of its damages. *See* WIS. STAT. § 402.703.[5] Pertinent

[5] Entitled "Seller's remedies in general," WIS. STAT. § 402.703 addresses breaches by those who contract to buy goods, and provides in pertinent part:

(continued)

here is the seller's resale remedy provided in WIS. STAT. § 402.706. The seller may recover the deficiency, if any, between the contract price and the resale price, together with any incidental damages, but less expenses saved as a result of the breach, so long as the seller satisfies certain requirements in the resale.[6]

¶19 The evident goal of WIS. STAT. § 402.706, which matches the language of Section 2-706 of the U.C.C., is to attempt to put a seller of goods in

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> Where the buyer wrongfully rejects … goods or … repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (s. 402.612), then also with respect to the whole undelivered balance, the aggrieved seller may:
>
> ....
>
> **(4)** Resell and recover damages as provided in s. 402.706;

[6] Entitled "Seller's resale including contract for resale," WIS. STAT. § 402.706 provides in pertinent part, with emphasis on portions of particular significance in this appeal:

> **(1)** Under the conditions stated in s. 402.703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof. *Where the resale is made in good faith and in a commercially reasonable manner* the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under s. 402.710, but less expenses saved in consequence of the buyer's breach.
>
> **(2)** … [R]esale may be at public or private sale [and] may be as a unit or in parcels and at any time and place and on any terms but *every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable*. The resale *must be reasonably identified as referring to the broken contract*, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach.

In place of the cumbersome phrase "reasonably identified as referring to," as used in the U.C.C. 2-706 and WIS. STAT. § 402.706(2), we substitute the phrase "reasonably conforming to."

the position that he or she would have been in if the buyer had not breached the contract by rejecting the goods, based on a resale of conforming goods by the seller "made in good faith and in a commercially reasonable manner." *See* 4 ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2.7 (3d ed.1983), "Resale formula," 1 DAMAGES UNDER UCC (Sept. 2015) (addressing § 2-706 of the U.C.C.; "This recovery, with appropriate prejudgment interest for delay, will put the seller in the monetary position she would have occupied had the breached contract been performed."); *see also* WIS. STAT. § 401.305(1) ("The remedies provided by chs. 401 to 411 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 ….").

¶20 Stated in the terms used in WIS. STAT. § 402.706, the circuit court here determined that the Seller resold, "in good faith and in a commercially reasonable manner," goods that were reasonably conforming to "the broken contract," and therefore the Seller "may recover the difference between the resale price and the contract price together with any incidental damages allowed under s. 402.710, but less expenses saved in consequence of the buyer's breach."

B. Reasonably conforming

¶21 The Buyer's first argument against application of the seller's resale remedy is that the circuit court erred as a matter of law in concluding that the Graceland sale was of cranberries that reasonably conformed to the breached contracts, as required in WIS. STAT. § 402.706(2). This was error, the Buyer argues, because there was no evidence presented at trial of "any connection whatsoever between" the cranberries that the Buyer contracted to buy in October 2011 and the cranberries sold to Graceland in March 2013.

¶22 In response, the Seller argues that the court's conclusion that the cranberries were reasonably conforming was proper because it was based on factual findings, not shown to be clearly erroneous, that the Seller was unable to find a purchaser for the rejected cranberries during the four months between the Buyer's breach and the Graceland sale. In other words, the Seller contends that the cranberries shipped to Graceland amounted to the first batch of cranberries that the Seller could sell that reasonably conformed to the rejected cranberries. We now explain why we agree with the Seller's position.

¶23 Neither party refers us to Wisconsin precedent on the meaning of the phrase "reasonably identified as referring to the broken contract" as used in WIS. STAT. § 402.706(2), and our independent research has not revealed any Wisconsin precedent.[7] However, the parties appear to agree that a federal court of appeals decision interpreting U.C.C. § 2-706 provides persuasive guidance sufficient to resolve the "reasonably conforming" issue in this case, and we agree that this persuasive authority provides valuable insights that we now address. *See* ***Apex Oil Co. v. Belcher Co. of New York, Inc.***, 855 F.2d 997 (2d Cir. 1988) (aggrieved seller's sale of No. 2 heating oil six weeks after breach by buyer could not properly be used to calculate damages on basis of resale, where seller sold oil conforming to the broken contract on the day after buyer's breach).[8] That is,

[7] In its response brief, the Seller directs us to other statutes in Wisconsin's enactment of the U.C.C. that the Seller submits provide pertinent definitions of the concept of "identification." *See* WIS. STAT. §§ 402.501(1), 402.704(1)(a). However, given the way in which we resolve this issue, as explained in the text of this opinion, we need not and do not interpret these other statutes in this context.

