

MARKETING AGREEMENT

[Containing details as required by the APAC Rules in respect of Export Agents]

[Consignment Agreement]

made and entered into between

1. THE EXPORT AGENT:

Name:	
Registration Number:	
Physical Address:	
Postal Address:	
Telephone Number/s:	
Facsimile Number/s:	
E-mail Address:	
VAT Registration Number:	
Export Registration Number:	
Represented by:	

And

2. THE SUPPLIER:

Name:	
Registration Number:	
Physical Address:	
Postal Address:	
Telephone Number/s:	
Facsimile Number/s:	
E-mail Address:	
VAT Registration Number:	
Bank Account details:	
Represented by:	

1. INTRODUCTION

- 1.1. The Supplier is a producer of fresh fruit and wishes to appoint the Export Agent to market, distribute and sell such fruit on its behalf.
- 1.2. The Export Agent is willing to do so on certain terms and conditions and therefore the Parties agree as follows.

2. INTERPRETATION AND DEFINITIONS

- 2.1. In this agreement, unless inconsistent with the context, the following words and expressions shall bear the meanings assigned thereto and cognate words and expressions shall bear corresponding meanings:
 - 2.1.1. "**Agreement**" means the agreement reached between the parties set out herein including any annexures hereto;
 - 2.1.2. "**Business Day**" means any day other than a Saturday, Sunday or public holiday in the Republic of South Africa;
 - 2.1.3. "**Commission**" means the commission payable to the Export Agent as set out in clause 10;
 - 2.1.4. "**Costs**" means all costs incurred by the Export Agent on behalf of the Supplier in relation to the export, marketing, sale and distribution of Products;
 - 2.1.5. "**the Export Agent**" means _____;
 - 2.1.6. "**Gross Proceeds**" means the proceeds received by the Export Agent in respect of the sale of Products without deduction;
 - 2.1.7. "**Incoterms**" means the International Commerce Terms 2010, as published by the International Chamber of Commerce, setting out rules and standards for the transportation and delivery of products;
 - 2.1.8. "**Net Proceeds**" means Gross Proceeds less Costs and Commission;
 - 2.1.9. "**PPECB**" means the Perishable Products Export Control Board, a statutory body, which board is responsible to conduct quality testing and certify that product comply with export quality requirements;
 - 2.1.10. "**Products**" means fresh fruit produced by or on behalf of the Supplier meeting the export quality requirements and standards laid down by the Export Agent from time to time;
 - 2.1.11. "**Product Specifications**" means the quality and other specifications required by the Export Agent of the Supplier, which specifications may be provided by the Export Agent to the Supplier from time to time;
 - 2.1.12. "**Season**" shall mean in the case of grapes from September to April of each year and in case of citrus from March to November of each year and in the case of pome fruit from January to October of each year; and
 - 2.1.13. "**the Supplier**" means the supplying entity listed on the front page hereof.

- 2.2. In this Agreement, words importing the singular shall include the plural, and *vice versa*, and words importing the masculine gender shall include the feminine and neuter genders, and *vice versa*, and words importing persons shall include partnerships, trusts and bodies corporate, and *vice versa*.
- 2.3. The headings to the paragraphs to this Agreement are inserted for reference purposes only and shall not affect the interpretation of any of the provisions to which they relate.
- 2.4. Each of the provisions contained in this Agreement shall be construed as independent of every other such provision to the effect that if any provisions of this agreement shall be determined to be illegal, invalid and/or unenforceable then such determination shall not affect any other provisions of this agreement all of which shall remain in full force and effect.
- 2.5. The parties acknowledge and agree that they have had equal opportunity to take legal advice and to negotiate and amend this agreement and the "*contra proferentum*-rule" (and any other rule of interpretation that provides that this agreement shall be interpreted against the party responsible for the drafting or preparation of this Agreement) shall not apply.
- 2.6. If any provision in a definition is a substantive provision conferring rights or imposing obligations on any party, effect shall be given to it as if it were a substantive clause in the body of the Agreement, notwithstanding that it is only contained in the interpretation clause.

