

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. STATEMENT OF CASE..... 2

 A. The Contracts Are Fully Integrated Agreements
 That Govern All Accounting of Revenue..... 2

III. AS A MATTER OF LAW, THE CONTRACT
GOVERNS ACCOUNTING OF ALL REVENUE,
INCLUDING GIVEBACKS 4

 A. The contracts are fully integrated agreements,
 and therefore the Court erred by removing a
 category of “revenue” from the formula for
 calculating “net revenue” under the contracts. 4

 B. The contracts govern all revenue, including
 givebacks. 9

 C. The Court cannot sit in equity to revise the
 treatment of revenue in the contracts..... 10

IV. CONCLUSION..... 12

TABLE OF AUTHORITIES

Cases

Berg v. Hudesman, 115 Wn.2d 657 (1990) 7, 9

Brogan & Anensen, LLC v. Lamphiear, 165 Wn.2d 773 (2009) 7

DePhillips v. Zolt Constr. Co., 136 Wn.2d 26 (1998)..... 7

Freestone Capital Partners, LP v. MKA Real Estate Opportunity
Fund I, LLC, 155 Wn. App. 643 (2010)..... 6

Hearst Commc'ns, Inc. v. Seattle Times, 154 Wn.2d 493 (2005) 5, 7

Hollis v. Garwall, Inc., 137 Wn.2d 683 (1999) 7

State v. R.J. Reynolds Tobacco Co., 151 Wn. App. 775 (2009)..... 6

Treatises

11 RICHARD A. LORD, WILLISTON ON CONTRACTS § 32:7, at 434 (4th
ed. 1999) 9

I. INTRODUCTION

Appellants FreightCo (which refers, collectively, to Cruise Logistics LLC, Transville, LLC, Seattle Logistics, Inc., and Charlotte Logistics, LLC) submits this reply brief in support of its appeal of the trial court's erroneous conclusion of law which inserted a new provision into a fully integrated contract that governs the disbursement of "all revenue." The decision below creates a new category of revenue (called a "giveback") that was not specified in the written agreements, was not contemplated at the time of contract, and was not supported by the course of dealing between the parties.

The terms of the contracts establish that the Appellants are due net revenue – that is, all revenue, minus specific costs and fees. Respondent's brief does not deny that the Court's action – which carved out a category of revenue and allocated it to the Respondents – is unsupported by the contract between the parties. Rather, Respondents claim that the Court may assign giveback revenue to Transgroup by ignoring the fully integrated contracts and ruling as a court of equity. Respondents' argument fails because the fully integrated contract controls all revenue, and there is no equitable claim at issue. Accordingly, the Court of Appeals should reverse the trial court's Conclusion of Law ("COL") No. 3 and order that the court below

erred in awarding Transgroup (which refers, collectively, to Transfair North America International Freight Services, Inc. and Transgroup Express, Inc.) that portion of FreightCo's revenue that it labeled "givebacks."

II. STATEMENT OF CASE

1. The Contracts Are Fully Integrated Agreements That Govern All Accounting of Revenue

Appellants will not restate the facts, which were set out in detail in the Opening Brief, but rather emphasize a few salient points that are agreed to or remain uncontested by the Respondents.

First, it is not disputed that, by their terms, the contracts (formally entitled Transportation Services Agreements, and referred to herein as "the contracts") address the treatment of *all revenue and all fees and costs* associated with FreightCo's transactions under the Transgroup/Transfair names. Ex 12-22; CP 251 (FOF No. 1); see also Respondent's Brief at 5.

The contracts are comprehensive pertaining to all revenue and all expenses. For example, Section 1.1 references "all accounting services as outlined in the attached Exhibit A." In turn, Exhibit A addresses "**All revenue** billed by ICO" (*Id.*; Contracts at Exh. A, § I.B (emphasis added)) and provides for remittance of "**net revenue**," defined as "**revenue**," less "service fees, all carrier costs, designation charges, direct insurance costs and any other third party direct cost of

the shipment.” Pursuant to the schedule of accounting services, Freightco is entitled to “**net revenue**” defined as **gross revenue less the specifically enumerated costs**. Id. Pursuant to the contracts, the only fee or payment to Transgroup is Transgroup’s percentage share of revenue (11% or 30%). Id.; CP 251 (FOF No. 2).

Respondents concede, as they must, that givebacks are a subset of “all revenue billed by ICO.” Respondents Brief at 13 (“Accordingly, Transgroup holds back enough of **the revenue** from the particular shipments to pay for those unbilled charges. If the vendor does not bill the charges in the next calendar year, Transgroup will ‘give back’ **these unbilled amounts** to the ICO the following year”) (emphasis added).