[8] There are only irrelevant, stylistic differences between the pertinent terms of § 2-706 of the U.C.C. quoted and interpreted by the court in ***Apex Oil Co. v. Belcher Co. of New York, Inc.***, 855 F.2d 997, 1001 (2d Cir. 1988), and the pertinent terms of the current version of WIS. STAT. § 402.706.

despite significant differences between the facts in ***Apex Oil*** and the facts here, the opinion contains certain observations that are useful.

¶24 The Buyer here acknowledges that the ***Apex Oil*** court was correct in observing that "fungible goods resold pursuant to Section 2-706 must be goods identified to the contract, but [the resold fungible goods] need not always be those *originally* identified to the contract." *See* ***id.*** at 1005 (emphasis in original).[9] That is, when the rejected goods are truly fungible with other products held by or available to the aggrieved seller, § 2-706 contemplates that the seller may generally substitute new goods for those literally identified in the contract, because it would not serve any legitimate U.C.C. purpose "to force an aggrieved seller to segregate goods originally identified to the contract when doing so is more costly than mixing them with other identical goods." ***Id.*** The Buyer at points in its briefing appears to concede that none of the cranberries that the Seller purports to have "resold" to Graceland under WIS. STAT. § 402.706 must have been previously physically set aside by the Seller at any time for the benefit of the Buyer. One way the Buyer states this is to assert that it "has never argued" that the Seller "was obligated to show a resale of the very same cranberries" that the Buyer contracted to buy from the Seller.

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[9] The U.C.C. as adopted in Wisconsin provides in WIS. STAT. § 401.201(2)(j):

> "Fungible goods" means any of the following:
>
> 1. Goods of which any unit, by nature or usage of trade, is the equivalent of any other like unit.
>
> 2. Goods which by agreement are treated as equivalent.

¶25 At the same time, the Seller does not dispute that, as stated in another ***Apex Oil*** passage, "the reasonableness of the identification" referred to in the seller's resale remedy must be assigned some meaning, and that this meaning is "determined by examining whether the market value of, and the price received for, the resold goods 'accurately reflects the market value of the goods which are the subject of the contract.'" *See* ***id.*** (quoting ***Servbest Foods, Inc. v. Emessee Industries, Inc.***, 403 N.E.2d 1, 8 (Ill. App. Ct. 1980)). That is, the "reasonably conforming" determination should be made while bearing in mind "the purpose of the resale remedy," "which is simply to fix the price" of the rejected goods, at an accurate market price. *See* ***Apex Oil***, 855 F.2d at 1005.

¶26 With that context in mind, we turn to the Buyer's core argument. The Buyer argues that this case resembles ***Apex Oil***, which rejected the aggrieved seller's purported "resale" in part because the seller responded to a buyer's breach by promptly selling the goods ordered in the original contract, and then, after the market price fell, tried to fix damages using the sale of new quantities of the fungible goods later at a lower price. *See* ***Apex Oil***, 855 F.2d at 1007-08 ("the oil originally identified to the contract was sold the day after … breach, and no doubt [the seller] sold ample amounts thereafter in the six weeks before the purported resale"; the day-after-breach-resale "fixed the value of the goods refused as a matter of law"). The Buyer here argues that this is what the Seller did with the rejected cranberries.

¶27 However, findings of the circuit court that the Buyer does not show are clearly erroneous make this case distinguishable from the facts of ***Apex***, and support a conclusion that the sale to Graceland here was a resale of reasonably conforming fungible goods.

¶28 Between the time of the Buyer's breaches and the Graceland sale, the Seller sold 18 loads of cranberries to purchasers other than the Buyer and Graceland. This is significant, the Buyer argues, because the prices of these sales were at significantly higher prices than the ultimate sale to Graceland. Thirteen of the 18 sales were of sliced cranberries. We first address the topic of sliced cranberries, and then address the remaining five loads.