3. APPOINTMENT

- 3.1. The Supplier hereby appoints the Export Agent to market, distribute and sell the Products in accordance with the terms and conditions of this Agreement and the Export Agent hereby accepts such appointment.
- 3.2. The Export Agent shall market, sell and distribute the Products on a consignment basis save where indicated otherwise per Product/s by the Parties by completing Annexure "A" hereto (in the event of fixed prices or minimum guaranteed prices) or by completing Annexure "B" hereto (pooling arrangements).
- 3.3. It is recorded, for the sake of clarity, that in the event of a fixed price, MGP or pooling arrangement the following clauses of this Agreement shall be amended as set out in Annexures "A" and "B" respectively, namely clause 8 (Inspection on arrival and Quality Report), clause 9 (Payment of Proceeds) and clause 10 (Commission). The remainder of the Agreement shall continue to apply without change.

4. COMMENCEMENT AND DURATION

This Agreement shall commence on _____ ("**the Commencement Date**") and shall continue in force for a minimum period of 1 (one) Season and shall thereafter be renewed automatically and continue in force indefinitely until terminated by either party on written notice of at least 60 (sixty) days prior to the commencement of the next Season and subject further to provisions of termination set out in clause 13 below.

5. OBLIGATIONS OF THE SUPPLIER

- 5.1. The Supplier shall:

- 5.1.1. at least _____ weeks prior to the commencement of each Season provide the Export Agent with a crop estimate setting out an estimate of its Products, which estimate shall contain details such as fruit kind, variety, specifications, volume, grade and any other specifications/information as may be required by the Export Agent;
- 5.1.2. notify the Export Agent in writing on a continuous basis of any change in such estimates;
- 5.1.3. pack and label Products into cartons and with labels bearing such trade marks and other specifications directed by the Export Agent, which cartons and labels shall indicate at least the following information, namely production unit code of the Supplier, the name and address of the Export Agent and any prescribed specifications of the relevant Products concerned, before delivery to the Export Agent, failing which the Export Agent will debit the Supplier for additional costs as may be incurred in ensuring the correct labeling;
- 5.1.4. deliver full pallets of Products according to the palletization directions issued by the Export Agent, failing which the Export Agent will debit the Supplier for such additional costs as may be incurred in the handling, marketing and distribution of such incomplete pallets of Products according to charges and procedures determined by the Export Agent;
- 5.1.5. adhere to all other reasonable instructions of the Export Agent in respect of picking, cooling, transportation and delivery of the Products;
- 5.1.6. abide by all applicable Product Specifications;
- 5.1.7. abide by all applicable protocols and standards in respect of handling the Products to ensure that the quality of Products is not adversely affected to the extent that it can no longer be sold in the class or market for which it was initially packed; and
- 5.1.8. abide by instructions of the Export Agent in relation to market segmentation and strategies for the marketing of the Products.

6. OBLIGATIONS OF THE EXPORT AGENT

- 6.1. The Export Agent shall:
 - 6.1.1. place orders for delivery of Products on the Supplier from time to time during the duration of this Agreement and shall provide the Supplier with the necessary Product Specifications and other directions in respect of any order placed by the Export Agent in accordance with the requirements of the specific market segmentation and/or strategy to be employed by the Export Agent in the marketing, sale and distribution of the Supplier's Products;
 - 6.1.2. at all times comply with the rules and regulations laid down by the PPECB in respect of the maximum time periods allowed between packing and shipping of Products;
 - 6.1.3. on commencement of shipping of the Products and thereafter whenever a material change take place regarding the market conditions and/or condition of the Product concerned, communicate in writing such information to the Supplier;
 - 6.1.4. supply the Supplier with the following information:
 - 6.1.4.1 the amount and nature of each deduction in respect of expenses incurred in connection with the sale and delivery of the Products or in respect of any

other service rendered by the Export Agent to the Supplier at the written request of the Supplier;

6.1.4.2 particulars of Products that have in terms of any applicable law have been found to be unsuitable to be presented for sale in any particular market or have for another reason been withdrawn from sale;

6.1.5. utilize the most recent crop estimate provided by the Supplier and which is on record not more than 3 (three) weeks prior to the date of shipping for the purposes of making freight bookings. If the volume delivered by the Supplier is different from the volume used for the freight bookings as calculated, any penalties and/or debt freight costs incurred shall be for the account of the Supplier;

6.1.6. exercise due care and diligence in the marketing, distribution and sale of the Supplier's Products in accordance with the terms and conditions of this Agreement.