Second, the contracts are fully integrated and require that any modification – such as a new subcategory of revenue treated separately – must be in writing. In section 14.1, entitled “entire agreement,” the contracts state that “[t]his Agreement constitutes the entire agreement between the parties hereto. In addition to section 14.1, section 14.2 of the contracts states that “The Agreement may not be amended or modified except by an instrument in writing and executed by both TRANSFAIR and ICO.” (emphasis added). Ex 12-22.

Respondents do not dispute that the contracts are fully integrated. Respondent’s Brief at 16. Rather, Respondents contend that this Court should adopt the trial court’s non sequitur: that because

the contracts did not use the word “givebacks,” they can create a new category of revenue that Respondents may seize after termination.

The trial court’s first step is correct; “givebacks are not addressed or even mentioned in the parties' contracts” and givebacks were not contemplated in the execution of the contracts. CP 254 (FOF 24). But it does not follow that revenue received with the intention of paying those invoices is somehow not “revenue” under the contracts. In fact, the trial court recognized that givebacks are revenue, finding that that “Transgroup holds back enough of the revenue from the particular shipments to pay for those unbilled charges” if the vendor ultimately bills the charge. CP 254 (FOF 21) (emphasis added). However, the trial court erred in its legal conclusion that “givebacks” were a special category of revenue omitted from the contracts. Rather, the contracts are unambiguous that FreightCo was to be remitted net revenue – that is, all revenue, less Transgroup’s specified fees and costs.

III. AS A MATTER OF LAW, THE CONTRACT GOVERNS ACCOUNTING OF ALL REVENUE, INCLUDING GIVEBACKS

- A. The contracts are fully integrated agreements, and therefore the Court erred by removing a category of “revenue” from the formula for calculating “net revenue” under the contracts.**

The Court erred by holding that revenue referred to as “givebacks” should be governed outside the plain language of the contracts. Under Washington law, the contracts are fully integrated

and require that any modification must be in writing. In section 14.1, entitled “entire agreement,” the contracts state:

This Agreement constitutes the entire agreement between the parties hereto, and no party is bound in any matter by express or implied warranties, guarantees, promises, statements or representations, whatsoever, made or furnished by any agent, employee, servant or other person representing or purporting to represent any party, unless such warranties, guarantees, promises, statements, or representations are expressly and specifically set forth herein. Any inducements embodied herein shall be of no force and effect.

In addition to section 14.1, section 14.2 of the contracts states that “The Agreement may not be amended or modified except by an instrument in writing and executed by both TRANSFAIR and ICO.” (emphasis added). Ex 12-22.

The trial court’s Conclusion of Law states only that FreightCo is not entitled to givebacks because FreightCo terminated the contracts. CP 255 (COL 3). The trial court’s justification in looking outside the four corners of the contracts is not specified. Respondents do not contest that Washington follows the “objective manifestation” theory of contracts. Hearst Commc'ns, Inc. v. Seattle Times, 154 Wn.2d 493, 502 (2005). A court gives words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. Freestone Capital Partners, LP v. MKA Real Estate Opportunity Fund I, LLC, 155 Wn. App. 643, 671

(2010). This Court recently articulated the court's role in interpreting contracts as follows:

The court gives words their ordinary, usual, and popular meaning unless the entirety of the agreement evidences a contrary intent. If relevant for determining mutual intent, surrounding circumstances and other extrinsic evidence may be used to determine the meaning of specific words and terms used, but not to show an intention independent of the instrument or to vary, contradict, or modify the written word. Where, as here, interpretation does not depend on the use of extrinsic evidence, interpretation of a contract provision is a question of law reviewed de novo.

State v. R.J. Reynolds Tobacco Co., 151 Wn. App. 775, 783 (2009)

(internal citations omitted)(emphasis added).

