

1 Jan L. Kahn #55788
2 Rissa A. Stuart #166459
3 David W. Kahn #258700
4 KAHN, SOARES & CONWAY, LLP
5 Attorneys at Law
6 219 North Douty Street
7 Hanford, California 93230
8 Telephone: (559) 584-3337
9 Facsimile: (559) 584-3348

E-FILED
1/5/2017
FRESNO COUNTY SUPERIOR COURT
By: S. Lopez, Deputy

6 Attorneys for Plaintiff, AFOURER, INC.
7 dba MULHOLLAND CITRUS

9 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 IN AND FOR THE COUNTY OF FRESNO

11 AFOURER, INC., a California corporation
12 dba MULHOLLAND CITRUS
13 Plaintiff,
14 vs.
15 VANTAGGIO FARMING CORP., a
16 California corporation; and DOES 1
17 through 20,
18 Defendants.

Case No. 17CECG00046

**COMPLAINT FOR BREACH OF
CONTRACT; PROMISE WITHOUT
INTENT TO PERFORM; BREACH OF
IMPLIED WARRANTY OF FITNESS;
BREACH OF EXPRESS WARRANTY;
NEGLIGENCE; NEGLIGENT
INTERFERENCE WITH ECONOMIC
RELATIONSHIP**

19 Plaintiff alleges:

20 **I.**
21 **GENERAL ALLEGATIONS**

22 1. Plaintiff, Afourer, Inc. is and at all times mentioned in this complaint was a
23 corporation duly formed in the State of California, doing business as Mulholland Citrus
24 ("Plaintiff"), with its principal place of business located in the City of Orange Cove,
25 County of Fresno, State of California.

26 2. Plaintiff is informed and believes and thereon alleges that Defendants,
27 Vantaggio Farming Corp. is, and at all times mentioned was, a corporation duly formed
28 in the State of California, and lawfully doing business in the state of California.

1 3. The true names and capacities of Defendants identified herein as DOES 1
2 through 20 are unknown to Plaintiff, who therefor sues these Defendants by such
3 fictitious names and will amend this complaint to allege their true names and capacities
4 when ascertained. Plaintiff is informed and believes and thereon alleges that each of
5 the fictitiously named Defendants is responsible in some manner for the acts or
6 omissions alleged in this complaint and Plaintiff's damages were proximately, legally,
7 and foreseeably caused by the acts or omissions of these Defendants.

8 4. Plaintiff is informed and believes and thereon alleges that at all times
9 mentioned herein each Defendant was the agent, servant, and employee of each of the
10 remaining Defendants and was in doing the acts alleged herein, acting within the full
11 scope of their agency and/or employment and acting with the full knowledge or
12 subsequent ratification of their principals or employers.

13 5. Plaintiff is in the business of, among other things, rearing a micro wasp
14 known as Aphytis Melinus (the "**Wasp**") which is a natural enemy used to prevent or
15 control California Red Scale, a pest found in citrus regions of California that causes
16 damage to citrus trees and fruit. Plaintiff sells the Wasps to citrus producers throughout
17 the citrus industry.

18 6. Plaintiff rears the Wasp on its host, Oleander Scale, which is placed on
19 and feeds on the banana squash (the "**Banana Squash**"). Plaintiff requires a year
20 around supply of the Banana Squash for such purposes.

21 7. Defendants are in the business of, among other things, growing Banana
22 Squash.

23 8. In or around December, 2015, Plaintiff and Defendants agreed to a
24 transaction, the terms and conditions of which included the purchase and sale of
25 Banana Squash, sized 9" x 24", and specifically pesticide free as Oleander Scale, which
26 hosts the Wasp, is raised on the surface of the Banana Squash. Once the Oleander
27 Scale on the Banana Squash matures, the Wasps are introduced and lay their larvae in
28

1 the mature Oleander Scale on the Banana Squash. The Oleander Scale is very
2 sensitive to pesticides, especially the systemic Neonicotinoid pesticide known as
3 "Imidacloprid." The parties' agreement to provide pesticide free Banana Squash is
4 memorialized in various emails and other writings, correspondence and invoices.