6.2. The Supplier acknowledges and agrees that the Export Agent shall be entitled to appoint any of its group companies and/or agents and/or sub-contractors to market, distribute and sell the Products and to provide such group companies and/or agents and/or sub-contractors with such powers as it may deem necessary to exercise such actions in terms hereof.

7. DELIVERY AND PASSING OF RISK

7.1. The Supplier shall deliver the Products to the Export Agent at the intake points specified by the Export Agent in writing in respect of each order of Products.

7.2. Delivery shall be deemed to have taken place when:

7.2.1. the Products are delivered at the intake points;

7.2.2. the Products have been accepted and approved by the Export Agent by signature of the relevant intake documents; and

7.2.3. the Products are approved by the PPECB as suitable for export; and

7.2.4. successful inspection by relevant authorities as may be required by the destination country in addition to the approval referred to in clause 7.2.3, including but not limited to, phyto sanitary inspections as well as any other exporting authority.

7.3. On delivery and acceptance in accordance with clause 7.2 above, the risk in the Products, excluding risk of latent, progressive or inherent risks, shall pass to the Export Agent.

7.4. For the sake of clarity, it is agreed that latent, inherent and progressive defects include any inherent weaknesses that is dormant, hidden or suppressed at the time of delivery to and acceptance by the Export Agent. This also includes, but is not limited to, any product defects that are caused as a result of incorrect spraying/harvesting or packing methods/excessive minimum residue levels, etc. Such risk will remain with the Supplier regardless of which market segment the Products are sold in.

7.5. The Export Agent undertakes to handle all Products within the prescribed protocols, including temperature and handling protocols of the specific export markets, but for the sake of clarity it is recorded that Products shall be required to have such inherent quality as would enable the Products to withstand the relevant protocols applicable to each export market, and such risk shall remain with the Supplier.

8. INSPECTION ON ARRIVAL AND QUALITY REPORT

- 8.1. The Export Agent shall obtain from its customer a quality control report and/or arrival report within 72 (seventy two) hours after first arrival at its customer's depot.
- 8.2. The quality control report will detail the quality of the Product on arrival and will report on the compliance of the Product against the Product Specification, handling and temperature protocols.
- 8.3. The Export Agent shall provide such report to the Supplier within 24 (twenty four) hours of receiving the report and, in the event of quality defects or other problem/s affecting the value of the Products, the Export Agent shall forthwith:
 - 8.3.1. ensure temperature logs are downloaded and forwarded by the receiver of the Products to the Export Agent;
 - 8.3.2. assess whether any damage to or deterioration of the Products reflects anything other than damage or deterioration of an inherent nature, including temperate deviations, shipping delays of more than 3 (three) days, controlled atmosphere malfunctions, or steri failure;
 - 8.3.3. inform the applicable insurer of the situation and, if necessary, call for an independent survey of the cargo; and
 - 8.3.4. keep the Supplier fully informed in writing in respect of all matters relating to the potential claim and the disposal of the Products.
- 8.4. The Supplier shall on request be entitled to conduct its own survey at its cost and shall advise the Export Agent in writing of its intention to inspect the Products within 24 (twenty four) hours of receipt of the quality report and shall be entitled to make written submissions to the Export Agent with regard to the cause of any defects and/or damages.
- 8.5. The Export Agent undertakes to consult with the Supplier on how any non-compliant Product is to be dealt with provided that the Export Agent shall not be liable for any losses, damages or claims suffered by the Supplier in respect of defective Products caused by inherent, latent or progressive defects.