Respondents urge this Court to carve an exception to the contracts using the trial court's finding that, after contract execution, the Appellants became aware of (but never agreed to) Respondents' policy of withholding giveback revenue when an ICO left the Transgroup system. But Freightco's awareness of this policy does not indicate that it became a contractual term. Under Washington law, this Court cannot look to the parties' behavior after the time of contract to construe the contracts itself. Where the Court looks beyond the objective manifestation of the contracts, it looks to determine the

mutual intent of the parties *at the time of contract*. Hearst Commc'ns, 154 Wn.2d at 504. As the Washington Supreme Court recently stated,

Specifically, the court may consider the context of the language in the agreement. The parol evidence rule precludes the use of extrinsic evidence to add to, subtract from, modify, or contradict the terms of a fully integrated written contract; that is, a contract intended as a final expression of the terms of the agreement. DePhillips v. Zolt Constr. Co., 136 Wn.2d 26, 32, 959 P.2d 1104 (1998). But a party may offer extrinsic evidence in a contract dispute to help the fact finder interpret a contract term and determine the contracting parties' intent regardless of whether the contract's terms are ambiguous. Berg v. Hudesman, 115 Wn.2d 657, 667-69, 801 P.2d 222 (1990). Extrinsic evidence is not admissible, however, to show intention independent of the contract. Hollis v. Garwall, Inc., 137 Wn.2d 683, 695, 974 P.2d 836 (1999). Washington courts focus on objective manifestations of the contract rather than the subjective intent of the parties; thus, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used. Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 504, 115 P.3d 262 (2005).

Brogan & Anensen, LLC v. Lamphiear, 165 Wn.2d 773, 775-776

(2009). Extrinsic evidence is admissible only for the purpose of elucidating the meaning of the terms of a contract and is inadmissible for the purpose of adding to, modifying, or contradicting these terms.

Berg v. Hudesman, 115 Wn.2d 657, 669 (1990). When ascertaining the intent of the parties, the court may consider: (1) the circumstances of the parties at the time the contract was executed; (2) the

circumstances under which the contract was executed; and (3) the subsequent conduct of the parties. *Id.* at 668-69. As asserted above, the objective manifestation of the contracts governs the distribution of all revenue, including givebacks.

Even if the Court were to look past the objective manifestation of the contracts, the trial court mistakenly considered the understanding of the parties *after entering into the contracts*. CP 255 (FOF 29) (finding that “FreightCo was aware of Transgroup’s policy regarding givebacks *during the parties’ contractual relationship*”)(emphasis added). The record is uncontroverted that the parties did not discuss “givebacks” at the time of contract formation. CP 254 (FOF 24); RP11/02/2009 at 41:23-42:5. In fact, it is undisputed that the contracts were a form contract that FreightCo could not negotiate. RP 11/4/2009 at 110:6-111:18 (Transgroup’s executive director of operations testifying that ICO contracts are the same “because [Transgroup has] to secure consistency across the system”); RP 11/2/2009 at 41:1-44:15; 62:5-9. The court did not consider the circumstances *at the time of contract* and, if it had, those circumstances would not have supported Transgroup’s practice of seizing givebacks after contract termination, which FreightCo was made aware of after signing the contracts and joining the Transgroup

system. See also 11 RICHARD A. LORD, WILLISTON ON CONTRACTS § 32:7, at 434-35 (4th ed. 1999) (“In constructing a contract, a court seeks to ascertain the meaning of the contract *at the time and place of its execution*”) (emphasis added). Under Berg and its progeny, the court cannot rely upon the “awareness” of FreightCo “*during the parties’ contractual relationship*” about a practice that was not raised during the formation of the contracts.

In sum, the contracts are fully integrated agreements that cannot be altered without a writing signed by both parties.

B. The contracts govern all revenue, including givebacks.

The trial court erred by finding that the contracts did not contain any provisions dealing with the revenue referred to as “givebacks” – essentially carving out an exception to the contracts’ provisions dealing with revenue. Although it’s true that the contracts did not refer, by nickname, to “givebacks,” they do provide specific instructions for how to account for **all revenue and all costs and fees**: Transgroup collects revenue from customers, pays vendors, takes its percentage and remits the remaining portion of revenue to FreightCo. The trial court and Respondents err when they claim that the revenue referred to as

“givebacks” should be excluded from the accounting system dictated by the contracts.

The contracts are comprehensive pertaining to all revenue and all expenses. For example, Section 1.1 references “all accounting services as outlined in the attached Exhibit A.” In turn, Exhibit A addresses “**All revenue** billed by ICO” (Id.; Contracts at Exh. A, § I.B (emphasis added)) and provides for remittance of “**net revenue**,” defined as “**revenue**,” less “service fees, all carrier costs, designation charges, direct insurance costs and any other third party direct cost of the shipment.” Pursuant to the schedule of accounting services, Freightco is entitled to “**net revenue**” defined as **gross revenue less the specifically enumerated costs**. Id. Pursuant to the contracts, the only fee or payment to Transgroup is Transgroup’s percentage share of revenue (11% or 30%). Id.; CP 251 (FOF No. 2).

