

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE  
COMMERCIAL AND EQUITY DIVISION  
COMMERCIAL COURT

SCI 2010 398

IN THE MATTER OF TIMBERCORP SECURITIES LIMITED  
(IN LIQUIDATION) ACN 092 311 469

TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION)  
ACN 092 311 469 IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE  
2005 TIMBERCORP CITRUS PROJECT (ARSN 114 091 299)  
AND ORS

Plaintiffs

CERTIFICATE IDENTIFYING EXHIBIT


Date of document: 23 February 2010  
Filed on behalf of: the Plaintiffs

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This is the exhibit marked "**MAK-17**" now produced and shown to **MARK ANTHONY KORDA** at the time of swearing his affidavit on 23 February 2010.

Before me:



LUCY HANNAH KIRWAN  
Arnold Bloch Leibler  
Level 21, 333 Collins Street  
Melbourne 3000

An Australian Legal Practitioner within the  
meaning of the Legal Profession Act 2004

**Exhibit "MAK-17"**  
**Citrus Management Agreement for the**  
**2005 Timbercorp Citrus Project**

# **CITRUS MANAGEMENT AGREEMENT 2005 TIMBERCORP CITRUS PROJECT**

**CHIQUITA BRANDS SOUTH PACIFIC LIMITED  
ACN 002 687 961**

**CHIQUITA AGRIBUSINESS PTY LTD  
ACN 093 583 049**

**CITRUSCORP MANAGEMENT PTY LTD  
ACN 105 995 257**

**TIMBERCORP SECURITIES LIMITED  
ACN 092 311 469**

**TIMBERCORP LIMITED  
ACN 005 185 067**

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**CITRUS MANAGEMENT AGREEMENT**  
**2005 TIMBERCORP CITRUS PROJECT**

**DATED**     *19 May 2005*

**PARTIES**

1.     **CHIQUITA BRANDS SOUTH PACIFIC LIMITED ABN 41 002 687 961** of Level 2, 768 Lorimer Street, Port Melbourne in the State of Victoria (**Chiquita**).
2.     **CHIQUITA AGRIBUSINESS PTY LTD ABN 67 093 583 049** of Level 2, 768 Lorimer Street, Port Melbourne in the State of Victoria (**CAG**).
3.     **CITRUSCORP MANAGEMENT PTY LTD ACN 105 995 257** of Level 8, 461 Bourke Street, Melbourne, Victoria, 3000 (**CMPL**).
4.     **TIMBERCORP SECURITIES LIMITED ACN 092 311 469** of Level 8, 461 Bourke Street, Melbourne, Victoria, 3000 in its capacity as responsible entity of the Project under the Corporations Act (**Securities**).
5.     **TIMBERCORP LIMITED ACN 005 185 067** of Level 8, 461 Bourke Street, Melbourne, Victoria, 3000 (**Timbercorp**).

**BACKGROUND**

- A.     Securities proposes to establish a Project for the management and cultivation of a citrus orchard, the harvesting of citrus and the processing and marketing of citrus for commercial gain.
- B.     Securities will be the responsible entity of the Project for the purposes of the Corporations Act 2001 and will manage the Orchard on behalf of the Growers.
- C.     Securities has appointed or will appoint CMPL as independent contractor to cultivate and manage the Orchard and to procure the processing and marketing of the citrus.
- D.     CMPL wishes to engage Chiquita as an independent contractor to cultivate and manage the Orchard on the Land and to process and sell the Citrus on and subject to the terms of this Agreement.

**OPERATIVE PROVISIONS**

**1.     DEFINED MEANINGS**

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Words used in this document and the rules of interpretation that apply are set out and explained in the definitions and interpretation clause at the back of this Agreement.

## 2. COMMENCEMENT AND TERM

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This Agreement commences on the later of 1 June 2005 and the date of issue of a PDS for the Project by Securities, and unless terminated earlier under **clauses 14** or **16** or otherwise, terminates on the Termination Date.

### 2A SECURITIES' RIGHTS OF STEP-IN

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- (a) If:
- (i) Securities believes on reasonable grounds that CMPL may not properly perform its obligations under this Agreement to the extent that such non-performance may:
    - (A) give Chiquita a right to terminate this Agreement pursuant to **clause 14**; or
    - (B) result in a contravention of Securities' duties as Responsible Entity of the Project under Part 5C.2 of the Corporations Act; or
  - (ii) there is a change in control of CMPL or sale of the main and undertaking of CMPL,

Securities may elect to step-in and assume the rights, duties, obligations and liabilities of CMPL under this Agreement, by giving written notice to Chiquita notifying it of that election (**Step-in Notice**) without in any way releasing CMPL from those duties, obligations and liabilities which arose prior to or on the Step-in Date (as defined in **clause 2A(b)**) and without in any way affecting, altering, derogating, diminishing, prejudicing or waiving any remedies or rights Chiquita has against CMPL that arose prior to or on the Step-in Date (as defined in **clause 2A(b)**).

- (b) Subject to **clause 2A(c)**, immediately upon, and with effect from, Securities giving Chiquita a Step-in Notice (**Step-in Date**):
- (i) this Agreement will be amended with such modifications as are necessary to replace all references to CMPL with Securities;
  - (ii) Securities will be bound by and must comply with, perform and otherwise observe all duties, obligations and liabilities of CMPL under this Agreement, including duties, obligations and liabilities which have arisen prior to the Step-in Date and which have not been fully performed or discharged on or before the Step-in Date;
  - (iii) Securities will enjoy all the rights and benefits of CMPL under this Agreement; and
  - (iv) each party to this Agreement (other than CMPL in relation to duties, obligations and liabilities arising after the Step-in Date) acknowledges that it will continue to be bound by, and will continue to perform and observe, all of its duties, obligations and liabilities under this Agreement after the Step-in Date, having regard to the amendment of this Agreement in accordance with this **clause 2A(b)**.

- (c) If, at the time Securities gives Chiquita a Step-in Notice, Chiquita has previously given notice under **clauses 14.2(a) or 14.2(b) (Termination Notice)** and any default the subject of such notice has not been remedied to the reasonable satisfaction of Chiquita or if it is unable to be remedied:
  - (i) **clause 2A(b)** will have no effect in respect of the Step-in Notice until and unless CMPL remedies any default or circumstance giving rise to the Termination Notice to the reasonable satisfaction of Chiquita or if it is unable to be remedied, pays reasonable compensation within a period of 30 days after the final date by which that default or circumstance was otherwise required to be remedied under that Termination Notice in accordance with this Agreement (**Extended Period**); and
  - (ii) for the purposes of **clause 2A(c)(i)**, Chiquita will not be entitled to terminate this Agreement on the basis of the Termination Notice unless:
    - (A) the Extended Period has expired; and
    - (B) no Project Party (as the case may be) has remedied each default and/or circumstance giving rise to the Termination Notice to the reasonable satisfaction of Chiquita, or if unable to be remedied reasonable compensation has not been paid, within the Extended Period.
- (d) If at any time during the Term, Securities is removed as the responsible entity of the Project pursuant to the constitution of the Project and/or the Corporations Act 2001, then immediately prior to such removal, Securities will be deemed to have given a Step-in Notice to Chiquita under **clause 2A(a)** and the provisions of **clause 2A(b)(i)-(v)** will be deemed to have been effected immediately prior to such removal.
- (e) If at any time during the Term, Chiquita wish to terminate this Agreement, as a result of CMPL becoming an Insolvent or for any act or omission whatsoever in connection with Chiquita, other than those described in clauses 14.2(b) - (e):
  - (i) Chiquita must give Securities a notice of its intention to terminate the Agreement; and
  - (ii) Securities will be deemed to have given a Step-in Notice under clause 2A(a) on the date Securities receives the notice in accordance with clause 2A(e)(i), and the provisions of clause 2A(b) and (c) will apply with any necessary modifications, including the Extended Period ending at the earliest, 21 days after the date Securities receives the notice in accordance with clause 2A(e)(i).

### 3. ENGAGEMENT OF CHIQUITA

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#### 3.1 Engagement

CMPL engages Chiquita as an independent contractor to carry out the Services during the Term, on and subject to the terms and conditions of this Agreement.

### **3.2 Acceptance of engagement**

Chiquita accepts its engagement to carry out the Services during the Term on and subject to the terms and conditions set out in this Agreement.

### **3.3 Commencement of Orchard Services**

Chiquita is to commence the Orchard Services on the date of this Agreement. The other Services will commence as provided for in, or as contemplated by, this Agreement.

### **3.4 Additional services**

If CMPL wishes to engage Chiquita to provide any services other than and in addition to the Services during the Term (**Additional Services**), CMPL and Chiquita agree that they will enter into discussions in good faith and acting reasonably with the intention of reaching agreement as to the terms and conditions on which such Additional Services will be provided and the fee that will be payable to Chiquita in consideration for those Additional Services. However, if the parties are unable to reach such agreement in accordance with this **clause 3.4**, Chiquita will not be required to provide any such Additional Services and Chiquita will permit CMPL or its contractors to have access to the Orchard under **clause 9.2(a)** to carry out any such Additional Services at CMPL's sole cost and expense, provided the provision of such Additional Services will not unreasonably interfere with the provision by Chiquita of the Services.