¶29 The circuit court rejected the proposition that the Seller's sales of sliced cranberries following the Buyer's breaches here were equivalent to the ***Apex Oil*** seller's sale of oil following the buyer's breach. As noted above, the Buyer rejected whole cranberries, not sliced ones. The circuit court found that the Seller possessed sliced cranberries in its inventory following the Buyer's rejection of the contracts, and that it was "unknown" what it would have cost the Seller to produce sliced cranberries in order to fill orders for sliced cranberries. The Buyer now effectively challenges this last finding, asserting that "[t]he processing required to produce sliced, rather than whole, cranberries usually adds 1-2 cents per pound to the market price of the cranberries." However, an examination of the record citations that the Buyer provides for this proposition reveals it to be insufficiently supported.[10] Accordingly, the Buyer provides insufficient grounds

[10] Without any indication of the fact, counsel for the Buyer relies on a transcript passage reflecting the mere assertion of an attorney, in the form of a question, as the basis for this proposition, where the answer given by the witness is meaningless and does not confirm it. We remind counsel for the Buyer that unfounded or misleading assertions have no place in representations to courts.

It is true that invoices of sales by the Seller referenced by the Buyer could support one reasonable inference that sliced cranberries typically sold for a few cents more than whole cranberries during the pertinent period. However, the Buyer does not develop an argument sufficient to persuade us that the circuit court clearly erred in finding, based on all evidence presented at trial, that the court lacked a sufficient basis to make a finding as to what it would (continued)

to upset the circuit court's finding that it lacked evidence to determine the cost to the Seller of producing and selling sliced cranberries. For this reason, we conclude that the sales of sliced cranberries are irrelevant to any issue raised on appeal.[11]

¶30 We return now to the remaining five of the 18 loads sold after the breaches, namely, those involving whole cranberries. The circuit court found that three loads of whole cranberries were sold on "specialty contracts" that the Seller had, and therefore also could not be considered as resales of the rejected cranberries. While the circuit court did not make extensive findings on this topic, it implicitly credited testimony of the Seller's manager, who testified that, as summarized by the circuit court, "the cranberries contracted for by [the Buyer] did not meet these specialty requirements," which involved, in two cases, "very special needs" for bottling and baking uses, and in a third case a discrete load of cranberries that had to be set aside under the terms of a "program" contract.

¶31 On the topic of specialty contracts, the Buyer's position is confusing. The Buyer first asserts in its principal brief that the circuit court's findings regarding specialty contracts are "unsupported by the evidence," but fails to

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have cost the Seller to use the rejected whole cranberries to produce and ship sliced cranberries during the pertinent time period.

[11] Regarding sliced cranberries, the Buyer draws our attention to testimony to the effect that the Seller typically sold a much higher proportion of whole, as opposed to sliced, cranberries. Based on this testimony, the Buyer asserts that the Seller "likely sold many more whole cranberries during the relevant time period than those for which it produced documentation." This argument is premised on a misunderstanding of our standard in reviewing factual findings by circuit courts. Moreover, the Buyer fails to point to record evidence that it presented this argument squarely to the circuit court, and we typically will not blindside circuit courts based on arguments made by appellants for the first time on appeal.

explain why the circuit court could not credit the testimony of the Seller's manager on these topics. Only in its reply brief does the Buyer attempt to pull together detailed arguments to challenge the circuit court's fact finding on this issue. In any case, we reject this argument because the Buyer again effectively asks us to reweigh the relative merits of the evidence before the circuit court and to make credibility findings, which is not our role.

¶32 In addition, the Buyer argues that the circuit court should have dismissed the entire specialty contracts concept as irrelevant, because the Seller took the position at trial that it had not "set aside" any particular cranberries for resale after the Buyer rejected the eight orders. Whatever the Buyer means to convey in talking about the Seller failing to "set aside" cranberries following the Buyer's breaches, this argument appears at a minimum to contradict the Buyer's acknowledgment elsewhere in its briefing, as we have explained, that fungible goods resold pursuant to WIS. STAT. § 402.706 need not be those literally identified in the breached contract, and that an aggrieved seller of tangible goods need not necessarily segregate any particular set of the goods for the buyer. *See* ***Apex***, at 1005.

