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No. 649388

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CRUISE LOGISTICS, LLC
dba FREIGHTCO, TRANSVILLE, LLC, SEATTLE LOGISTICS,
INC., AND CHARLOTTE LOGISTICS, LLC,

Appellants,

v.

TRANSFAIR NORTH AMERICA INTERNATIONAL
FREIGHT SERVICES, INC. AND TRANSGROUP
EXPRESS, INC.,

Respondents.

RESPONDENTS' OPENING BRIEF

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I. INTRODUCTION

Respondents Transfair North America International Freight Services, Inc. and Transgroup Express, Inc., (collectively, "Transgroup") submit this brief in response to appellant FreightCo's opening brief. As set forth herein, the trial court should be affirmed. First, its Conclusion of Law #3 is supported by Findings of Fact that are unchallenged by FreightCo. Second, the trial court did not interpret the parties' contract as FreightCo argues. Rather, it enforced the written terms of the parties' contract consistent with Washington contract law. Simply put, the terms of the contract required Transgroup to pay net revenue to FreightCo and the givebacks at issue do not constitute net revenue.

II. STATEMENT OF THE CASE

A. Summary of the Case and Proceedings Below

Transgroup accepts FreightCo's statement of the case and description of the proceedings below except its rendition of the motion for reconsideration. Transgroup did not oppose modification of the monetary award to FreightCo because the trial court's original award contained a mathematical error. *See* CP 234-36. Transgroup opposed the remaining grounds for reconsideration, none of which were granted by the trial court. CP 248-49.

B. Facts Relevant to Issues On Appeal.

FreightCo brought a multitude of claims for, among other things, libel, tortious interference, misrepresentation, violation of the Consumer Protection Act and violation of the Uniform Trade Secrets Act. CP 140-74. Most of the claims were either dismissed or abandoned immediately before trial. *See* CP 255 (COL 6); RP 11/4/09 at 123:1-124:20. What was left for trial was an accounting case, with the parties disputing various credits and offsets arising out of the termination of their eight-year contractual relationship. The accounting issues were numerous and complex and involved allocating responsibility for costs involved in thousands of domestic and international shipments of freight. The trial court did an admirable job comprehending and adjudicating the various issues. Of the many issues that came before the trial court, only one is on appeal – the so-called “givebacks” – perhaps the most straightforward and clear of all the issues tried. Since it is the only issue on appeal, Transgroup will limit its statement of facts to those background facts necessary to understand the parties’ business relationship and the “givebacks.”

1. The Transgroup system and how it operates.

Transgroup is a freight forwarding and logistics company. RP 11/4/09 at 132:6-7. It operates primarily through a network of stations

referred to as “ICOs,” an abbreviated reference to “independent contractors.” *Id.* at 132:7-17; 134:18-22. FreightCo is the collective name given in this litigation to NW Ico. Inc.; Transville, LLC; Seattle Logistics, LLC; Charlotte Logistics, LLC; and Cruise Logistics, LLC, all of which were ICOs in the Transgroup system at one time or another. CP 140-74. These entities entered into a number of contracts with Transgroup and those contracts defined the parties’ relationship. Ex. 12-22. The contracts are identical in all relevant parts and therefore will be referred to collectively as the “contract.” *Id.*

Among other things, Transgroup provides ICOs with financial backing, clout with vendors, prestige with customers, software solutions and expertise in the logistics industry. RP 11/4/09 at 136:9-137:16. Being part of the Transgroup system allows ICOs to secure business that it otherwise would be unable to secure. *Id.*

Generally, the ICO relationship works like this: utilizing the Transgroup brand, an ICO will secure business from a customer that needs to move freight from point A to point B. RP 11/4/09 at 138:20-139:23. The ICO will arrange for the truck, ship or plane as well as other vendors, and the freight will be moved on Transgroup’s bill of lading and invoice. *Id.* at 139:24-141:22. Transgroup pays the vendors and pays the ICO its net revenue. *Id.* at 143:2-15. When Transgroup collects the amount due

from the customer, it reimburses itself for the amounts previously paid to vendors and to the ICO, and pays itself the contractually agreed fee. RP 11/4/09 at 143:16-146:21; Ex. 12, p. 3, ¶ 1.3 and p. 12, ¶ I.