## **4. ORCHARD SERVICES**

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### **4.1 Cultivation, maintenance and management services (Existing Orchard)**

In the period from the Commencement Date until 30 June 2005, Chiquita must cultivate, maintain and manage the Citrus Trees and the Existing Orchard, in a manner consistent with the Management Plan, in a good workmanlike and commercially responsible manner and to a standard consistent with Best Horticultural Practice, including the following.

#### **(a) (*Irrigation and fertilisation*)**

##### **(i) subject to:**

- (A)** Chiquita being provided with access to the Internal Irrigation Equipment and the Irrigation Infrastructure; and
- (B)** Chiquita being provided with access to the water available under the Water Licences,

irrigate the Existing Orchard using the Internal Irrigation System and the Irrigation Infrastructure;

- ##### **(ii)**
- ensure that any irrigation undertaken pursuant to **clause 4.1(a)(i)** is undertaken in accordance with efficient irrigation application management and salinity and groundwater monitoring and control practices;



- (iii) comply with all requirements of the Irrigation and Drainage Plan; and
- (iv) apply fertilisers and nutrients at the appropriate times.
- (b) (**Weed control**) take reasonable steps to ensure no impediment to Citrus Tree development and crop production as a result of weeds in the Existing Orchard.
- (c) (**Insects and Diseases**) keep the Citrus Trees free from insects and diseases which might damage or inhibit the growth of the Citrus Trees to the extent practicable.
- (d) (**Spray diaries**) prepare and provide CMPL upon request with proper and accurate records of all fertilisers, nutrients and other chemicals applied to the Existing Orchard, the Citrus or the Citrus Trees which records must detail the types and quantities or concentrations applied and the times at which they were applied.
- (e) (**Fertilise**) fertilise the Citrus Trees as required to maintain satisfactory rates of growth and productivity of the Citrus Trees on the Existing Orchard.
- (f) (**Advise CMPL of deterioration or impurity**) promptly advise CMPL of any deterioration of, or impurity in the Citrus, which is apparent to Chiquita.
- (g) (**Destruction**) destroy any Citrus Trees or Citrus which a reasonable horticulturist would destroy having regard to the best interests of the remaining unaffected Citrus Trees or Citrus.
- (h) (**Inspect and retie**) regularly inspect and repair Citrus Tree stakes and where appropriate, retie any Citrus Trees to stakes.
- (i) (**Repair and Maintenance**) keep the following in good repair and condition:
  - (i) any access road or roads within the Existing Orchard, all waterways, dams, irrigation and pumping equipment within the Existing Orchard, as necessary;
  - (ii) all fences, fire-breaks and other improvements within the Existing Orchard, as necessary; and
  - (iii) all farm equipment, plant and equipment, tractors, vehicles, protective gear, and other things used to perform the services described in this clause; and
- (j) (**Vermin**) as permitted by law, take reasonable steps to control or eradicate rabbits and other vermin which have caused or may cause damage to the Existing Orchard, as appropriate, by fumigating and poisoning and complying with the provisions of all statutes, regulations and by-laws (and all amendments) and any other statutes, rules, regulations and by-laws relating to or affecting the Existing Orchard.

## 4.2 Management Plan

Chiquita must prepare a Management Plan in accordance with **clause 12.1** within 14 days of signing this Agreement and do all things required by the terms of the

Management Plan to a standard and in a manner consistent with Best Horticultural Practice including, without limitation, developing and preparing the following plans and programs and append them to the Management Plan:

- (a) a horticultural plan for the Orchard;
- (b) a horticultural program for the Financial Year ending 30 June 2006;
- (c) an operational plan including human resources requirements, machinery requirements and farm programs; and
- (d) annual financial and operational budgets in relation to these horticultural matters.

#### **4.3 Cultivation, maintenance and management services (Existing Orchard and New Orchard)**

In each subsequent Financial Year of the Term, commencing on 1 July 2005, as appropriate, Chiquita must cultivate, maintain and manage the Citrus Trees and the Orchard, in a manner consistent with the Management Plan, in a good workmanlike and commercially responsible manner and to a standard consistent with Best Horticultural Practice including the following:

##### **(a) (Irrigation and fertilisation)**

- (i) Subject to:
    - (A) Chiquita being provided with access to the Internal Irrigation Equipment and the Irrigation Infrastructure; and
    - (B) Chiquita being provided with access to the water available under the Water Licences,irrigate the Orchard using the Internal Irrigation System and the Irrigation Infrastructure;
  - (ii) ensure that any irrigation undertaken pursuant to **clause 4.3(a)(i)** is undertaken in accordance with efficient irrigation application management and salinity and groundwater monitoring and control practices;
  - (iii) comply with all requirements of the Irrigation and Drainage Plan; and
  - (iv) apply fertilisers and nutrients at the appropriate times.
- (b) (**Weed control**) take reasonable steps to ensure no impediment to Citrus Tree development and crop production as a result of weeds in the Orchard.
  - (c) (**Insects and Diseases**) keep the Citrus Trees free from insects and diseases which might damage or inhibit the growth of the Citrus Trees to the extent practicable.
  - (d) (**Spray diaries**) prepare and provide CMPL upon request with proper and accurate records of all fertilisers, nutrients and other chemicals applied to the Orchard, the Citrus or the Citrus Trees which records must detail the types

and quantities or concentrations applied and the times at which they were applied.

- (e) (**Fertilise**) fertilise the Citrus Trees as required to maintain satisfactory rates of growth and productivity of the Citrus Trees on the Orchard.
- (f) (**Advise CMPL of deterioration or impurity**) promptly advise CMPL of any deterioration of, or impurity in the Citrus, which is apparent to Chiquita.
- (g) (**Destruction**) destroy any Citrus Trees or Citrus which a reasonable horticulturist would destroy having regard to the best interests of the remaining unaffected Citrus Trees or Citrus.
- (h) (**Inspect and retie**) regularly inspect and repair Citrus Tree stakes and where appropriate, retie any Citrus Trees to stakes.
- (i) (**Repair and Maintenance**) keep the following in good repair and condition:
  - (i) any access road or roads within the Orchard, all waterways, dams, irrigation and pumping equipment within the Orchard, as necessary;
  - (ii) all fences, fire-breaks and other improvements within the Orchard, as necessary; and
  - (iii) all farm equipment, plant and equipment, tractors, vehicles, protective gear, and other things used to perform the services described in this clause.
- (j) (**Vermin**) as permitted by law, take reasonable steps to control or eradicate rabbits and other vermin which have caused or may cause damage to the Orchard, as appropriate, by fumigating and poisoning and complying with the provisions of all statutes, regulations and by-laws (and all amendments) and any other statutes, rules, regulations and by-laws relating to or affecting the Orchard.
- (k) (**Updated management plan**) review and as necessary, prepare an updated Management Plan in accordance with **clause 12.1**, which updated Management Plan will then constitute the Management Plan for the purposes of this Agreement.

#### 4.4 Harvest

Chiquita must harvest the Citrus, in a manner consistent with the Management Plan, in a good workmanlike and commercially responsible manner and to a standard consistent with Best Horticultural Practice including the following:

- (a) (**Test maturity**) testing the maturity of a sample or samples of the Citrus at the appropriate time to determine whether the Citrus Trees are ready for harvesting.
- (b) (**Commence harvesting**) commencing harvest at the most appropriate time and then harvest the Citrus (having regard to the Management Plan, good workmanlike and commercially responsible standards and Best Horticultural Practice) as soon as reasonably practicable.

- (c) (**Load Citrus**) transferring the Citrus which have been harvested and which are available for collection to the Packhouse utilising trucks or other modes of transport as Chiquita determines from time to time.
- (d) (**Weigh Citrus**) weighing all harvested Citrus after delivery from the Orchard to the Packhouse and supply CMPL with all weighbridge dockets.

#### **4.5 Testing of Citrus**

The parties agree:

- (a) subject to making a prior appointment in writing with Chiquita, that CMPL may be present at any tests carried out by Chiquita in relation to the Citrus (or a Random Sample of them); and
- (b) that CMPL is entitled to request Chiquita to provide it with the results of any tests carried out under **clause 4.5(a)** and such other related information in the possession of Chiquita as is reasonably required to enable CMPL to analyse those results. Chiquita will provide such information to CMPL if requested by CMPL in writing.

#### **4.6 No Warranties**

Chiquita has not made and will not make any representation or warranty to any Project Party:

- (a) as to the yields which the Orchard is able to achieve or as to the quality or quantity of the Citrus the Orchard might yield; or
- (b) in relation to the absence or lack of presence of any viral/viroid infection, bacterial infection, fungal infection or any other pest or disease in relation to the Citrus fruit, the Citrus Trees or the ultimate performance of the Citrus Trees after they are planted on the Land.

#### **4.7 Processing**

Chiquita must Process the Citrus as soon as reasonably practicable following delivery of them to the Packhouse.

#### **4.8 Assessment of Citrus**

Chiquita will assess the Citrus after Processing having regard to size, variety and defects and consistent with the assessment used for Chiquita Citrus, and report the results to CMPL in the Citrus Sale Report to be prepared pursuant to **clause 5.4(a)**.

#### **4.9 CMPL may Dispute Assessment**

CMPL may dispute Chiquita's assessment under **clause 4.8** of all or part of the Citrus by notice in writing to Chiquita within 7 days of receiving the Citrus Sale Report which will describe the results of the assessment referred to in **clause 4.8**. If such dispute arises the parties will meet together in good faith to try to resolve the dispute. The parties will treat each other fairly and take all reasonable steps to resolve the dispute.