¶33 Having addressed the sliced cranberry and specialty contract sales, we turn to what remains by the Buyer's own account, namely, the following two non-specialty sales by the Seller of what the Buyer asserts were whole cranberries in advance of the Graceland sale: January 11, 2013, 120 pounds, at 64 cents per pound; February 6, 2013, 6,520 pounds, at 72 cents per pound.

¶34 We first address the February 6 sale. The circuit court did not make a specific finding on the point, but the Seller argues that the circuit court's ultimate decision is supported by undisputed trial testimony that the February 6

sale was of sliced, not whole, cranberries. The witness testified that the witness believed that all invoices in a consolidated exhibit, including the invoice for the February 6 sale, reflected sales of sliced cranberries. In reply, the Buyer points to the fact that, after testifying that all invoices reflected sales of sliced cranberries, the witness agreed with the questioner that one of the invoices, for a January 11, 2013 sale, reflected the sale of both sliced and whole cranberries. However, the Buyer points to nothing else in this testimony to suggest that the February 6 sale, as opposed to the January 11 sale, involved whole cranberries, and thereby concedes the point.

¶35 This leaves a single, non-specialty sale of whole cranberries: January 11, 2013, for 120 pounds at 64 cents per pound. The Seller suggests that the circuit court was entitled to view such a small order as insignificant in establishing a resale price for the massively larger rejected orders. The Buyer does not challenge this suggestion that the sale price could have been inflated in some manner by the small size of the order. Rather, the Seller only responds as follows: "But in fact, the [January 11, 2013 sales] price was at the low end of the range of prices seen from October 2013 to March 2014." The Buyer's argument assumes that the sales that we have concluded the circuit court had grounds to ignore should have been factored in. We reject the Buyer's only argument on this topic on that basis.

¶36 Given our conclusion that the circuit court could reasonably distinguish all 18 cranberry sales by the Seller after November 27, 2012, when the Buyer rejected the eight loads ordered in October 2011, we see no persuasive argument by the Buyer on the "reasonably conforming" topic as it relates to these 18 sales.

¶37 The Buyer substitutes exaggeration for legal argument, repeatedly making the obviously meritless assertion that the rejected cranberries were not "related in any way at all" to those sold to Graceland. This position fails to come to grips with the fact that it was the same Seller selling the same fungible product in the same market following the same harvest season (2012) in which the Buyer breached, and fails to come to grips with the court's finding that the Seller, using reasonable efforts, could not find a buyer for a large shipment of whole cranberries until it struck the Graceland deal.

¶38 We now turn to the topic of container sizes. The Buyer argues that the cranberries sold to Graceland were not reasonably conforming to the rejected cranberries (and also that the sale to Graceland was not "commercially reasonable," a topic addressed in the following section of this opinion), because the cranberries that the Buyer ordered from the Seller were to be packed in 40-pound containers, while Graceland took its cranberries in 1000-pound containers. This is significant, the Buyer contends, because cranberries packed in smaller containers always sell for more than those packed in larger containers. However, the trial testimony to which the Buyer now directs us as authority for the concept that bigger containers of cranberries always yield lower prices, or must have produced lower prices in this case, is vague and inconclusive. Moreover, there was testimony at trial that Graceland simply preferred to receive these cranberries in larger containers, and the circuit court found that this packaging preference did "not change the type of cranberries that were resold." The Buyer fails to provide us with a sound reason to disturb this finding.

¶39 Separately, the Buyer argues that awarding seller's resale damages is inappropriate because the Buyer contracted to buy 2011 cranberries, while some or all of the cranberries sold to Graceland were 2012 cranberries. This argument

ignores the timeline of events established by the circuit court and summarized above. The Buyer led the Seller to believe, all the way until the end of the 2012 harvest season, that the Buyer would take shipments on the eight rejected loads based on contracts struck in October 2011. The Buyer fails to explain why we should conclude that the seller's resale remedy is not available here when the Buyer pushed these eight transactions to the end of a new harvest season, and only then rejected the orders.

¶40 For these reasons, we conclude that the Graceland sale involved a fungible product that reasonably conformed to the product identified in the breached contracts.