5 9. During the parties' negotiation of the above described transaction, Plaintiff
6 explained to Defendants that Plaintiff raises the Wasps on the Oleander Scale infested
7 Banana Squash. Plaintiff told Defendants of the requirement for the pesticide free
8 Banana Squash so as to cause no harm to the Oleander Scale and/or the Wasp and
9 Wasp larvae. Defendants, and each of them, understood this condition and warranted
10 they could meet the requirement of providing pesticide free Banana Squash.

11 10. In or about May and June, 2016, as per the parties' agreement,
12 Defendants delivered approximately 124 bins of Banana Squash to Plaintiff.

13 11. In or about May 26, 2016, Plaintiff placed the Oleander Scale on the
14 Banana Squash daily for growth and maturation, before the Wasp rearing begins. This
15 process takes approximately 45 – 60 days. However, within approximately 25 days all
16 of the Oleander Scale died, as a result of the pesticide on the Banana Squash. Thus,
17 without the Oleander Scale, Plaintiffs had no host for and could not produce the Wasp
18 population needed to fulfill its many contracts.

19 12. On or about July 5, 2016, Plaintiff advised Defendants that the Banana
20 Squash tested positive for the pesticide "Imidacloprid," and that all of the Oleander
21 Scale placed on the Banana Squash died and Plaintiff was unable to raise its pre-sold
22 Wasp population.

23 **II.**

24 **FIRST CAUSE OF ACTION**

25 **(Breach of Written Contract)**

26 13. Plaintiffs incorporate herein by this reference paragraphs 1 through 12 of
27 this Complaint, as though the same were fully set forth herein.

28 14. Plaintiff and Defendants agreed in writing that Defendants would

1 provide pesticide free Banana Squash for the purpose of Plaintiff rearing the Wasp on
2 the Oleander Scale grown on the Banana Squash, in consideration for payment from
3 Plaintiff for the Banana Squash.

4 15. Plaintiff paid Defendants the agreed upon sum of \$33,882.00 for 124 bins
5 of Banana Squash delivered by Defendants.

6 16. Defendants breached the written agreement by failing to deliver Banana
7 Squash that was pesticide free as required by Plaintiff.

8 17. As a proximate result of Defendants' breach as described hereinabove,
9 Plaintiff incurred additional labor and management costs in the approximate amount of
10 \$10,104.92, in its attempt to salvage and raise the Oleander Scale to host the Wasp
11 population, and costs related to lab testing of the Banana Squash in the approximate
12 amount of \$279.00, and other consequential damages, all in an amount according to
13 proof at trial.

14 18. As a further proximate result of Defendants' breach as described
15 hereinabove, Plaintiff was unable to raise a Wasp population for sale to citrus growers
16 and, thus, lost sales of the Wasps to Plaintiff's customers, in the approximate amount
17 of \$397,338.40, or in an amount according to proof at trial.

18 19. As a further result of the Defendants' breach as described hereinabove,
19 Plaintiff was able to purchase a limited number of Wasps, to fill certain orders for
20 certain customers, in the total approximate amount of \$12,945.00., or in an amount
21 according to proof at trial.

22 20. As a direct and proximate result of Defendants' breach, Plaintiffs have
23 suffered damages in a total amount to be determined according to proof, but not less
24 than the sum of \$454,549.32 (the total of the above-described damages), plus
25 prejudgment interest accruing thereon at the legal rate.

26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

III.
SECOND CAUSE OF ACTION
(Promise Without Intent to Perform)

21. Plaintiffs incorporate herein by this reference paragraphs 1 through 20 of this Complaint, as though the same were fully set forth herein.

22. Defendants, and each of them, made a promise about a material matter related to its sale of Banana Squash to Plaintiff without any intention of performing it, as Defendants understood and promised it would provide the Banana Squash pesticide free so that it may be used for the purpose of raising Oleander Scale on the surface of the Banana Squash, which is then the host for the Wasps and Wasp larvae.

23. Defendants never intended to provide the Banana Squash pesticide free as Defendants promised.

24. Defendants' promise without any intention of performance was made with the intent to defraud and induce Plaintiff to purchase the Banana Squash. At the time Plaintiff performed under the parties' agreement, Plaintiff was unaware of Defendants' intention not to perform the promise. Plaintiff acted in justifiable reliance upon Defendants' promise. If Plaintiff had known of the actual intention of Defendants, Plaintiff would not have entered into or performed under the agreement with Defendants.