## **5. SALE OF CITRUS**

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### **5.1 Citrus sales guarantee**

Subject to any agreement in writing between Chiquita and CMPL, Chiquita guarantees to CMPL that all Citrus available from any harvest for a particular Season effected pursuant to this Agreement will be sold by Chiquita as soon as practicable and ensuring the optimum Marketability of the Citrus.

### **5.2 Sale of Citrus**

Chiquita will:

- (a) at all times use reasonable endeavours to market the Citrus such that the returns to the Grower over both the short and long-term are maximised, given the quality, grade, size and variety of Citrus having regard to usual practices in the citrus industry, existing and potential customer relationships and any marketing plan that may be developed by Chiquita and CMPL during the Term;
- (b) subject to **clause 5.2(a)**, sell the Citrus into three market segments: Fresh Pack Export, Fresh Pack Domestic and Processing Market;
- (c) provide on a monthly basis during the harvesting and selling season, a breakdown of fruit sold into each of the market segments described in **clause 5.2(b)** and the returns from those markets at that time; and
- (d) in respect of the marketing and selling of the Citrus pursuant to this **clause 5**:
  - (i) adopt usual practices in the citrus industry for marketing and selling citrus; and
  - (ii) incorporate retention of title clauses reasonably acceptable to Chiquita and CMPL in the terms of any sale agreement with its customers.

### **5.3 Payment terms**

Chiquita will pay CMPL the Ex Works Proceeds of Sale for the Citrus sold pursuant to this **clause 5** no later than 30 days following the date on which Chiquita receives payment for the Citrus from the Customer. Chiquita will be entitled to deduct from the Ex Works Proceeds of Sale all sorting, grading, processing and packing costs payable under clause 10.2(b)(ii).

### **5.4 Citrus Sale Reports**

- (a) Subject to **clause 5.4(b)**, Chiquita agrees to provide CMPL with a Citrus Sale Report in respect of each Month during the Term within 14 days of the end of the Month to which the Citrus Sale Report relates, which will include:
  - (i) the results of Chiquita's assessments under **clause 5.6** in respect of the Citrus harvested during the month to which the Citrus Sale Report relates;

- (ii) a breakdown of the Citrus sold into each of the market segments described in **clause 5.2(b)**; and
- (iii) such information, as Chiquita acting reasonably considers appropriate, which demonstrates to CMPL that the price payable by Chiquita to CMPL for the Citrus is comparable to:
  - (A) that paid to other citrus suppliers, having regard to the variety and quality of the Citrus sold; and
  - (B) the prevailing market price for the Citrus at the time of sale, having regard to the prevailing market conditions; and
- (iv) such information as CMPL, by notice in writing to Chiquita, reasonably requires to satisfy it that the matters described in **clause 5.4(a)(iii)** are complied with.
- (b) In preparing the Citrus Sale Report for CMPL under **clause 5.4(a)**, Chiquita will not be required to include information that is of a confidential or commercially sensitive nature.

## **6. OWNERSHIP OF PROPERTY**

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- (a) Chiquita acknowledges that it does not own:
  - (i) the Citrus Trees;
  - (ii) (subject to **clause 6(b)**) the Citrus grown on the Citrus Trees;
  - (iii) the Water Licences; or
  - (iv) the Capital Works.
- (b) Notwithstanding **clause 6(a)(i)**, it is agreed that title to, and all ownership of, the Citrus passes to Chiquita immediately prior to the payment for the Citrus by the Customer, or by that Customer's representative, from time to time.

## **7. CHIQUITA'S DISCRETION AND DELEGATION**

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### **7.1 Discretion**

Subject to compliance with the Management Plan and this Agreement, Chiquita will have complete discretion in the performance of the Services.

### **7.2 Delegation**

Chiquita may appoint CAG or Yandilla Park, and with the consent of CMPL which must not be unreasonably withheld, such other suitably qualified and skilled agents and sub-contractors and engage such personnel and acquire and use materials necessary, usual or desirable for the purposes of exercising all or some of its powers and performing all or some of its obligations under this Agreement, provided that Chiquita will be liable under this Agreement for the exercise of such powers and the performance of such obligations.

### **7.3 CAG etc obligation**

CAG and/or Yandilla Park or such other agents and sub-contractors appointed under **clause 7.2**, must perform the obligations of Chiquita as if it were personally named in place of Chiquita in this Agreement, the Management Plan and any other agreement necessary to fulfil Chiquita's obligations with respect to the Project.

## **8. INSURANCE**

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### **8.1 Chiquita to keep insurance**

- (a) Chiquita must, at its cost, effect and maintain adequate insurance to cover all reasonable risk of the destruction or theft of or damage to the harvested and processed Citrus save and except for any natural deterioration in the Citrus and public liability insurance in relation to the Land. All such insurance to be effected and maintained will name CMPL and Securities as interested parties.
- (b) The cost of any such insurance to be provided under **clause 8.1(a)** must be reasonable and economically justified, and does not include crop insurance unless specifically agreed in writing between CMPL and Chiquita from Financial Year to Financial Year.
- (c) Chiquita will provide CMPL with a copy of all relevant policies upon reasonable request by CMPL.

### **8.2 Not to render void**

No party will at any time during the Term permit or suffer to be done any act, matter or thing upon the Orchard or the Land, whereby any insurances in respect of all or any of the harvested and processed Citrus, or public liability insurance, may be prejudiced or rendered void or voidable, or whereby the rate of premium on any insurance policy will be liable to be increased.

## **9. POSSESSION AND ACCESS**

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### **9.1 Access and Possession**

Subject to **clause 9.2**, CMPL must ensure Chiquita has sufficient rights of access to and use of the Citrus Trees, the Capital Works and the Land throughout the Term in order to perform its duties and obligations under this Agreement.

### **9.2 Right of access**

- (a) Notwithstanding **clause 9.1**, CMPL and its agents, representatives and nominees (including the Growers) will have the right to enter upon the Land at any time, upon giving Chiquita reasonable prior written notice, for the purpose of:
  - (i) inspecting the Orchard and monitoring the provision of the Orchard Services by Chiquita; or
  - (ii) any other rights of CMPL or the Growers or in order to fulfil any obligation of CMPL.

- (b) The rights under **clause 9.2(a)** are subject to:
  - (i) the exercise of each of those rights not causing any interference in or impediment to the activities of Chiquita; and
  - (ii) compliance with the reasonable directions of Chiquita or Chiquita's nominees, agents, contractors or subcontractors while present on the Land.

### **9.3 Security measures**

Subject to the rights of Chiquita under this Agreement CMPL may, at its own cost and expense, padlock gates on roads and tracks entering the Orchard in order to prevent trespassers entering and to take such other security measures as it considers appropriate. CMPL must provide to Chiquita the keys to all padlocks and such other security access necessary to enable Chiquita to perform its duties and obligations under this Agreement.

### **9.4 Warranty by CMPL**

CMPL represents and warrants to Chiquita that it is able, and has the capacity and authority, to give or procure for the benefit of Chiquita sufficient rights of access to and possession and occupation of the Land throughout the Term, and to the extent necessary (in the case of CMPL), will procure the Land Owner, Timbercorp or Securities (as the case may be) to give to Chiquita any such rights. The exercise by Chiquita of the rights of access, possession and occupation conferred in **clause 9.1** will not constitute a trespass against, or an interference with the rights or interests of any other person.

### **9.5 Denial of possession**

Chiquita will not be liable for any failure to perform its duties or obligations under this Agreement, which arises because it is denied, or is otherwise unable to secure, access to, or possession or occupation of, the Land or any part of it, for whatever reason.

## **10. CITRUS ORCHARD FEES**

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10.1 For each Financial Year during the Term (or part year) in which Chiquita performs the Services (or any part of them, as required by this Agreement), CMPL is liable to pay the Management Fee in accordance with **clause 10.2**.

10.2 For the purposes of **clause 10.1**, the Management Fee will be as follows:

(a) *Period ending 30 June 2005*

\$180.34 per Citruslot (or \$721.36 for each hectare of the Land (or part thereof)) payable as to 50% on or before 30 June 2005 and as to the balance of 50%, payable on or before 31 December 2005;

(b) *Subsequent periods*

for each subsequent Financial Year during the Term:



- (i) \$112.5 per Citruslot (or \$450 per annum (or part year) for each hectare of the Land (or part thereof)), payable by four equal instalments in arrears on 30 September, 31 December, 31 March and 30 June; and
  - (ii) \$375 per tonne of citrus for sorting, grading, packing and processing services payable progressively out of Ex Works Proceeds of Sale on each occasion Ex Works Proceeds of Sale are remitted to CMPL in accordance with clause 5.3.
- 10.3 In addition to the fee payable under clause 10.1, in each Financial Year during the Term CMPL will reimburse Chiquita for all reasonable and Direct Costs and Expenses incurred by Chiquita in relation to or in connection with providing all or any of the Orchard Services for each such Financial Year, including those set out in the Management Plan for each such Financial Year.
- 10.4 Chiquita will invoice CMPL:
  - (a) quarterly in arrears for the fee referred to in **clause 10.1** on the first day of each month during which payment is to be made and CMPL will pay these fees to Chiquita within 30 days of receipt of the invoice by CMPL; and
  - (b) monthly in arrears for the Direct Costs and Expenses referred to in **clause 10.3** on the first day of the month following the month in which the Direct Costs and Expenses were incurred, and CMPL will reimburse Chiquita for those Direct Costs and Expenses within 14 days of receipt of the invoice by CMPL.
- 10.5 If CMPL defaults in making payment under this **clause 10** in accordance with **clause 11.2(b)**, then interest will be payable by CMPL on the amount payable under this **clause 11** at the ANZ Bank official overdraft rate plus 2%.