9. ACCOUNTING AND PAYMENT OF PROCEEDS

- 9.1. The Export Agent shall market, sell and distribute the Products on a consignment basis. In the event that a minimum guaranteed price ("**MGP**") or fixed price is payable in respect of any specific consignment, the Parties will complete Annexure "A" attached hereto.
- 9.2. If agreed between the parties, the Export Agent will pay the Supplier an agreed advance, 14 (fourteen) days after shipment.
- 9.3. Within 12 (twelve) weeks after shipping of the Products delivered to the Export Agent by the Supplier, the Export Agent shall pay the Supplier Net Proceeds in respect of such consignment, subject to any deductions referred to in clause 9.4 below.
- 9.4. Before making payment to the Supplier in accordance with clause 9.3 above, the Export Agent shall be entitled to set off and deduct:

- 9.4.1. any amount owing by the Supplier to the Export Agent from whatever cause and howsoever arising,
 - 9.4.2. any Costs incurred by the Export Agent on behalf of the Supplier in relation to the marketing, sale and distribution of the Products, including but not limited to, any costs, expense, losses or reduced prices suffered by the Export Agent as a result of the Suppliers' Products being defective or where the quality thereof leads to a reduction of value or compromised price;
 - 9.4.3. the amount of any under recovery by the Export Agent or overpayment to the Supplier as a result of a first advance payment made in accordance with clause 9.2 above; and
 - 9.4.4. the Commission due to the Export Agent;
- 9.5. The payments made by the Export Agent to the Supplier shall be made by electronic funds transfer ("**EFT**") to such bank account details nominated by the Supplier in writing and recorded on the front page of this Agreement.
- 9.6. On payment in accordance with clause 9.3 above, the Export Agent shall provide a summarized statement to the Supplier on which the following particulars are indicated:
- 9.6.1. the date/s of sale of the Products concerned;
 - 9.6.2. the number of the delivery note, if any, that accompanied the consignment;
 - 9.6.3. the class or grade of Products, the quality thereof and the Gross Proceeds realised;
 - 9.6.4. the amount and nature of each deduction in respect of Costs incurred in connection with the sale and export of the Products concerned or in respect of any other service rendered by the Export Agent to the Supplier at the written request of the Supplier;
 - 9.6.5. the amount, rate or scale of Commission due to the Export Agent in respect of each consignment;
 - 9.6.6. particulars of defective Products or Products withdrawn from sale for any other reason;
 - 9.6.7. the amount of the Net Proceeds payable to the Supplier.

10. COMMISSION

The Export Agent shall be entitled to a commission of ___% on a ___ basis.

11. INSURANCE

- 11.1. On written request by the Supplier on/before the Commencement Date, the Export Agent shall take out and maintain at the expense of the Supplier, the following insurance in respect of the Products:
- 11.1.1. marine and transit insurance; and/or
 - 11.1.2. product liability insurance; and/or

- 11.1.3. export credit insurance; insurance; and/or
- 11.1.4. theft and dishonest conduct insurance; and/or
- 11.1.5. defective/hazardous fresh Product insurance;

[Select applicable]

- 11.2. The terms and conditions of the respective policies shall be made available to the Supplier on request.

12. CONFIDENTIALITY

- 12.1. The parties acknowledge that the information exchanged between them in connection with this Agreement, including all information relating to the business activities and operations of each of the parties, was exchanged in strict confidence.
- 12.2. Each of the parties undertakes to maintain and protect the confidentiality of all information which it received from the other party.
- 12.3. The obligation with regard to the maintenance of confidentiality as hereinafter provided for shall remain binding on the parties notwithstanding the termination of this agreement for any reason.

13. BREACH AND TERMINATION

Should either Party ("**the Defaulting Party**"):

- 13.1. commit any act of insolvency as defined in the Insolvency Act, 1936; or
- 13.2. be wound up, whether provisionally or finally and whether compulsorily or voluntarily or be placed under judicial management; or
- 13.3. enter into any arrangement or compromise with the general body of its creditors; or
- 13.4. be the subject of any resolution passed for its winding up or dissolution; or
- 13.5. breach any of the terms and conditions of this Agreement,

then the other Party ("**the Aggrieved Party**") shall be entitled forthwith in the case of clauses 13.1 to 13.4, both inclusive, and in the case of clause 13.5 where the Defaulting Party has failed to remedy such breach within a period of 14 (fourteen) days after receipt of written notice by the Aggrieved Party requiring it to do so, to claim specific performance or to cancel this Agreement by written notice to that effect given to the Defaulting Party, either of which shall be without prejudice to any other rights which the Aggrieved Party may have at law.