25. Because of Plaintiff's reliance upon Defendants' promise without intention of performance, Plaintiff has been damaged as follows: Plaintiff incurred expenses in purchasing the Banana Squash from Defendants in the total approximate amount of \$33,882.00; Plaintiff incurred additional labor and management costs in the approximate amount of \$10,104.92 trying to save the Oleander Scale as a host for Wasp larvae, to no avail; Plaintiff incurred costs for laboratory testing of the Banana Squash in the approximate amount of \$279.00; Plaintiff lost sales in the approximate amount of \$397,338.40; and Plaintiff incurred additional costs in securing an alternative source of the Wasp for certain customers in the approximate amount of \$12,945.00,

1 or all in an amount according to proof at trial.

2 26. As a direct and proximate result of Defendants' conduct, Plaintiff has
3 suffered damages in a total amount to be determined according to proof, but not less
4 than the sum of \$454,549.32, (which is the current total of the above-described
5 expenses), plus prejudgment interest accruing thereon at the legal rate.

6 27. Defendants' acts alleged hereinabove were willful, wanton, malicious and
7 oppressive, and were undertaken with the intent to defraud Plaintiff and justify the
8 awarding of exemplary and punitive damages.

9 **IV.**
10 **THIRD CAUSE OF ACTION**

11 **(Breach of Implied Warranty of Fitness)**

12 28. Plaintiffs incorporate herein by this reference paragraphs 1 through 27 of
13 this Complaint, as though the same were fully set forth herein.

14 29. In or about December, 2015, and through July, 2016, Plaintiff entered into
15 a purchase and sale transaction with Defendants, and each of them, for pesticide free
16 Banana Squash, for the known purpose of Plaintiff rearing the Wasps for commercial
17 production and sale. Defendants, and each of them, were aware the Banana Squash
18 was not for human consumption and that it must be pesticide free to accommodate the
19 Oleander Scale, as the host for the Wasp larvae and Wasp growth. Plaintiff relied on
20 Defendants' skill and judgment to produce and supply such pesticide free Banana
21 Squash that would be suitable for the purpose of rearing the Wasps. In or about 2016,
22 Defendants sold to Plaintiff approximately 124 bins of the Banana Squash, and Plaintiff
23 bought the Banana Squash from Defendants, in reliance on Defendants' skill and
24 judgment, for the amount of approximately \$33,882.00.

25 30. At the time of contracting for the purchase and sale of the goods,
26 Defendants knew or had reason to know the particular purpose for which the goods
27 were required by virtue of the fact that Plaintiff expressly communicated these purposes
28 to Defendants in requesting the Banana Squash, and that Plaintiff was relying on

1 Defendants' skill and judgment to furnish pesticide free Banana Squash; so that there
2 was an implied warranty that the Banana Squash were fit for this purpose, i.e. pesticide
3 free and safe for rearing the Wasps on their host, Oleander Scale.

4 31. However, Defendants, and each of them, breached the warranty implied
5 at the time of the sale in that Defendants, and each of them, did not provide suitable
6 goods, and the goods were not fit for the particular purpose for which they were
7 required, in that the Banana Squash were not pesticide free and/or safe for rearing
8 Oleander Scale, the host for the Wasps, and therefore the Oleander Scale failed to
9 mature and died and Plaintiff was unable to develop the Wasp population on the
10 Oleander Scale growth on the Banana Squash.

11 32. Plaintiff discovered the breach of warranty in or about July, 2016. On or
12 about July 5, 2016, Plaintiff notified Defendants of the breach in writing.

13 33. As a direct and proximate result of Defendants' conduct, Plaintiff has
14 suffered damages in a total amount to be determined according to proof, but not less
15 than the sum of \$454,549.32 (the total damages described in Paragraph 25 above),
16 plus prejudgment interest accruing thereon at the legal rate.

17 **V.**
18 **FOURTH CAUSE OF ACTION**
19 **(Breach of Express Warranty)**

20 34. Plaintiffs incorporate herein by this reference paragraphs 1 through 33 of
21 this Complaint, as though the same were fully set forth herein.