## **11. PRICE REVIEW**

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On each Price Review Date, the fees referred to in **clause 10.1**, applicable immediately prior to that Price Review Date will be reviewed by Chiquita and CMPL and, in the absence of an agreement in writing between Chiquita and CMPL, increased by that percentage equal to the CPI Increase. If the CPI Increase is negative or zero, then those fees will be the same as they were applicable immediately prior to that Price Review Date, so that there can never be any decrease in any of those fees.

## **12. MANAGEMENT PLAN AND REPORTS**

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### **12.1 Preparation of Initial Management Plan**

The parties will negotiate in good faith and agree upon an initial management plan for the financial years ended 30 June 2005 and 30 June 2006 within 14 days after the commencement of this Agreement.

### **12.2 Preparation of Subsequent Management Plans**

On or before 1 January of each year during the Term commencing on 1 January 2007, Chiquita must prepare and provide to CMPL a Management Plan prepared in

accordance with Best Horticultural Practice, which plan must include details of the matters referred to in **clause 12.3**.

### **12.3 Contents of Management Plan**

Each Management Plan to be prepared pursuant to **clause 12.1** and **clause 12.2** must include the matters referred to in **clause 4.2**.

### **12.4 Amendment of Management Plan**

- (a) Within 20 Business Days after CMPL receives the Management Plan, CMPL must notify Chiquita in writing either that:
  - (i) it accepts the Management Plan without amendment; or
  - (ii) it requires amendments to the Management Plan, provided the amendments accord with Best Horticultural Practice, together with full particulars of these amendments.
- (b) If CMPL accepts the Management Plan or if Chiquita accepts CMPL's amendments to it, then Chiquita must perform the Orchard Services in accordance with the Management Plan, as accepted.
- (c) Chiquita agrees to accept each amendment to the Management Plan (if any) notified to it by CMPL where each such amendment is reasonable in Chiquita's opinion. Without limitation, Chiquita will not accept an amendment where, in Chiquita's reasonable opinion, the amendment will require Chiquita to undertake any actions which:
  - (i) are materially more expensive or time consuming or materially more onerous than the actions which Chiquita is required to undertake pursuant to the Management Plan for the relevant Financial Year provided by Chiquita to CMPL under **clause 12.1**;
  - <sup>s</sup> (ii) do not accord with Best Horticultural Practice generally recognised and applied in Australia to citrus orchards of the same type and character as the Orchard;
  - (iii) are unsuitable for use on the Orchard;
  - (iv) will involve, or may involve, a breach by Chiquita of any obligation or duty it owes to any other person at law; or
  - (v) are not usual or desirable for the operation of a commercial citrus orchard on the Orchard,

and it notifies CMPL of its refusal to accept the amendment within 10 Business Days of being notified of it.

- (d) If Chiquita refuses to accept an amendment to the Management Plan under **clause 12.3(a)**, the parties will consult with each other in good faith within 5 Business Days of notification to CMPL of the refusal, in an endeavour to resolve the matter.

- (e) If the matter is resolved pursuant to **clause 12.3(d)**, then Chiquita will perform the Orchard Services in accordance with the Management Plan in the form agreed during that consultation.
- (f) If the matter is not resolved pursuant to **clause 12.3(e)**, then Chiquita will perform the Orchard Services in accordance with the Management Plan proposed by Chiquita (subject to any amendments requested by CMPL which are accepted by Chiquita) and the dispute will be referred for resolution under **clause 18**.
- (g) If Chiquita refuses to accept an amendment to the Management Plan and pending resolution under **clause 18**, CMPL may enter upon the Orchard to carry out any act which Chiquita refuses to perform or prevent Chiquita from performing an act which in its reasonable opinion will be detrimental or is likely to cause damage to the Citrus, the Citrus Trees or the Orchard generally, provided that CMPL will bear responsibility for, and will indemnify Chiquita in relation to, its actions and Chiquita will not be responsible or liable for any such actions carried out by CMPL.

## **12.5 Changes to Management Plan**

At any time during the Financial Year to which a Management Plan relates, if Chiquita reasonably believes the Management Plan should be amended or varied and/or annual Orchard maintenance costs and expenses should be increased in order to perform the Services in accordance with Best Horticultural Practice, then Chiquita may make reasonable changes to the Management Plan with the consent of CMPL (which consent will not be unreasonably withheld).

## **13. QUARTERLY REPORTS AND INSPECTIONS**

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### **13.1 Reports**

As soon as possible, but in any event not later than 30 days after the end of December, March, June and September in each Financial Year, Chiquita must prepare and forward to CMPL a report on the Services performed during the preceding six months, including a report on:

- (a) the progress achieved in performance of the Services by reference to the Management Plan;
- (b) the progress and general condition of the Orchard, the Citrus Trees and the Citrus including the results of harvest; and
- (c) any matters which CMPL, by notice in writing to Chiquita, reasonably requires Chiquita to report on with respect to the Orchard or the Services.

### **13.2 Inspections by CMPL and TSL**

Subject to **clause 13.3**, Chiquita agrees to provide CMPL and TSL access to Chiquita's processing and packaging facilities at reasonable times agreed by the parties to enable them to assess the efficiency of the processes, procedures and plant and equipment used by Chiquita in providing the Services under this Agreement by reference to the Australian citrus industry.

### 13.3 Notice of inspections

Not less than three business days prior to undertaking an inspection pursuant to **clause 13.2**, CMPL and TSL must provide Chiquita with prior written notice of the proposed date and time of the inspection.

### 13.4 Reporting of results of inspections

If during an inspection CMPL and TSL form the reasonable view that the efficiency of Chiquita's processing and packaging facilities is below industry standards, then CMPL and TSL may prepare a written report to Chiquita identifying those deficiencies and potential efficiency improvements.

### 13.5 Strategies for maximising efficiency

If CMPL and TSL prepare a report pursuant to **clause 13.4**, then Chiquita agrees to meet with CMPL and TSL to discuss in good faith the alleged inefficiencies and the implementation of measures designed to achieve efficiency levels consistent with industry standards.

## 14. TERMINATION AND DEFAULT

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### 14.1 Termination of Agreement by CMPL

CMPL may at any time, by notice in writing to Chiquita, immediately terminate this Agreement upon the occurrence of any of the following:

- (a) Chiquita becomes an externally administered body corporate (as defined in section 9 of the *Corporations Act 2001*);
- (b) Chiquita defaults in the performance of any material obligation it owes to CMPL under this Agreement and Chiquita does not remedy the default within 60 days after:
  - (i) it is given written notice of the default by CMPL; and
  - (ii) the parties have used their reasonable and best endeavours to address the default; and
  - (iii) the Chief Executive Officers of both parties have met to discuss the alleged default and the strategies for addressing that default; and
- (c) any breach of or default under any of the provisions contained in **clause 14.5** occurs.

### 14.2 Termination of Agreement by Chiquita

Chiquita may at any time, by notice in writing to CMPL and Securities, immediately terminate this Agreement upon the occurrence of any of the following:

- (a) any fee or other amount properly payable to Chiquita by CMPL under or in connection with this Agreement is not paid in full within 30 days after receipt by CMPL of a notice in writing specifying the amount payable and when it fell due;

- (b) CMPL defaults in the performance of any other material obligation it owes to Chiquita under this Agreement and CMPL does not remedy the default within 60 days after:
  - (i) it is given written notice of the default by Chiquita; and
  - (ii) the parties have used their reasonable and best endeavours to address the default; and
  - (iii) the Chief Executive Officers of the parties have met to discuss the alleged default and the strategies for addressing that default; or
- (c) CMPL is in breach of, or default under, any of the provisions contained in **clause 14.4**.

### **14.3 Effect of Termination**

- (a) The termination of this Agreement (whether under this **clause 14** or under any other clause or otherwise) will terminate the rights and obligations of the parties under this Agreement, except to the extent that those rights and obligations are expressed to survive termination, provided however that the termination of this Agreement will not prejudice any right, power or remedy of any party to the extent that it accrued prior to or on termination.

### **14.4 Warranties**

CMPL represents and warrants to Chiquita that as at the date of this Agreement:

- (a) it is incorporated or registered and validly existing under the laws of its place of incorporation or registration and has the power to carry on its business;
- (b) it has full power and legal capacity to enter into, exercise its rights and perform its own obligations under this Agreement;
- (c) the execution and performance of all of its obligations under this Agreement have been properly authorised;
- (d) neither its execution of, nor its exercise of its rights or performance of its obligations under this Agreement will:
  - (i) contravene or conflict with any applicable law to which it or any of its property is subject or any order of any government agency binding on it or any of the property;
  - (ii) contravene any undertaking or instrument;
  - (iii) contravene or conflict with its constituent documents;
- (e) no litigation, arbitration or administrative proceedings are taking place, pending or to the knowledge of any of its officers, threatened against it or any of its property which is adversely determined, or could have, either separately or in aggregate, an adverse effect on its business operations, assets, financial conditions or prospects which does or is likely to have a material adverse effect on its ability to perform its obligations under this Agreement;

- (f) no meeting has been convened or resolution proposed, or application presented, and no order has been made for its winding up;
- (g) no distress execution or other similar order or process has been levied on any of its property or assets;
- (h) no receiver or manager, provisional liquidator, office of the court, controller or other external administrator has been appointed in relation to it; and
- (i) no voluntary arrangement has been proposed or reached with any of its creditors.