14. DISPUTE RESOLUTION

- 14.1. Any dispute, question or difference arising at any time between any of the Parties with regard to any matter arising out of this Agreement shall, upon the request of any Party made to the other Party be referred to the mediation/arbitration process conducted by the Fresh Produce Exporters Forum.

- 14.2. Should such process be unsuccessful or the outcome is non-binding, either party may refer the matter to arbitration to be held in terms of this clause 14.
- 14.3. The arbitration shall be held in Cape Town in accordance with the provisions of the Arbitration Foundation of South Africa ("**AFSA**") and:
- 14.4. the arbitration shall be informal; and
- 14.5. the Arbitrator shall have the discretion to determine the procedure to be adopted at the arbitral hearing.
- 14.6. The appointment of the Arbitrator will be agreed upon between the Parties, but failing agreement between them within a period of 14 (fourteen) days after the arbitration has been requested, any of the Parties shall be entitled to request the President for the time being of the Law Society of the Cape of Good Hope, whom failing, the chief executive officer/s of the Law Society of South Africa, to make the appointment and who, in making his appointment, will have regard to the nature of the dispute.
- 14.7. The decision of the Arbitrator shall be final and binding and shall not be subject to appeal.
- 14.8. The Parties acknowledge and agree that the provisions of this clause shall not preclude any of them from proceeding against any of the other of them in any court of competent jurisdiction where relief is being sought on an urgent and interim basis.

15. NOTICES AND DOMICILIA

- 15.1. Each of the parties chooses *domicilium citandi et executandi* ("**domicilium**") for the purposes of the giving of any notice, the serving of any process and for any other purposes arising from this Agreement at its respective address set forth on the front page of this Agreement.
- 15.2. Each of the parties shall be entitled from time to time, by written notice to the other to vary its *domicilium* to any other address which is not a post office box or poste restante and which is in the Republic of South Africa.
- 15.3. Any notice given and any payment made by a party to any of the others ("**the addressee**") which:
- 15.3.1. is delivered by hand during the normal business hours of the addressee at the addressee's *domicilium* for the time being shall be presumed, unless the contrary is proved by the addressee, to have been received by the addressee at the time of delivery;
 - 15.3.2. is posted by prepaid registered post (or its equivalent) to the addressee at the addressee's *domicilium* for the time being shall be presumed, unless the contrary is proved by the addressee, to have been received by the addressee on the fifth day after the date of posting;
 - 15.3.3. is transmitted by telefax or e-mail to the addressee shall be presumed, unless the contrary is proved by the addressee, to have been received by the addressee within 2 (two) hours of transmission.
- 15.4. Where, in terms of this agreement any communication is required to be in writing, the term "writing" shall include communications by e-mail or telefax. Communications by e-mail, or telefax shall, unless the contrary is proved by the addressee, be deemed to have been received by the addressee one hour after the time of transmission.

15.5. Notwithstanding anything to the contrary contained or implied in this Agreement, a written notice or communication actually received by one of the parties from another including by way of facsimile transmission or electronic mail shall be adequate written notice or communication to such party.

16. GENERAL

16.1. No relaxation, indulgence or concession granted by any party to the other(s) in respect of any of its obligations hereunder shall constitute a novation of any part of this Agreement nor otherwise prejudice, derogate from, or affect, any rights which the party granting the relaxation, indulgence or concession may have against the party(ies) in whose favour such grant shall have been made.

16.2. No variation of, or addition or agreed cancellation to this agreement shall be of any force or effect unless it is reduced to writing and signed by or on behalf of the parties.

16.3. The Agreement shall be interpreted and governed in all aspects in accordance to the laws of the Republic of South Africa.

16.4. The Parties consent to the jurisdiction of the Cape Provincial Division of the Supreme Court of the Republic of South Africa in respect of any matter flowing from this Agreement.

SIGNED AT _____ ON THIS _____ DAY OF _____ 20____.