Transgroup has significant financial exposure in this process. Consequently, its contracts with ICOs contain a number of provisions intended to protect Transgroup. For example, all ICOs establish a bad-debt reserve account, the purpose of which is to protect Transgroup in the event a customer does not pay an invoice. Ex. 12, p. 3, ¶ 1.4 and p. 13, ¶ VI; RP 11/4/09 at 66:18-24; 145:20-146:21. This is important because by the time the customer invoice is due, Transgroup has already paid the carriers and other vendors for their costs and already paid the ICO its profit and will be unable to recover those out-of-pocket costs if the customer does not pay. RP 11/4/09 at 77:17-78:3; 146:9-12. The bad-debt reserve provides a means to reimburse Transgroup in those situations where the customer does not pay the invoice. RP 11/4/09 at 146:3-8. Transgroup is also entitled to offset liabilities against the revenue due to the ICO in the event there are unexpected charges and expenses. *Id.*; Ex. 12, p. 13, ¶ VI.

2. The accounting: arriving at “net revenue.”

Pursuant to the contract, Transgroup is obligated to pay net revenue to its ICOs. “Net revenue” is defined as the revenue received

from a shipment of freight less the carrier and vendor charges necessary to move the freight and less Transgroup's contractual fee:

All revenue billed by ICO on a TRANSGROUP bill of lading with a seven (7) day period, recapped, and received at TRANSGROUP's office on Wednesday of each week will be processed for payment and ICO's net revenue portion will be mailed by Friday of the same week. *ICO net revenue shall be revenue after TRANSGROUP service fees, all carrier costs, destination charges, direct insurance costs and any other third party direct cost of the shipment.*

Ex. 12, p. 12, ¶ I. B (emphasis added). Arriving at net revenue involves two processes, referred to in the contract as "Recapping" and "Differences." Ex. 12, p. 12, ¶¶ II and III.

Recapping is done by the ICO when the ICO arranges for a shipment of freight. The ICO identifies, or "recaps," for Transgroup the total revenue to be received from the customer as well as all the carrier and other vendor costs to be incurred in moving the freight. RP 11/4/09 at 67:11-22; 145:5-6. Based on the recap, Transgroup withholds funds sufficient to pay all the charges associated with the shipment, and then calculates the net revenue payable to the ICO. *Id.* at 145:4-146:21.

Once the shipment is completed, Transgroup receives the invoices from the various vendors and compares those invoices to the costs identified in the "recap." RP 11/5/09 at 97:10-19. If the vendor costs

differ from what was recapped, it creates a “difference” or a “variance.”¹

Id. The difference can be a positive or negative variance depending on whether the vendor’s actual invoice is greater or less than what was recapped. RP 11/5/09 at 98:8-11. The difference is then presented to the ICO, who has a period of days to dispute the difference if it believes the vendor’s charges are incorrect. RP 11/4/09 at 70:9-71:20; 84:2-12; 86:14-87:11.

The recap and differences determine the “net revenue,” which Transgroup pays to the ICO after deducting its contractual fee. Ex. 12, p. 12, ¶ I. B. and p. 3, ¶ 1.3; RP 11/4/09 at 145:10-19; 146:9-21.

It is useful to describe the process by way of a fictitious movement of freight. Let’s say FreightCo was retained to move goods for ABC Company from Boston to Los Angeles for \$20,000. To move the goods, FreightCo will retain various vendors. There will be the pickup carrier, Trucking Company 1, that will pick up the goods from the customer’s warehouse and bring it to FreightCo’s warehouse, where FreightCo will verify the number of pieces, weight and dimensions. From there, another carrier, Trucking Company 2, will move the goods from FreightCo’s warehouse to the airline. The airline will fly the freight to Los Angeles.

¹ In their testimony, the parties often use the terms “differences” and “variances” interchangeably. *See e.g.*, RP 11/5/09 at 97:10-19.