#### **14.5 Chiquita Warranties**

Chiquita represents and warrants that, as at the date of this Agreement:

- (a) it is incorporated or registered and validly existing under the laws of its place of incorporation or registration and has the power to carry on its business;
- (b) it has full power and legal capacity to enter into, exercise its rights and perform its own obligations under this Agreement;
- (c) the execution and performance of all of its obligations under this Agreement have been properly authorised;
- (d) neither its execution of, nor its exercise of its rights or performance of its obligations under this Agreement will:
  - (i) contravene or conflict with any applicable law to which it or any of its property is subject or any order of any government agency binding on it or any of the property;
  - (ii) contravene any undertaking or instrument;
  - (iii) contravene or conflict with its constituent documents;
- (e) no litigation, arbitration or administrative proceedings are taking place, pending or to the knowledge of any of its officers, threatened against it or any of its property which is adversely determined, or could have, either separately or in aggregate, an adverse effect on its business operations, assets, financial conditions or prospects which does or is likely to have a material adverse effect on its ability to perform its obligations under this Agreement;
- (f) no meeting has been convened or resolution proposed, or application presented, and no order has been made for its winding up;
- (g) no distress execution or other similar order or process has been levied on any of its property or assets;
- (h) no receiver or manager, provisional liquidator, office of the court, controller or other external administrator has been appointed in relation to it;
- (i) no voluntary arrangement has been proposed or reached with any of its creditors.

## **14A. CONTINUING SERVICES UPON TERMINATION**

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Notwithstanding anything contained in this Agreement, upon termination of this Agreement (other than under **clause 14** or **16**), **clauses 1, 3, 4.4(c)-4.4(d), 4.5, 6, 8.1, 10, 11, 14, 15, and 16-24** (inclusive) of this Agreement will continue to have full force and effect but only to the extent necessary to facilitate the ongoing provision by Chiquita of the Services in respect of any Citrus that have been harvested by Chiquita under this Agreement on or before the date of termination.

## **15. OBLIGATIONS UPON TERMINATION**

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Upon termination of this Agreement by Chiquita or expiration of the Term, Timbercorp or Securities (as the case may be) must permit Chiquita, within 30 days after termination, at its own expense, to enter upon the Land and to remove all of its employees, contractors and agents from the Land, together with all their equipment, tools, plant, vehicles and machinery.

## **16. EXCUSES FOR NON PERFORMANCE**

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### **16.1 Observation or compliance with terms of Agreement**

No party will have any obligation to observe or comply with the terms of this Agreement to the extent that the observance of, or compliance with, those terms is prevented by Force Majeure.

### **16.2 Liability**

A party's failure to observe or comply with the terms of this Agreement will not give rise to any liability to that party for any direct or indirect consequential or special loss or damage of any kind, to the extent that the failure to observe or comply with those terms is attributable to Force Majeure.

### **16.3 Claiming protection or benefit of Force Majeure**

A party claiming the benefit or protection of **clause 16.1** or **16.2** must at its own cost:

- (a) promptly give notice to the other party, as soon as it becomes aware of the Force Majeure, of the occurrence and circumstances in respect of which the claim arises;
- (b) take all reasonable steps to ameliorate and remedy the consequences of that occurrence without delay and give the other parties on request details of the steps that have been taken or are to be taken; and
- (c) resume performance in full of its obligations under this Agreement as soon as reasonably practicable and give the other parties notice as soon as it is able to resume performance of its obligations.

### **16.4 Force Majeure**

- (a) For the purposes of this Agreement, **Force Majeure** means an act of God, lock out or other interference with work, war declared or undeclared, blockage,

disturbance, lightning, fire, drought, earthquake, storm, flood, explosion, government or quasi-government restraint, exploration, prohibition, intervention, direction, embargo, unavailability or delay in availability of equipment or transport, inability or delay in obtaining governmental or quasi-governmental approvals, consents, permits, licenses, authorities or allocations, or any other cause whether of the kind specifically set out above or otherwise which is not reasonably within the control of the person relying on the force majeure.

- (b) Force Majeure does not include any events or circumstances referred to in **clause 16.4(a)** caused by a lack of or unavailability of funds or as a result of any event or chain of events brought about by the action or inaction of a party seeking to claim the benefit of **clause 16**. Each of the terms within **clause 16.4(a)** is to be construed separately and independently. None of them is to limit the generality of any other.

## **16.5 Termination**

If a party is unable to observe or comply with the terms of this Agreement due to Force Majeure and it does not resume performance of its obligations within 12 months after that Force Majeure arose, then, if Chiquita is the party affected by the Force Majeure, CMPL may terminate this Agreement by notice in writing to Chiquita, and if CMPL is the party affected by the Force Majeure, then Chiquita may terminate this Agreement by notice in writing to CMPL and Securities.

## **17. ASSIGNMENT**

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- 17.1 No party may assign or encumber, or attempt to assign or encumber, any obligation, right or interest under this Agreement without the prior written consent of the other parties, which consent may not be unreasonably withheld where the first party wishes to make such assignment in relation to or as a consequence of a corporate restructure of the first party or of a related body corporate which, in another party's reasonable opinion, will not materially adversely affect or materially diminish that other party's interests or rights under this Agreement.
- 17.2 Where a party is a company, other than a company listed on Australian Stock Exchange Limited, any change in the shareholding of that party or any change in the shareholding of any holding company of that party altering the effective control of the party, will (for the purposes of **clause 17.1**) be deemed to be an assignment of this Agreement and must require the written consent of the other parties, which consent will not be unreasonably withheld.

## **18. DISPUTE RESOLUTION BY EXPERT**

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### **18.1 Dispute notice**

If a dispute arises concerning this Agreement, a party may serve a dispute notice on the party with whom it is in dispute. The dispute notice must state that a dispute has arisen and identify what is disputed.



### **18.2 Appointment of expert**

The parties in dispute may appoint an expert to determine the dispute after service of the dispute notice, but only after the Chief Executive Officers of the parties have met in an attempt to resolve the dispute in good faith. If the parties cannot agree on the expert within 7 days after the Chief Executive Officers have met, any of the parties may request the President for the time being of the Institute of Chartered Accountants of Australia to appoint an expert.

### **18.3 Legal representation**

The parties are entitled to legal representation during the dispute resolution proceedings.

### **18.4 Expert's responsibilities**

The parties must instruct the expert to:

- (a) determine, after consultation with the parties, the dispute resolution technique and procedures to be adopted;
- (b) determine the timetable for all steps in those procedures;
- (c) seek any information and conduct investigations as the expert thinks fit;
- (d) act as an expert and not as an arbitrator;
- (e) determine the dispute, excluding liability to pay legal costs (each party bearing their own), as the expert thinks fit; and
- (f) advise the parties in writing of the determination.

### **18.5 Determination binding**

The determination of the expert is binding on the parties.

### **18.6 Costs of Expert**

The parties to the dispute must pay the expert's costs equally unless the expert determines otherwise.

## **19. COUNTERPARTS**

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- (a) This Agreement may consist of a number of counterparts and, if so, the counterparts taken together will constitute the one instrument.
- (b) Each party agrees with the other party that it will, at the request of the other Party, execute any further counterparts in the form or to the effect of this Agreement, so long as in no circumstances will the rights or entitlement of that party be diminished.
- (c) Each party agrees that, by their execution of any counterpart of this Agreement, they will be and remain liable to the other party notwithstanding

any other person intended to be a party does not sign or execute this counterpart of the Agreement.

## **20. MISCELLANEOUS**

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### **20.1 Further assurances**

Each party must execute all documents and take all other action necessary or desirable to give full effect to this Agreement.

### **20.2 Entire understanding**

This Agreement contains the entire understanding between the parties concerning the subject matter contained in it. All previous representations, warranties, explanations and commitments, expressed or implied, affecting this subject matter are superseded by this Agreement and have no effect.

### **20.3 Waiver and Exercise of Rights**

- (a) A single or partial exercise or waiver of a right relating to this Agreement does not prevent any other exercise of that right or exercise of any other right.
- (b) No party is liable for any loss or expense of the other party caused or partly caused by the waiver or exercise of, or failure to exercise, a right.

### **20.4 Stamp Duty**

CMPL will pay all of the stamp duty payable in relation to this Agreement.

### **20.5 Legal costs**

Each party agrees to pay its own legal costs relating to the preparation and negotiation of this Agreement.

### **20.6 Relationship**

Unless expressly provided otherwise in this Agreement, this Agreement does not create any partnership, agency, trust or joint venture between the parties. No party may pledge the credit of the other party, nor purport to enter into contracts except as permitted under this Agreement. This Agreement does not constitute nor does it create any agreement or relationship whatsoever between Chiquita and the Growers or Chiquita and any of the Growers.