22 35. In or about December, 2015, Plaintiff and Defendants negotiated for
23 purchase and sale of certain goods consisting of a year around supply of Banana
24 Squash. In the course of the negotiations, a particular description of the Banana
25 Squash was made a part of the basis of the bargain between the parties as a result of
26 correspondence between the parties, and, thus constituting an express warranty. The
27 description of the Banana Squash stated that the Banana Squash would be pesticide
28 free, and suitable for rearing the Wasps.

1 the citrus industry, causing damage to Plaintiff's business, including but not limited to
2 lost Wasp sales, lost profits, and loss of business reputation. Further, as a direct result
3 of Defendant's negligence, Plaintiff was compelled to purchase replacement Wasps,
4 although the numbers available were limited, all in an amount according to proof at trial.

5 44. As a further direct and legal result of the negligence of Defendants, and
6 each of them, Plaintiff incurred damages, including additional labor and management
7 costs and fees to salvage the Oleander Scale and Wasp production, in an amount
8 according to proof at trial.

9 45. As a further direct and legal result of the negligence of Defendants,
10 Plaintiff lost customers in its insectary business, and sustained other general damages
11 including, but not limited to, damage to its reputation, all in an amount according to
12 proof at trial.

13 **VII.**
14 **SIXTH CAUSE OF ACTION**

15 **(Negligent Interference with Economic Relationship)**

16 46. Plaintiff incorporates herein by this reference paragraphs 1 through 12 of
17 this Complaint, as though the same were fully set forth herein.

18 47. In or about December, 2015, Plaintiff and Defendants agreed to a
19 transaction by which Defendants, and each of them, agreed to provide Banana Squash
20 to Plaintiff pesticide free for the purpose of Plaintiff growing Wasps on the Oleander
21 Scale host, grown on the Banana Squash.

22 48. Plaintiff is in the business of growing the Wasps for commercial purposes,
23 i.e. Plaintiff sells the Wasps in the citrus industry for the purpose of combatting
24 California Red Scale.

25 49. Defendants were informed when the parties negotiated for the purchase
26 and sale of the Banana Squash that the Banana Squash was to be used for the
27 purpose of rearing the Wasps on a scale host, and that such Wasps would be sold by
28 Plaintiff in the citrus industry, and, thus, the Banana Squash had to be pesticide free.

1 50. Defendants nevertheless negligently planted, grew, controlled,
2 supervised, maintained, purchased, sold, and/or delivered to Plaintiff Banana Squash,
3 which was not pesticide free.

4 51. As a result of Defendants', and each of their, negligence, the Oleander
5 Scale host for Plaintiff's Wasps died and, thus, Plaintiff was unable to grow or produce
6 the Wasps on the Banana Squash. As a proximate result of the loss of Oleander Scale
7 and resultant inability to produce or rear new Wasps or Wasp larvae, Plaintiff lost
8 anticipated and promised Wasp sales, suffered lost profits, sustained damage to its
9 business reputation, lost customers, and was compelled to purchase replacement
10 Wasps, albeit, limited numbers, all to its damage, in an amount according to proof at
11 trial.

12 52. As a further direct and legal result of the negligence of Defendants, and
13 each of them, Plaintiff incurred special damages, including additional labor and
14 management costs and fees, in an amount according to proof at trial, and general
15 damages in an amount according to proof at trial.

16 PRAYER FOR RELIEF

17 WHEREFORE, Plaintiff prays judgment as follows:


- 18 1. For consequential damages according to proof, but not less than
19 \$454,549.32;
 - 20 2. For prejudgment interest accruing thereon at the legal rate of ten percent
21 (10%);
 - 22 3. For special damages in an amount according to proof at trial;
 - 23 4. For general damages in an amount according to proof at trial;
 - 24 5. For punitive and exemplary damages;
 - 25 6. For costs of suit incurred herein; and
- 26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

7. For such other relief as the court may deem just and proper.

Dated: December 28, 2016

KAHN, SOARES & CONWAY, LLP

By: 
Jan L. Kahn / Rissa A. Stuart,
Attorneys for Plaintiff, Afourer, Inc.
dba Mulholland Citrus

F:\WORD\16\16142.00\Complaint - FINAL 121316.doc