FreightCo's agent will then recover the cargo in Los Angeles and perform destination services, which could include customs clearance (for international freight), storage of the goods and sorting. It would then transport the goods via yet another carrier, Trucking Company 3, to the customer's final destination such as a distribution center. The cost of the services in our example may look like this:

Trucking Company 1 (pick up carrier)	\$2,000
Trucking Company 2 (warehouse to airline carrier)	\$1,000
Air freight	\$10,000
Airport warehouse	\$1,000
Sorting for customer	\$1,000
Trucking Company 3 (to final destination)	\$2,000

These costs total \$17,000 and would be identified in the recap sent by FreightCo to Transgroup. The freight would then be moved and the customer invoiced \$20,000. Transgroup would hold back \$17,000 of the \$20,000 in revenue in order to pay the recapped vendor charges. The remaining \$3,000, less Transgroup's contractual fee, would go to FreightCo as net revenue. *See generally*, RP 11/4/09 at 132:18-135:17; 138:19-145:19.

A difference would occur if, in this example, Transgroup received an invoice from Trucking Company 2 for \$1,500 instead of the \$1,000

recapped because of some unexpected additional work. Transgroup would present the invoice to FreightCo because it is “different” than what FreightCo recapped. If FreightCo approved the additional costs, it would generate a difference of \$500 and that additional \$500 would be charged against FreightCo, thereby reducing its net revenue by \$500.² *See generally*, RP 11/4/09 at 86:11-87:16.

3. “Givebacks:” continuing liabilities, not net revenue.

Occasionally, a vendor who participates in the movement of freight will not invoice Transgroup for its services. RP 11/4/09 at 89:21-90:10. In our example, the airport warehouse may neglect to invoice for the \$1,000 due for storage. In that case, Transgroup would pay, from the \$17,000 it withheld to pay vendors, \$16,000 to the vendors who submitted invoices. Transgroup would retain the \$1,000 in order to pay the warehouse charges expecting that the vendor would eventually invoice Transgroup for its services, and pay the remaining \$3,000, less its fee, to FreightCo as net revenue. *See generally*, RP 11/4/09 at 89:21-90:11; 145:10-19. In the words of FreightCo’s president, the \$1,000 would be retained to “protect” the outstanding payable. RP 11/2/09 at 52:8-16.

² Since Transgroup’s fee is based on the ICO’s revenue, the amount of its fee would be adjusted, along with the ICO’s revenue, when a difference occurs.

This is important because it means the \$1,000 retained by Transgroup is not net revenue to FreightCo as there is still an outstanding liability owed by Transgroup to the vendor for warehouse storage. Ex. 12, p. 12, ¶ I. B.

There are a multitude of reasons why a vendor does not bill for its services. Most often, it is simply sloppy bookkeeping. RP 11/4/09 at 91:2-5. Other times, something unusual happens. In one instance, the owner of a company suffered a heart attack and no one else in the company was capable of reconstructing the billing so Transgroup did not get billed until the owner recuperated and went back to work. RP 11/5/09 at 129:21-130:7. In another, the government seized the company's records in an investigation. It took the company several years to resolve the case and obtain access to its records so it could bill Transgroup for past services. RP 11/5/09 at 129:8-20.

Regardless, vendors who do not promptly bill are nonetheless entitled to bill and collect for their services once they ultimately discover they are owed money. RP 11/5/09 at 129:16-20; 130:8-25. It is becoming more frequent for vendors to hire auditors who will pour through their books – typically on a contingent fee basis – and identify missed bills for collection. Ex. 70 at ¶ 12. If a trucking company has several thousand moves a year and mistakenly fails to bill for 1% of those moves, it can recover a substantial amount of lost revenue through such an audit. As the

party on the bill of lading, Transgroup remains liable for the charges for a period of years. Ex. 70 at ¶ 12; RP 11/4/09 at 144:8-15.