### **20.7 Governing Law and Jurisdiction**

- (a) This document is governed by the laws in force in Victoria.
- (b) Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of Victoria and any courts having jurisdiction to hear appeals from those courts.

## **20.8 Variation**

No modification, amendment or other variation of this Agreement will be valid or binding on any of the parties unless it is made in writing and signed by or on behalf of each of the parties.

## **20.9 Confidentiality**

All matters pertaining to this Agreement are required to be kept confidential unless agreed by the parties in writing or required to be disclosed by law (including the Corporations Act) or the Listing Rules of the Australian Stock Exchange Limited.

## **21. NOTICES**

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### **21.1 Form of notice**

Notices and other communications under this Agreement:

- (a) must be in writing, and
- (b) must be signed by an authorised officer of the relevant party.

### **21.2 Service of Notice**

Notices and other communications relating to this Agreement must be served:

- (a) personally on the person;
- (b) if to a natural person, by leaving it at or posting it by prepaid post (or prepaid airmail if to an address outside Australia) to the person's current address for service;
- (c) if to a company, by addressing it to the company and leaving it at or posting it by prepaid post (or prepaid airmail if to an address outside of Australia) to the company's registered office or place of business;
- (d) by facsimile to the person's current number for service; or
- (e) by any other method authorised by law.

### **21.3 Particulars for Service**

- (a) The particulars for service are:

#### **To a Project Party:**

Attention: Michael Worthington  
Timbercorp Securities Limited  
Level 8  
461 Bourke Street  
Melbourne VIC 3000  
Facsimile: (03) 9670 4271

#### **To Chiquita or CAG:**

Attention: David Green  
Chiquita Brands South Pacific Limited  
Level 2, 768 Lorimer Street  
Port Melbourne Vic 3207  
Facsimile (03) 8645 1671

- (b) A party may change its particulars for service by 5 calendar days' written notice to the other parties.

#### **21.4 Time of Service**

- (a) A letter posted in Australia to an Australian address is deemed to have been received two Business Days after posting and, in any other case, seven Business Days after posting.
- (b) A facsimile is deemed received at the time indicated on the transmission report produced by the sender's facsimile machine indicating that the facsimile was sent in its entirety to the addressee's facsimile.
- (c) A letter or facsimile received after 5.00 pm in the place of receipt or on a day which is not a Business Day is deemed received at 9.00 am on the next Business Day.

### **22. LIABILITY**

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#### **22.1 Available remedies**

In addition to any other remedies available at law, a party is entitled to exercise or obtain declaratory relief, an injunction or restraining order to restrain a breach by another party of its obligations or duties, a mandatory injunction, or order for specific performance in order to compel another party to perform its obligations or duties.

#### **22.2 Fraud**

Nothing in this Agreement will limit the liability of CMPL, or Chiquita in respect of a breach by either party of their duties or obligations where the party has been fraudulent.

#### **22.3 Third party claim**

Nothing in this Agreement will limit any claim against CMPL or Chiquita irrespective of whether CMPL or Chiquita is entitled to be insured in respect of that claim or is entitled to recover damages from another person in respect of that claim.

### **23. GST**

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If any payment made by one party to any other party under or relating to this document constitutes consideration for a taxable supply for the purposes of GST or any similar tax, the amount to be paid for the supply will be increased so that the net amount retained by the supplier after payment of that GST is the same as if the

supplier was not liable to pay GST in respect of that supply. This provision is subject to any other agreement regarding the payment of GST on specific supplies, and includes payments for supplies relating to the breach or termination of, and indemnities arising from, this document.

## 24. GUARANTEE

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- 24.1 In consideration of Chiquita entering into this Agreement, at the request of the Guarantor, the Guarantor unconditionally and irrevocably guarantees to Chiquita the due and punctual payment by each of CMPL and Securities of all moneys payable by each of CMPL and Securities to Chiquita under or pursuant to this Agreement (**Guaranteed Moneys**) and also the due performance and observance by each of CMPL and Securities of all and singular the covenants, obligations, provisions and stipulations contained or implied in this Agreement and on the part of each of CMPL and Securities to be performed and observed (**Guaranteed Obligations**).
- 24.2 The Guarantor acknowledges that this guarantee is given upon and subject to and with the benefit of the following conditions:
- (a) Chiquita shall have the fullest liberty without affecting this guarantee to postpone for any time and from time to time the exercise of all or any of the powers, rights, authorities and discretions conferred by or arising by virtue of this Agreement and to exercise the same at any time and in any manner and either to enforce or forbear to enforce the covenants for payment of the Guaranteed Moneys payable by each of CMPL and Securities under this Agreement or any other covenants, obligations, provisions or stipulations contained or implied in this Agreement or any other remedies or securities available to Chiquita AND the Guarantor shall not be released by any exercise by Chiquita of its liberty with reference to the matters aforesaid or any of them or by any time being given to CMPL and/or Securities or by any other thing whatsoever which under the law relating to sureties would but for this provision have the effect of so releasing the Guarantor;
  - (b) this guarantee shall be a continuing guarantee and shall not be considered as wholly or partially discharged by the payment at any time hereafter of any part of the moneys hereby secured or by any settlement of account, intervening payment or by any other manner or thing whatsoever;
  - (c) this guarantee shall enure for the benefit of Chiquita and its successors and assigns;
  - (d) the Guarantor INDEMNIFIES Chiquita against and in respect of any loss or damage suffered by Chiquita by reason or as a result of any non-payment by CMPL and/or Securities of any of the Guaranteed Moneys or by reason of the failure by CMPL and/or Securities to duly perform and observe all and singular the covenants, obligations, provisions and stipulations contained or implied in this Agreement or by reason of any disclaimer of this Agreement by the liquidator of CMPL and/or Securities upon any winding up of CMPL and/or Securities or the non-payment by CMPL and/or Securities of the Guaranteed Moneys and also in respect of all costs, charges and expenses whatsoever which Chiquita may incur by reason of any default on the part of CMPL and/or Securities under or in relation to this Agreement;

- (e) if any payment made to Chiquita or on behalf of Chiquita shall subsequently be avoided or set aside by reason of any statutory provision or otherwise such payment shall be deemed not to have prejudiced or otherwise affected this guarantee or Chiquita's right to recover such payment from the Guarantor pursuant hereto to the intent that Chiquita shall with respect to its rights to recover the Guaranteed Moneys secured be restored to the same position in which it would have been had such payment not been made.
- 24.3 In consideration of Chiquita entering into this Agreement, at the request of the Guarantor, the Guarantor unconditionally and irrevocably undertakes to Chiquita that it will cause and procure that Securities does not during the Term retire as, or otherwise cease to be, the responsible entity of the Project unless Securities is removed as the responsible entity of the Project pursuant to the constitution of the Project and/or the Corporations Act 2001 or unless the entity which replaced Securities as the Responsible Entity of the Project (**New RE**) and the parties to this Agreement (other than Securities) have entered into a new Management Agreement with Chiquita on the same terms and conditions contained in this Agreement (with such necessary modifications and provided always that Chiquita's interests and rights under and in connection with this Agreement are not in any way adversely affected, diminished or prejudiced).
- 24.4 The Guarantor's guarantee and indemnity remains effective in respect of a Guaranteed Obligation (including, but not limited to, the obligation to pay the Guaranteed Moneys) even if the Guaranteed Obligation is or may be unenforceable or not immediately enforceable against a Project Party (whether by reason of any legal limitation, disability or incapacity on or of the Project Party or otherwise).
- 24.5 Notwithstanding anything contained in this Agreement, each guarantee and indemnity contained in this **clause 24** is a continuing guarantee and indemnity for the purpose of securing the whole of the Guaranteed Obligations (including, but not limited to the obligation to pay the Guaranteed Moneys), despite any part performance of the Guaranteed Obligations, settlement of account, or the termination of this Agreement, or the step-in on the part of Securities under **clause 2A** of this Agreement or any amendment to this Agreement or any other matter or thing whatsoever. The obligations of the Guarantor under this **clause 24** are absolute and unconditional. The liabilities of the Guarantor under this Agreement will not be altered or extinguished nor will the rights of Chiquita against the Guarantor under this Agreement be adversely affected by anything which might otherwise have that effect at law, in equity, by statute or otherwise.

## **25. OCCUPATIONAL HEALTH AND SAFETY**

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### **25.1 Obligations**

Each of Chiquita and CMPL will comply with all their respective statutory obligations relating to matters of occupational health and safety including, but not limited to, obligations imposed under applicable South Australian legislation.

## 25.2 Review and Audit

- (a) CMPL or a person authorised by it will be entitled, where reasonably necessary, to review and audit at its own expense:
  - (i) compliance by Chiquita with occupational health and safety obligations;
  - (i) Chiquita's occupational health and safety systems; and
  - (ii) any procedures or work practices adopted by Chiquita which have implications for the occupational health and safety of CMPL's employees, agents and servants while exercising any right of access to the Land or any other right pursuant to this agreement.
- (b) CMPL or the person authorised by it to conduct the review and audit will:
  - (i) be given reasonable access to any property, premises, plant or equipment of Chiquita utilised in relation to the performance of this agreement, and subject to any commercial confidentiality, will be given reasonable access to any records and documentation including those of any sub-contractor which is relevant to the review and audit function. Such documentation is deemed intellectual property and at all times ownership remains vested in Chiquita; and
  - (ii) be entitled to speak to any officer, employee or agent of Chiquita for the purpose of carrying out the audit and review.
- (c) If CMPL or its representative reasonably determines that Chiquita should make some provision or implement some measure which is necessary in order to comply with the occupational health and safety obligations of Chiquita under **clause 25.1**, CMPL or its representative may reasonably direct Chiquita to make that provision or take that measure and Chiquita will do so as soon as reasonably practicable in accordance with its obligations under **clause 25.1**. However, in the event that Chiquita disputes the necessity to do so, the disputed matter will be dealt with in accordance with **clause 18**.