AS WITNESSES:

1. _____

2. _____

for and on behalf of
THE EXPORT AGENT,
duly authorised thereto

SIGNED AT _____ ON THIS _____ DAY OF _____ 20____.

AS WITNESSES:

1. _____

2. _____

For and on behalf of
THE SUPPLIER,
duly authorised thereto

FIXED PRICE / MINIMUM GUARANTEED PRICE (“MGP”)

1. PRODUCTS

1.1 The Parties agree that the following Products shall be subject to a Minimum Guaranteed Price (“MGP”) / Fixed Price as indicated below, namely:

Variety:	Pack week:	Volume:	No of cartons:	Class:	Applicable Incoterms level:	MGP:	Fixed Price:

1.2 The Supplier acknowledges and agrees that only Products complying with the Product Specifications and any minimum requirements as may be advised by the Export Agent, from time to time in writing, shall be subject to the payment of the MGP/Fixed Price.

2. INSPECTION ON ARRIVAL AND QUALITY CONTROL REPORT

2.1 In the event that the quality control report and procedures set out in clause 8 of the Agreement to which this Annexure is attached reveal non-compliant Product due to latent, progressive or inherent quality defects, the MGP/Fixed Price shall not be payable by the Export Agent to the Supplier and payment due to the Supplier shall be calculated on the same basis as is applicable in respect of consignment sales.

ANNEXURE A [CONTINUE]

2.2 The Supplier acknowledges and agrees that it shall have no claim against the Export Agent in such event as a result of non-payment of the MGP/Fixed Price and the Supplier hereby undertakes to indemnify and hold the Export Agent harmless against any such claims.

3. PAYMENT TERMS

3.1 Within 12 (twelve) weeks after shipping of the Products, the Export Agent shall pay the Supplier the MGP/Fixed Price due, if applicable, subject to any deductions referred to in clause 9.4 of this Agreement into the bank account nominated by the Supplier in writing on the front page of this Agreement.

3.2 In the event that the Net Proceeds realised on the sale of Products set out above should exceed the agreed MGP, the amount in excess of the MGP shall be divided between the Export Agent and the Supplier on the following basis:

3.3 In the event of a fixed price agreement between the Export Agent and the Supplier, the provisions of clause 3.2 shall not be applicable.

POOLING ARRANGEMENTS

1. The Supplier hereby consents to the Products set out below to be combined in a pool together with other products similar to the Products on the following basis:
 - 1.1 Description of Pool:

 - 1.2 Duration of pooling arrangement:

 - 1.3 Estimated number of pool participants as at commencement of Season:

 - 1.4 Region of pool participants:

 - 1.5 Proportionate Share in respect of loss/profit:

[other information?]

2. The Export Agent agrees that products combined together for purposes of a pooling arrangement shall be of similar class, size and quality unless otherwise agreed between all pool participants in writing prior to exporting the products concerned.
3. The Net Proceeds of the pool, after deduction of all Costs relating to the sale and export of the products which have been combined for purposes of the pooling arrangement, shall be distributed between the pool participants, in such proportions as all pool participants may agree in writing prior to exporting the products concerned. Any such agreement shall set out the extent of each pool participant's participation portion in the pooling arrangement or the manner in which such pool income shall be shared. Payment of each pool participant's portion shall be made within 12 (twelve) weeks after shipping.
4. Any losses suffered by pool participants, after deduction of all costs relating to the sale and export of the products which have been combined for purposes of the pooling arrangement, shall be shared in the same proportion as stipulated in sub-paragraph 3, unless the pool participants agree otherwise in writing prior to exporting the products concerned, in which event, the extent of the participation portion of each pool participant in such losses or the manner in which such pool losses shall be shared, shall be recorded in writing.
5. The Supplier shall be entitled at any time to withdraw from the pooling arrangement by giving written notice of such withdrawal to the Export Agent, provided however that:
 - 5.1 such withdrawal shall only take effect when all products of that pool participant which is subject to a pool arrangement, have been sold and accounted for by the Export Agent; and
 - 5.2 the Export Agent shall, forthwith, inform all pool participants of the withdrawal of the Supplier as a pool participant, in writing, from the pooling arrangement.