These valid but unbilled vendor charges form the basis of the party's dispute about "givebacks." RP 11/4/09 at 89:11-90. At the end of each year, Transgroup is in possession of money it has retained to pay vendors who provided services but did not invoice Transgroup for those services.³ RP 11/4/09 at 89:23-24. Over the years, Transgroup developed what became known as its "giveback policy." RP 11/4/09 at 89:13-20. Under that policy, Transgroup would identify each year all the unbilled charges for each ICO. RP 11/4/09 at 93:3-11. If those vendors had not billed Transgroup by the end of the following year, Transgroup would "give back" to the ICO the money retained to pay those unbilled charges. *Id.* at 94:18-95:7.

Transgroup was not required to do this by the contract. RP 11/4/09 at 98:6-99:11; 100:1-4; RP 11/5/09 at 43:1-5; Ex. 70 at ¶ 11. As stated above, the money retained was not "net revenue" to the ICO because it consisted of amounts due to vendors for services provided. The recap prepared by the ICO confirmed that the charges were valid and proper. RP 11/4/09 at 145:4-18; RP 11/5/09 at 34:1-36:18. Since the money

retained by Transgroup represented amounts legitimately due to vendors for services provided, Transgroup was entitled to retain the money until the debt to the vendors was either satisfied or extinguished. Ex. 12, p. 12, ¶ I. B. If the charges identified on the recap were not proper, there was a procedure available to the ICO to remove them, which would prevent Transgroup from retaining revenue that was not properly due to a vendor. RP 11/4/09 at 70:9-71:20; 84:2-12; 86:14-87:11.

By giving the retained money to its ICO at the end of the year, Transgroup was, from a practical standpoint, allowing the ICO rather than Transgroup to hold the money while the vendors' charges were pending. In other words, Transgroup was "giving back" to the ICO the money being held pursuant to the parties' contract to pay vendors' legitimate but as-of-yet unbilled charges.

Transgroup was willing to give the retained money to its ICOs as long as the ICOs were in the Transgroup system and financially sound because it presented no risk to Transgroup: when the vendor ultimately billed Transgroup for its services, Transgroup could pay the bill and charge that bill against the ICO's ongoing revenue. RP 11/4/09 at 100:5-

³ Although every ICO does not generate givebacks every year, FreightCo did generate givebacks for all three of the years in dispute here. *See*, Ex. 23.

101:8; Ex. 70 at ¶ 12. In the example above, if the warehouse charge was billed to Transgroup several years later, after Transgroup had given the retained money back to FreightCo, Transgroup would be able to pay the \$1,000 and charge it against FreightCo's future revenue.

Once an ICO left the Transgroup system, however, there was great risk in giving back the retained funds. RP 11/4/09 at 98:3-8; 174:5-175:9. The money retained by Transgroup represented continuing liabilities – amounts the ICO identified on its recap as valid, legitimate charges due to vendors. RP 11/4/09 at 67:11-22; 145:7-19; RP 11/5/09 at 34:19-36:9. When the vendors ultimately came to collect, Transgroup would have to pay them. RP 11/4/09 at 144:8-15; Ex. 70 at ¶ 12. By that time, the ICO would no longer have ongoing revenue against which to charge the invoices and the ICO could be out of business, insolvent, or otherwise unable to reimburse Transgroup. RP 11/5/09 at 62:13-18; Ex. 70 at ¶ 13. With FreightCo, for example, Transgroup believed the company would quickly fail once it struck out on its own. RP 11/5/09 at 49:20-51:18. Accordingly, Transgroup was not willing to give back to its ICOs the money retained to pay vendor charges when the ICO terminated its relationship with Transgroup. RP 11/4/09 at 97:10-98:8.

FreightCo and the other ICOs appreciated the risk of continuing liabilities and, consequently, acknowledged that Transgroup would not

continue to pay givebacks to an ICO that left the Transgroup system. RP 11/5/09 at 45:5-19; 48:6-13; RP 11/2/09 at 56:25-57:3.

III. AUTHORITY

A. The trial court's Findings of Fact that support its Conclusion of Law #3 are unchallenged by FreightCo and therefore are verities on appeal.