The trial court created a new category of revenue for “giveback” revenue, and excluded it from “all revenue” as governed under the contracts. Because the contracts support no such new category, the Court cannot author a new provision. Givebacks must be treated like all other revenue under the contracts.

C. The Court cannot sit in equity to revise the treatment of revenue in the contracts.

In an attempt to sidestep the trial court’s error in authoring a new contractual term that creates a new category of revenue,

Respondents make an extraordinary claim: that the trial court is able to avoid the language of the contract because, for that portion of the conclusions of law, it was not sitting as a court of law, but as a court of equity. Respondent's Brief at 16.

The trial court's Findings of Fact and Conclusions of law contain no indication that the court can invoke, *sua sponte*, some sort of equitable jurisdiction. The entirety of the Court's explanation is contained in Conclusion of Law No. 3 and makes no reference to sitting in a court of equity: "Transgroup is not obligated to pay any 'givebacks' to FreighCo since FreightCo terminated the parties' contract and ICOs are not entitled to givebacks after they leave Transgroup."

Respondents attempt to backfill the Court's findings and conclusions by quoting from the oral transcript of a colloquy between the bench and Appellants' counsel, in which the Court mentions equity.¹ Yet no such justification is cognizable on appeal, as the Court did not see fit to include any reference to equity in its findings and

¹ "Because we're talking about contract interpretation and I realize I'm sitting as a court or equity but how can I write something into a contract that doesn't exist? I mean doesn't that violate basic contract law, parole evidence rule about the givebacks? ... My question is one of contract interpretation. It's not in the contract." Quoted at Respondent's brief at 16.

conclusions – findings and conclusions that were drafted, in fact, by the Respondents.

Respondents fail to cite any case law rebutting Appellants' contract claims. Respondents do not even address the contract construction and interpretation rules and maxims that mandate reversal. Respondents do not address the rules of contract interpretation and construction because the trial court's conclusion of law is unsupportable under well established rules of contract law.

The "court of equity" argument is a red herring.² Givebacks were found by the trial court to be "revenue" – as mandated by the Court's finding of fact no. 21³ – and are subject to the written agreement apportioning "all revenue."

IV. CONCLUSION

The fully integrated contracts specify that all revenue is to be remitted to FreightCo, less expenses and the specified percentage to Transgroup. The trial court ordered that Transgroup may seize additional revenue after FreightCo terminates the contract.

² Even if the Superior Court could sit in equity to apportion revenue in a fully integrated contract, the ruling makes no sense as a matter of equity because it does not contemplate remittance of givebacks even when there is no risk of vendors collecting invoices (e.g., after expiration of the applicable statute of limitation).

³ FOF 21 (defining givebacks, and noting that "... Transgroup holds back enough of **the revenue...**") (emphasis added).

Transgroup's post-termination practice was not specified in the contracts and was not even discussed at the time the parties entered into the contracts. Furthermore, the practice was inconsistent with the course of dealing between the parties which provided for remitting givebacks annually. The trial court erred in looking outside the objective manifestation of the contract and relying upon its finding FreightCo was "aware" of (but did not consent to) Transgroup's practice *after* Freightco had entered the contracts and joined the Transgroup system. FreightCo's post-contract awareness that Transgroup would seize an additional category of its revenue is not a proper ground to modify the language of the contracts.

RESPECTFULLY SUBMITTED this 1st day of November, 2010



Roger M. Townsend, WSBA No. 25525
BRESKIN JOHNSON & TOWNSEND PLLC
1111 Third Avenue, Suite 2230
Seattle, Washington 98101
Phone: (206) 652-8660
FAX: (206) 652-8290

William Sherman, WSBA No. 29365
THE SHERMAN LAW FIRM PLLC
1111 Third Avenue, Suite 2230
Seattle, Washington 98101
Phone: (206) 552-9607
Fax: (206) 426-5414

Attorneys for Appellant

CERTIFICATE OF SERVICE

I, Amber Siefer, certify and declare:

I am over the age of 18 years, make this Declaration based upon personal knowledge, and am competent to testify regarding the facts contained herein. On this 1st day of November 2010, I served true and correct copies of the document to which this Certificate is attached on the following in the matter listed below.

Kevin A. Bay, WSBA #19821
Bryan C. Graff, WSBA #38553
RYAN, SWANSON, CLEVELAND
1201 Third Avenue, Suite 3400
Seattle, WA 98101

- VIA FACSIMILE
- Via First Class Mail
- Via Electronic Filing
- Via Email
- Via Messenger

I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.


Amber Siefer, Legal Assistant

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