C. "In good faith and in a commercially reasonable manner."

¶41 The Buyer's second argument is that the circuit court erred as a matter of law in concluding that the Seller's sale to Graceland was done "in good faith and in a commercially reasonable manner," as required in WIS. STAT. § 402.706(1). More specifically, the Buyer argues that "[n]o evidence presented at trial supports the [Seller's] contention that [the Seller was] forced to take a loss on [the Buyer's rejected] cranberries because the market for cranberries dramatically fell at some unspecified time in 2012 or 2013," and that the Seller "failed to present any evidence suggesting" that "the market dropped so sharply that [the Seller was] forced to sell at a huge loss." We reject this argument for the following reasons.

¶42 Official comment 5. to U.C.C. § 2-706 explains that, whether a resale was done "in good faith and in a commercially reasonable manner" "depends upon the nature of the goods, the condition of the market and other circumstances of the case," and that appropriate delay in making a purported

resale "cannot be measured by any legal yardstick or divided into degrees."[12] In addition, the court in ***Apex Oil*** makes the common sense point that if, in fact, "no reasonable market existed at [the] time [performance was due], no doubt a delay may be proper and a subsequent sale may furnish the best test, though confessedly not a perfectly exact one, of the seller's damages." ***Apex Oil***, 855 F.2d at 1006 (quoting 4 ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-706:25 (3d ed.1983)).

¶43 Based on all of the evidence presented at trial, the circuit court found that the Seller made "reasonable efforts" to resell the rejected cranberries, and that the sale to Graceland was "done within a reasonable time period." As noted above, the court credited testimony that a representative of the Seller "made attempts to resell the balance of the contracted cranberries, both domestically and internationally[,] through its standard marketing efforts, which included contract and spot sales, through its websites, directly to customers and through various brokers."

¶44 The Buyer again points to the Seller's sales of cranberries at markedly higher prices than 40 cents per pound between November 27, 2012, and March 15, 2013. The Buyer properly cites to Comment 3 to U.C.C. § 2-706, which explains that "[e]vidence of market or current prices at any particular time or place is relevant … to 'the question of whether the seller acted in a

[12] The official comments to the Uniform Commercial Code are reproduced in the Wisconsin Statutes Annotated. Our supreme court has favorably quoted the observation that the official comments "'are indispensable to an understanding of the objectives and purposes of the Uniform Commercial Code.'" ***Mayberry v. Volkswagen of America, Inc.***, 2005 WI 13, ¶22 n.12, 278 Wis. 2d 39, 692 N.W.2d 226 (quoting Acknowledgment: Uniform Commercial Code Comments, WIS. STAT. ANN. xi (West 2003)).

commercially reasonable manner in making the resale.'" However, we have explained above why the circuit court could reasonably have found that these sales at higher prices were different in kind from the large volume sale of whole cranberries to Graceland.[13]

¶45 As for the concept of "good faith," the circuit court implicitly found that the Graceland sale was an honest, arms length transaction, with no evidence that the Seller had allowed the cranberries sold to Graceland to deteriorate or degrade, lessening their value. And, the Buyer fails to point to any evidence that the Seller failed to take advantage of market conditions, or unreasonably delayed in light of existing market conditions, in making the large volume sale of whole cranberries to Graceland at the earliest practicable time at the highest possible price.

¶46 Having rejected the only arguments advanced by the Buyer on this topic, we conclude that the Graceland sale was executed "in good faith and in a commercially reasonable manner."

[13] The Buyer also makes arguments based on the prices of cranberries that the Seller sold before the Buyer rejected the eight contracts in November 2012. However, the circuit court could reasonably have assigned these earlier sales little weight, because it is undisputed that the 2012 season was still taking shape as a market at the time of rejection, because the Buyer acknowledges that the cranberry market is volatile, and because a seller's resale remedy arises only after the seller has a need to resell the rejected goods. In sum, the Buyer fails to persuade us that the circuit court should have placed weight on pre-Buyer's breach sales by the Seller in light of all circumstances. Instead, the court properly focused on what the Seller faced in trying to make a good-faith resale of the rejected cranberries at the highest possible price starting on November 27, 2012.