Conclusion of Law No. 3 is supported by Findings of Fact 21, 22, 23, 24, 25, 26, 27, 28 and 29. FreightCo does not challenge these findings so they are verities on appeal. *State v. Moore*, 161 Wn.2d 880, 884, 169 P.3d 469 (2007). The findings establish that:

Givebacks are vendor charges incurred by an ICO on certain shipments but which for some reason do not get billed by the vendor to Transgroup. These charges are identified on the ICO's weekly recap and it is expected that the vendor will eventually invoice Transgroup for such charges. 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. CP 254 (FOF 21); *see also*, RP 11/4/09 at 89:21-90:10; 145:10-19; RP 11/2/09 at 52:4-16.

Transgroup takes a risk in returning the givebacks to the ICO because Transgroup remains liable for the unbilled vendor expense for up

to six years or even longer depending on the particular statute of limitations. CP 254 (FOF 22); *see also*, RP 11/4/09 at 98:3-8; 144:8-15; 145:7-19; 174:5-175:9; 67:11-22; RP 11/5/09 at 34:19-36:9; Ex. 70 at ¶ 12.

The ICOs are aware that if Transgroup is billed by the vendor after Transgroup has distributed the givebacks to the ICO, Transgroup has the right to recoup the charges from the ICO. CP 254 (FOF 22); *see also*, RP 11/5/09 at 45:5-19; 48:6-17.

Givebacks are not addressed or even mentioned in the parties' contracts. CP 254 (FOF 23); *see also*, RP 11/4/09 at 99:10-11; 11/5/09 at 43:1-5; Appellants' Opening Brief at 7-8.

Transgroup has developed the procedure of paying the ICOs givebacks at the end of the second year following the unbilled charge. CP 254 (FOF 25); *see also*, RP 11/4/09 at 89:13-24; 93:3-11; 94:18-95:7; Ex. 70 at ¶ 11.

The procedure changes, however, when an ICO terminates its contract with Transgroup. CP 254 (FOF 26); *see also*, RP 11/4/09 at 98:3-8; 174:5-175:9; Ex. 70 at ¶ 13.

When an ICO leaves Transgroup, Transgroup no longer pays givebacks to the ICO. CP 254 (FOF 27); *see also*, RP 11/4/09 at 98:3-8; 174:5-175:9; RP 11/2/09 at 56:25-57:3; Ex. 70 at ¶ 13.

Vendors who do not bill Transgroup for services have at least six years to realize their omission and demand payment from Transgroup. Thus, when an ICO terminates, Transgroup retains the givebacks in reserve to protect against future billings from vendors. If Transgroup did not retain the givebacks and a vendor demanded payment from Transgroup after the ICO was no longer with Transgroup, Transgroup would be stuck paying the bill with no ability to collect that expense from the ICO. CP 255 (FOF 28); *see also*, RP 11/4/09 at 97:10-19; 98:3-8; 174:5-175:9; 67:11-22; 144:8-15; 145:7-19; RP 11/2/09 at 52:8-16; Ex. 70 at ¶ 12.

FreightCo was aware of Transgroup's policy regarding givebacks during the parties' contractual relationship. CP 255 (FOF 29); *see also*, RP 11/5/09 at 45:5-19; 48:6-13; RP 11/2/09 at 56:25-57:3.

These findings support Conclusion of Law #3 in that they demonstrate why Transgroup was unwilling to share givebacks after an ICO terminated its contract. They also establish that the contract is silent as to givebacks, that Transgroup was therefore entitled to retain, or "protect" funds to pay vendor costs arising out of FreightCo's shipments and that Transgroup was not required to pay givebacks to FreightCo after it terminated its contract.

B. The trial court did not interpret the contract to reach its Conclusion of Law #3; rather, it enforced the parties' contract as written.

In Conclusion of Law #3, the trial court concluded that "Transgroup is not obligated to pay any 'givebacks' to FreightCo since FreightCo terminated the parties' contract and ICOs are not entitled to givebacks after they leave Transgroup." CP 255.