## 25.3 OH&S Procedures

The parties agree to develop a manual of policies, practices and procedures as soon as reasonably practicable in relation to the performance by the parties of their obligations under this agreement in respect to occupational health and safety. However, in the event that the parties are unable to agree on any matter which is the subject of this **clause 25.3** then the disputed matter will be dealt with in accordance with **clause 18**.

## 26. COSTS

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- 26.1 Each party will bear its own costs and expenses (including legal costs) of and incidental to the negotiation, execution and implementation of this Agreement.
- 26.2 All costs and expenses (including legal costs on a full indemnity basis) of and incidental to the negotiation, execution and implementation of any variation or amendment to this Agreement, or in respect of any variation or carve-out to the Project after the execution of this Agreement, will be borne solely by Timbercorp.

## 27. DEFINITION AND INTERPRETATION

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### 27.1 Definitions

In this Agreement (including the Background), unless expressed or implied to the contrary:

**Best Horticultural Practice** means sound horticultural and environmental practices and industry practices that are adopted in relation to similar orchards.

**Business Day** means a day other than a Saturday, Sunday or public holiday in Victoria.

**Capital Works** means the infrastructure and capital works (including, without limitation, the Internal Irrigation System and the Irrigation Infrastructure) carried out on the New Orchard and all infrastructure and capital works that will in future be carried out on the Orchard.

**Chiquita** means Chiquita Brands South Pacific Limited ACN 002 687 961 and its approved assigns.

**Chiquita Citrus** means all of the citrus grown in Australia by Chiquita or other growers which are processed, marketed and sold by Chiquita (apart from the Citrus) in a particular Season.

**Citrus** means all citrus produced on the Citruslots or the Orchard whether harvested or unharvested.

**Citrus Sale Report** means the report prepared pursuant to **clause 5.4(a)**, in the form as set out in **Schedule 2**.

**Citrus Trees** means the citrus trees planted or to be planted on the Growers' Citruslots or the Orchard, whichever is applicable.

**Citruslot** means a stapled area of the Land comprising 0.15 hectares of the Existing Orchard and 0.1 hectares of the New Orchard which together comprise 0.25 hectares (**Plantable Portion**) on which the Project will be conducted, and on which a Grower will carry on the business of primary production and includes the Citrus Trees, the Capital Works and the Water Licences attributed to the Project. **Citruslots** has a corresponding meaning.

**CMPL** means Citruscorp Management Pty Ltd ACN 105 995 257 and its permitted assigns and successors.

**Commencement Date** means the date of issue of a PDS for the Project by Securities.

**Controller** has the meaning it has in the Corporations Act.

**Corporations Act** means the *Corporations Act 2001 (Cth)* and the *Corporations Regulations*.

**CPI** means:



- a) the Consumer Price Index (All Groups) average for the 8 capital cities; or
- b) if that index is suspended or discontinued and another index is substituted by the Australian Statistician, that index; or
- c) if there is no index under paragraph (b), the average inflation rate of each of the Australian states as used by the State Treasuries for the relevant period.

**CPI Increase** means an amount (expressed as a percentage) equal to:

$$\frac{\text{Current CPI} - \text{Previous CPI}}{\text{Previous CPI}} \times 100$$

**Current CPI** means the CPI for the last concluded quarter prior to the relevant Price Review Date.

**Customer** describes any company, organisation or individual that purchases Citrus sold by Chiquita.

**Direct Costs and Expenses** means all the direct expenditure associated with Chiquita performing the Services as described in **clause 4** as detailed in Schedule 1.

**Existing Orchard** means the existing orchard of approximately 309 hectares situated on the Solara Estate.

**Encumbrances** means all mortgages, charges, liens, bills of sale, pledges, options, title retentions and other encumbrances or securities or adverse interests whatsoever.

**Ex Works Proceeds of Sale** means the sale proceeds of Citrus calculated at the **Ex Works Price** as defined in the International Chamber of Commerce Inco Terms (that is, following sorting, grading, packing and processing).

**Financial Year** means a period ascertained as follows:

- (a) the first Financial year is the period commencing on the date of this Agreement and terminating at the end of 30 June 2005;
- (b) subject to paragraph (c), each subsequent Financial Year is the period of 12 months during the Term commencing on the date immediately following the end of the previous Financial Year and ending on the following 30 June; and
- (c) the last Financial Year is the period ending on the date on which this Agreement is terminated and commencing at the beginning of the preceding 1 July.

**Force Majeure** has the meaning given in **clause 16.4**.

**Fresh Pack Domestic** describes Citrus sold as fresh fruit on the Australian market.

**Fresh Pack Export** describes Citrus sold as fresh fruit into all markets other than Australia.

**Grower** means each several person who becomes a member of the Project from time to time and **Growers** has a corresponding meaning.

**GST** means the tax imposed by the GST Act and the related imposition Acts of the Commonwealth.

**GST Act** means the A New Tax System (Goods and Services Tax) Act 1999 (Cth).

**Guarantor** means Timbercorp.

A person is **Insolvent** if:

- (a) it is (or states that it is) an insolvent under administration or insolvent (each as defined in the Corporations Act); or
- (b) it has had a Controller appointed, or is in liquidation, in provisional liquidation, under administration or wound up or has had a Receiver appointed to any part of its property; or
- (c) it is subject to any arrangement, assignment, moratorium or composition, protected from creditors under any statute, or dissolved; or
- (d) an application or order has been made (and, in the case of an application, it is not stayed, withdrawn or dismissed within 30 days), resolution passed, proposal put forward, or any other action taken, in each case in connection with that person, which is preparatory to or could result in any of (a), (b) or (c) above; or
- (e) it is taken (under section 459F(1) of the Corporations Act) to have failed to comply with a statutory demand which is not in dispute; or
- (f) it is the subject of an event described in section 459C(2)(b) or section 585 of the Corporations Act (or it makes a statement from which the Chargee reasonably deduces it is so subject); or
- (g) it is otherwise unable to pay its debts when they fall due; or
- (h) something having a substantially similar effect to (a) to (g) happens in connection with that person under the law of any jurisdiction.

**Internal Irrigation Equipment and Internal Irrigation System** means the internal irrigation system installed or to be installed, or caused to be installed, by the Land Owner or Timbercorp in the Orchard for the purpose of enabling and facilitating the irrigation and delivery of water within the Citruslots, and which system will be licensed to Growers under the Licence Agreement.

**Irrigation and Drainage Plan** means the irrigation and drainage plan for the Orchard acceptable to Chiquita, the Land Owner and CMPL.

**Irrigation Infrastructure** means the pipeline (including the mainline), dam, pump and other equipment which are installed, or to be installed by the Land Owner or Timbercorp or to which the Land Owner or Timbercorp have rights and which already services or will be able to service that part of the Orchard situated on the Land adequately by enabling and facilitating the irrigation and delivery of the necessary water to the Citruslots.

**Kangara Undeveloped Land** means those parts of the undeveloped land located near Renmark, South Australia, on which the New Orchard will be established;

**Land** means the land on which the Project will be conducted as described in the product disclosure statement for the Project or such other land that is used for the Project.

**Land Owner** means:

- (a) in respect of the **Existing Orchard**, the registered proprietor for the time being of the Solora Estate or the person which at the date of this Agreement will become entitled to become the registered proprietor of the Solora Estate, which is OIM #2 Pty Ltd (ACN 112 691 997) as trustee for the Timbercorp Orchard Trust #2, of Level 2, 613 St Kilda Road, Melbourne, Victoria, and its permitted assigns and successors.
- (b) in respect of the **New Orchard**, the registered proprietor for the time being of the Kangara Estate which at the date of this Agreement is Orchard Investments Management Limited (ACN 105 684 231) as responsible entity for the Timbercorp Orchard Trust (ARSN 106 557 297), of Level 2, 613 St Kilda Road, Melbourne, Victoria, and its permitted assigns and successors.

**Licence Agreement** means the licence agreement between Securities as licensor and each several Grower as licensee in relation to the Citruslots.

**Management Plan** in relation to a Financial Year means the plan for the management of the Orchard that is accepted by both CMPL and Chiquita pursuant to **clause 12.1** and including any changes effected in accordance with **clause 12.3**.

**Marketability** describes the sale of citrus in its optimal condition given the quality of fruit at the time of harvest.

**Marketing Services** means the services that Chiquita provides under **clause 5**.

**Month** means a calendar month.

**New Orchard** means a citrus orchard of approximately 200 hectares of Plantable Portion to be established on that part of the Land that forms part of the Kangara Undeveloped Land on or about 30 September 2005.

**Orchard** means the Existing Orchard and the New Orchard, being an area of approximately 509 hectares of Plantable Portion.