D. 2011 Cranberries

¶47 The Buyer's third argument is frivolous. It rests on the false premise that this court reweighs conflicting evidence to find facts and makes credibility findings. The argument is that the circuit court should have found that the Seller "sold its entire stock of 2011 cranberries prior to November 2012," when the market price was higher than it became in 2013, and on that basis concluded that the Seller could not have been damaged at all by the Buyer's breaches. However, the Buyer does not dispute that there was trial evidence that clearly supports a finding that the Seller had not sold all of its 2011 cranberries by November 2012. Specifically supporting this finding are the following: an email sent by the Seller to the buyer, on the day before the Buyer announced its rejection of eight orders, stating, "We can give you either 2011 crop or 2012 crop" (a statement that would have made no sense if 2011 cranberries had not been available); and eyewitness testimony from the Seller's manager that, at this same time, he personally verified the presence of 2011 crop in storage.

III. INCIDENTAL DAMAGES BASED ON STORAGE CHARGES

¶48 The Buyer challenges the decision of the circuit court to award the Seller one cent per pound per month for the Seller's freezer-storage costs for holding the volume of cranberries rejected by the Buyer, during the period January 2012—March 2013. We first briefly explain the court's ruling and then address the Buyer's challenges.

¶49 As stated above, the court awarded the Seller, as incidental damages arising from the Buyer's breaches, monthly freezer-storage costs for 322,240 pounds of cranberries, the volume rejected by the Buyer. *See* WIS. STAT. § 402.706(1) (incidental damages allowed) and WIS. STAT. § 402.710 (defining

"commercially reasonable" incidental damages). The court concluded that the rate of one cent per pound per month was "reasonable" for storage of frozen cranberries, as the Buyer recognized in agreeing to that rate in five of the ten contracts. In addition, there was testimony that this is a standard freezer-storage charge in the industry.[14]

¶50 The Buyer argues that, because only five of the ten contracts provided for these storage costs, and the Buyer paid freezer-storage charges on two of those, it would be improper "to award freezer charges on contracts where the parties intentionally and mutually decided that [the Buyer] would not pay freezer charges." However, as the Seller points out, this argument overlooks the fact that these storage costs beginning in January 2012 were included only in the first set of five contracts, which called for delivery of some orders after January 1, 2012, and were not included in the second set of contracts, which called for delivery of all orders before January 1, 2012. The intent of the parties to the contracts is evident. There was no need to assign storage costs to the Buyer beginning in January 2012 for cranberries that the parties anticipated would all be delivered before January 1, 2012.

¶51 The Buyer also suggests that the court lacked a sufficient basis to conclude that purchasers of cranberries from the Seller between January 2012 and March 2013 did not compensate the Seller for the freezer-storage costs that the

[14] For a second time in this opinion, we remind counsel for the Buyer about unfounded or misleading assertions. The Buyer states in its principal brief, "The freezer charges imposed by the [Seller] do not correspond with the [Seller's] actual costs to store the cranberries." The transcript page cited by the Buyer for this proposition does not contain an assertion by a witness that there is no correspondence. If anything, the cited testimony implies that there could be a correspondence ("I'd have to do the calculations…. I don't have those figures.").

Seller incurred in storing the 322,240 pounds delivered to Graceland. The Buyer's argument appears to be a variation on the concept, discussed above, that because the cranberries that were sold to Graceland did not have to consist of the same literal batch of cranberries that would have gone to the Buyer absent the breaches, it would be unfair to now hold the Buyer responsible for the freezer-storage costs for cranberries that may have been sold to a different buyer in a different form (*i.e.*, sliced, or in a specialty order.).

¶52 To the extent that this is not merely a recycling of one or more of the arguments that we have already rejected in the discussion above, it appears to be based on speculation alone. The circuit court had a reasonable basis to conclude that the Seller incurred 15 months of freezer-storage charges for whole cranberries that it obtained, stored, and ultimately sold to Graceland after the Buyer rejected the same volume of whole cranberries. It was a fair and reasonable assessment of the facts to conclude that, if the Buyer had taken the shipments it contracted to receive in October 2011, the Seller would not have incurred these freezer-storage costs, for which it was not otherwise compensated. *See* ***Town of Fifield v. State Farm Mut. Auto. Ins. Co.***, 119 Wis. 2d 220, 235-36, 349 N.W.2d 684 (1984) (damages calculation "not an exact science," but may result from "a fair and reasonable approximation") (quoting ***Metropolitan Sewerage Comm. v. R.W. Const., Inc.***, 78 Wis. 2d 451, 463, 255 N.W.2d 293 (1977)).

CONCLUSION

¶53 For these reasons, we affirm both the seller's resale damages and the incidental damages awarded to the Seller.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.