FreightCo's appeal rests on the premise that the trial court interpreted the contract to arrive at this conclusion. *See* Appellants' Opening Brief at 9 ("The trial court erred in interpreting the fully integrated contracts."). FreightCo's premise is wrong. The trial court did not interpret the parties' contract. Rather, the trial court acknowledged that there were no ambiguous terms to interpret – the contract did not address givebacks and neither party identified any ambiguity. RP 11/4/09 at 100:1-4; RP 11/5/09 at 43:1-5; 47:23-48:14; RP 11/2/09 at 43:18-20; 55:19. The trial court recognized that Transgroup was not obligated to pay givebacks unless the court wrote a contract that the parties themselves had not written, something the court was unwilling to do:

Because we're talking about contract interpretation and I realize I'm sitting as a court of 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.

RP 11/10/09 at 54:5-55:10. This view was consistent with Washington law, which provides that the courts must enforce the terms of the parties' contract if its terms are unambiguous. *In re Estate of Bachmeier*, 147 Wn.2d 60, 68, 52 P.3d 22 (2002) (court's function is to enforce the contract as drafted by the parties and not to change the obligations of the contract the parties saw fit to make).

The unambiguous terms of the parties' contract obligated Transgroup to pay FreightCo the "net revenue" earned from FreightCo's shipments, nothing more. The contract did not require Transgroup to pay givebacks because that money was not net revenue. RP 11/4/09 at 98:6-99:11; 100:1-4; RP 11/5/09 at 43:1-5. Indeed, it appears there is no dispute on this point as FreightCo concedes the trial court correctly found that Transgroup is entitled to hold back enough of the revenue "to pay those unbilled charges if the vendor ultimately bills the charge." Appellants' Opening Brief, at 8.

Net revenue is the revenue from FreightCo's shipments less the costs incurred in those shipments:

ICO net revenue shall be revenue after TRANSGROUP service fees, all carrier costs, destination charges, direct insurance costs and any other third party direct cost of the shipment.

Ex. 12, p. 12, ¶ I. B.

The funds referred to as “givebacks” are funds retained by Transgroup to pay “carrier costs,” “destination charges” or “other third party direct costs” incurred as part of FreightCo’s various shipments. CP 254 (FOF 21). These costs are to be deducted from – or netted against – FreightCo’s gross revenue. Ex. 12, p. 12, ¶ I. B. Since the givebacks consist of funds retained to pay these continuing liabilities, and Transgroup is only obligated to pay net revenue, Transgroup is not contractually required to pay givebacks to FreightCo.⁴

The fact that the vendors had yet to bill Transgroup at the time Freightco terminated the contracts does not mean the charges are invalid and/or the amounts not due. To the contrary, all of the money retained by Transgroup represents amounts identified by FreightCo in the recap process as due to vendors for services rendered. RP 11/4/09 at 67:11-22; 145:7-19; RP 11/5/09 at 34:19-36:9.

Nor does the fact that Transgroup previously advanced such funds pursuant to its “giveback” policy create a contractual obligation to

⁴ On page 9 of its brief, FreightCo argues that the givebacks are part of “all revenue” and therefore should be subject to the distribution of revenue pursuant to the contract. FreightCo misses the point. FreightCo is not entitled to all revenue. It is entitled only to net revenue and the givebacks consist of vendor costs which are not part of net revenue. The trial court did not conclude that givebacks were not revenue; it concluded they were not net revenue.

continue doing so after FreightCo terminated the parties' contract. As FreightCo concedes in its brief, the parties never modified their respective obligations under the contract. Appellants' Opening Brief at 5. Transgroup gave its ICOs givebacks in the past not because it was required by the contract, but to show gratitude and keep its ICOs happy. RP 11/5/09 at 43:24-44:11. Transgroup was able to do this because there was no risk: the ICOs had continuing revenue against which Transgroup could offset or "net" the vendor costs once the vendors finally billed for their services. RP 11/4/09 at 100:3-101:8; Ex. 70 at ¶ 12. But once an ICO left the Transgroup system, there was no longer future revenue against which to offset vendor costs and Transgroup was not willing to take the risk of advancing the retained money. RP 11/4/09 at 98:3-8; 174:5-175:9; RP 11/5/09 at 62:13-18; Ex. 70 at ¶ 13. Transgroup wanted to keep the money to pay vendors and was entitled to do so by the contract.