**Orchard Services** means the services that Chiquita provides<sup>2</sup> or is to provide under **clause 5**, or any of those services.

**Packhouse** means the packhouse operated by Chiquita for processing citrus (including the Citrus) or any other such facilities Chiquita uses to process citrus (including the Citrus) under this Agreement.

**Parties** means the parties to this Agreement.

**Plantable Portion** means, in relation to the Land, a portion of the Land in respect of which Citrus Trees are planted or able to be planted.

**Previous CPI** means the CPI for the last concluded quarter prior to the immediately preceding Price Review Date (or, in the case of the initial Price Review Date, the quarter immediately preceding 1 July 2006).

**Price Review Date** means 1 July in each Financial Year during the Term commencing on 1 July 2006 (being the initial Price Review Date).

**Process** means sort, grade, package and store and "**processing**" has a corresponding meaning;

**Processing Market** describes the market for all Citrus not suitable for Fresh Pack Domestic or Fresh Pack Export markets, but suitable for conversion into Citrus juice or other processed products.

**Project** means the 2005 Timbercorp Citrus Project promoted by Securities and any permitted assign or successor, which project is a managed investment scheme.

**Project Party** means all or any of Securities, CMPL and Timbercorp.

**Random Sample** means a random sample of Citrus that is taken during the Term from the truck or container holding those Citrus.

**Receiver** has the meaning it has in the Corporations Act.

**Related body corporate** has the same meaning given to that term under the Corporations Act 2001.

**Season** means each period from the date on which the harvesting of the crop of the Orchard is commenced and ending on 30 June in the year following the year in which the harvesting of the crop commenced.

**Securities** means Timbercorp Securities Limited ACN 092 311 469 and its permitted assigns and successors.

**Services** means all or any of the Marketing Services and Orchard Services and as the context requires.

**Solara Estate** means those parts (or parts thereof) of the land located at Bookpurnong near Renmark, South Australia, more particularly described in Certificate of Title Register Book Volume 5278 Folio 11, Volume 5278 Folio 12, Volume 5471 Folio 442, and Volume 5519 Folio 293 on which the Existing Orchard was established.

**Term** means the term of this Agreement set out in **clause 2**.

**Termination Date** means the earlier of:

- (d) 30 June 2027;
- (e) the date of lawful termination of this Agreement; and
- (f) the date of lawful termination or expiry of the Project.

**Timbercorp** means Timbercorp Limited ACN 055 185 067 and its permitted assigns and successors.

**Vermin** means birds, rabbits and other animals of any type likely to cause substantial damage to any of the Citrus Trees or Citrus.

**Water Licences** means any water licences and any other authorisations acquired or held by the Land Owner, Timbercorp or Securities or their agents for the purposes of enabling the irrigation of the Citrus Trees.

**Yandilla Park** means Yandilla Park Limited ACN 050 165 921.

## **27.2 Construction**

In this document, unless expressed or implied to the contrary:

- (a) a reference to this document includes a variation or replacement of it;
- (b) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of it;
- (c) the singular includes the plural and vice versa;
- (d) if a word is defined, cognate words have corresponding definitions;
- (e) a reference to a person includes a firm, body corporate, an unincorporated association or an authority;
- (f) a reference to a person includes the person's legal personal representatives and successors, and permitted substitutes (including persons taking by novation) and assigns;
- (g) a reference to a gender includes the other genders;
- (h) a covenant or agreement on the part of the two or more persons binds them jointly and severally;
- (i) a reference to **\$** or **dollars** is a reference to Australian dollars;
- (j) a reference to a clause, recital or schedule is to a clause, recital or schedule in or to this Agreement; and
- (k) the defined terms in **clause 27.1** have the meaning given to them in that clause except where the context otherwise requires.

## **27.3 Headings**

Headings are for convenience of reference only and do not affect the interpretation of this Agreement.

## **27.4 Severance**

Each word, phrase, sentence, paragraph and clause (**a provision**) of this Agreement is severable and, if a court of law determines that a provision is unenforceable, illegal or void, the court of law must sever that provision, which will become inoperative, and such severance will not affect the other provisions of this Agreement.

# SCHEDULE 1

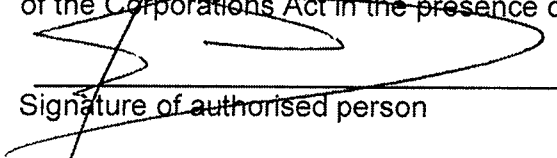
## DIRECT COSTS & EXPENSES

It is the intention of the parties that they will agree to a budget at the commencement of each Financial Year of the Term for the direct and indirect costs that may be incurred in the management and farming of the Defined Crops. Such direct costs and expenses will include, without limitation, the costs and expenses as set out in Schedule 1.

- Total salaries & wages of Orchard personnel performing duties on the Orchards
- On-costs (superannuation, payroll tax, work cover charges, FBT, training) associated with Orchard personnel
- Vehicle, computer, office and communication costs associated with Orchard personnel
- Chemicals and fertilisers applied to the Orchards
- Consulting and other associated fees charged by citrus and other relevant consultants as described in the Management Plan
- Fees and other charges levied or otherwise imposed by contracted service suppliers directly associated with the Orchards
- Council rates
- The costs of metered electricity associated with supplying irrigation to the Orchards
- Insurances for crop, personnel vehicles and public liability
- Costs associated with repairs and maintenance on irrigation system
- The costs of all tools, protective gear and other items associated with the Orchards
- Management systems (ISO 9001, etc)
- Orchard machinery hire from Chiquita

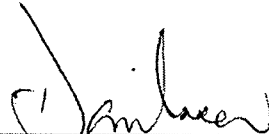
EXECUTED unconditionally as an Agreement.

EXECUTED by **CHIQUITA BRANDS  
SOUTH PACIFIC LIMITED ABN 67 002  
687 961** in accordance with section 127(1)  
of the Corporations Act in the presence of:

  
\_\_\_\_\_  
Signature of authorised person

\_\_\_\_\_  
Director

MANDO BABIOLAKIS  
\_\_\_\_\_  
Print Name of authorised person

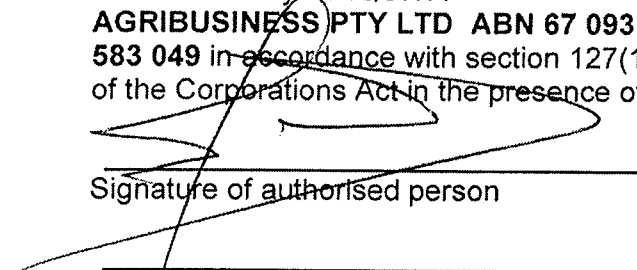
  
\_\_\_\_\_  
Signature of authorised person

\_\_\_\_\_  
Signature of authorised person

\_\_\_\_\_  
Director /Secretary

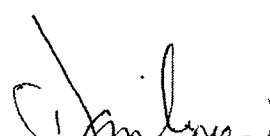
DAVID GREEN  
\_\_\_\_\_  
Print Name of authorised person

EXECUTED by **CHIQUITA  
AGRIBUSINESS PTY LTD ABN 67 093  
583 049** in accordance with section 127(1)  
of the Corporations Act in the presence of:

  
\_\_\_\_\_  
Signature of authorised person

\_\_\_\_\_  
Director

MANDO BABIOLAKIS  
\_\_\_\_\_  
Print Name of authorised person


  
\_\_\_\_\_  
Signature of authorised person


\_\_\_\_\_  
Signature of authorised person

\_\_\_\_\_  
Director /Secretary


DAVID GREEN  
\_\_\_\_\_  
Print Name of authorised person


**EXECUTED by CITRUSCORP  
MANAGEMENT PTY LTD ACN 105 995  
257** in accordance with the Corporations  
Act by:

  
\_\_\_\_\_  
Signature of authorised person  
**Director**  
\_\_\_\_\_  
Director  
**Sol Rabinowicz**  
\_\_\_\_\_  
Print Name of authorised person

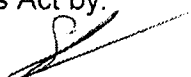
  
\_\_\_\_\_  
Signature of authorised person  
**Secretary**  
\_\_\_\_\_  
**Mark H Pryn** ~~Director~~ /Secretary  
\_\_\_\_\_  
Print Name of authorised person


**EXECUTED by TIMBERCORP  
SECURITIES LIMITED ACN 092 311 469**  
in accordance with the Corporations Act  
by:

  
\_\_\_\_\_  
Signature of authorised person  
**Director**  
\_\_\_\_\_  
Director  
**Sol Rabinowicz**  
\_\_\_\_\_  
Print Name of authorised person

  
\_\_\_\_\_  
Signature of authorised person  
**Secretary**  
\_\_\_\_\_  
**Mark H Pryn** ~~Director~~ /Secretary  
\_\_\_\_\_  
Print Name of authorised person

**EXECUTED by TIMBERCORP LIMITED  
ACN 005 185 067** in accordance with the  
Corporations Act by:

  
\_\_\_\_\_  
Signature of authorised person  
**Director**  
\_\_\_\_\_  
Director  
**Sol Rabinowicz**  
\_\_\_\_\_  
Print Name of authorised person

  
\_\_\_\_\_  
Signature of authorised person  
**Secretary**  
\_\_\_\_\_  
**Mark H Pryn** ~~Director~~ /Secretary  
\_\_\_\_\_  
Print Name of authorised person