FreightCo cannot be heard to argue differently. FreightCo understood that the givebacks were an informal policy not required under the contract, that the givebacks represented continuing liabilities and that the funds would no longer be advanced to FreightCo if it terminated its contract with Transgroup. RP 11/5/09 at 45:5-19; 48:6-13.

The trial court properly enforced the plain language of the parties' contract and declined FreightCo's invitation to write a new contract for the parties. Conclusion of Law #3 was correct and the trial court should be affirmed.

C. The givebacks are not "differences" under the terms of the contract.

FreightCo argued at trial that the givebacks are really "differences" that are due to FreightCo as net revenue. RP 11/10/09 at 8:8-15; 57:12-15. It is not clear whether FreightCo advances the same argument on appeal. In its Opening Brief, FreightCo claims that all revenue is to be distributed pursuant to the contract. *See* Appellants' Opening Brief, at 10. Since the only way funds retained to pay vendor costs could be payable to FreightCo pursuant to the contract is through the calculation of a difference, Transgroup addresses the argument as if it is part of FreightCo's appeal. To the extent FreightCo pursues this argument as part of its appeal, the argument is defeated by the plain terms of the contract.

A "difference" occurs when Transgroup receives a vendor's invoice and the invoice differs from the amount identified in FreightCo's recap as due to that vendor. RP 11/5/09 at 97:10-19. Thus, Transgroup must receive an invoice from the vendor before a "difference" can occur. RP 11/5/09 at 128:6-129:4. The givebacks are funds held by Transgroup

because it has *not* received an invoice from the vendor. *Id.*; RP 11/4/09 at 87:17-88:4. Since Transgroup has not yet received an invoice from the vendor, there can be no variance or “difference” between the amount recapped and the amount of the actual invoice. Therefore, the giveback money cannot constitute “differences” under the contract. RP 11/10/09 at 56:15-57:6; Ex. 12, p. 12, ¶ III.

D. The trial court did not rely on extrinsic evidence to modify the contract.

FreightCo’ final argument is that the trial court relied on extrinsic evidence – specifically, the parties’ post contract understanding – to modify the parties’ contract. *See*, Appellants’ Opening Brief, at 13.

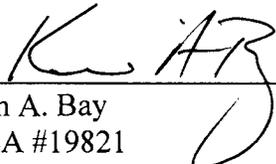
FreightCo is wrong on both counts. First, the trial court did not modify the parties’ contract. As stated above, the trial court simply enforced the contract according to its terms. Second, the trial court did not rely on FreightCo’s understanding of Transgroup’s givebacks policy as extrinsic evidence of contractual intent. The trial court cited to FreightCo’s understanding as further evidence that the contract did not address givebacks and that the parties had not modified the contract to address givebacks. *See* RP 11/10/09 at 54:10-16. FreightCo’s argument that the trial court improperly relied on extrinsic evidence to modify the contract is simply misplaced.

IV. CONCLUSION

Conclusion of Law #3 is supported by the trial court's Findings of Fact, which were both unchallenged by FreightCo and supported by substantial evidence in the record. The trial court did not interpret or modify the parties' contract but enforced it according to its unambiguous terms. Accordingly, the trial court should be affirmed.

DATED this 30th day of September, 2010

RYAN, SWANSON & CLEVELAND, PLLC

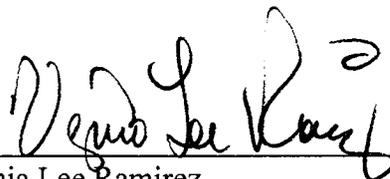
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DECLARATION OF SERVICE

I declare that on the 30th day of September, 2010, I caused to be served the foregoing document on counsel for Appellant, as noted, at the following addresses:

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Dated: September 30, 2010

Place: Seattle, WA