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No. 68843-0-1

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

KARM ENTERPRISES, INC., a Washington corporation, and JOHN
SJONG, an individual and resident of the State of Washington,

Appellants,

v.

BLUE ACE, LLC, a Washington limited liability corporation, and
MICHAEL BURNS, and his marital community,

Respondents.

BRIEF OF APPELLANTS

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I. INTRODUCTION

This case concerns the use of a fishing vessel's "catch history" – the record of its harvest of fish – to obtain an exclusive allocation of Pacific cod in the Bering Sea. The essential facts are 1) A sells a fishing vessel to B but retains the vessel's catch history under the terms of the sales agreement, and 2) B then uses the catch history A retained to obtain valuable Pacific cod "harvest shares" in a harvesting cooperative, without first acquiring A's permission to use the catch history. The question is whether A can recover from B under an unjust enrichment claim.

In 2004, appellants, Karm Enterprises, Inc., and John Sjong (then doing business through a corporation) (together, "Karm") sold their fishing vessel STORFJORD to respondent Blue Ace, LLC, for \$500,000. Under the terms of the sales agreement, Blue Ace also received an option to purchase Karm's nontransferable license to harvest groundfish and the catch history of the STORFJORD associated with the license for \$2,000,000, if the license ever became transferable.

The license ultimately did not become transferable, and Blue Ace has admitted it did not acquire the license or the related catch history from Karm. Nevertheless, the undisputed record shows Blue Ace used the catch history retained by Karm to obtain harvest shares from a harvesting cooperative, the Freezer Longline Conservation Cooperative ("FLCC"), in

2010. Those harvest shares provide an allocation of Pacific cod to Blue Ace that it alone has the right to harvest, to the exclusion of all other participants in the fishery.

Before the trial court, Karm contended that Blue Ace and one of its members, Michael Burns (“Mr. Burns”), were unjustly enriched when Blue Ace used the catch history that Karm had retained to receive FLCC harvest shares. The trial court dismissed Karm’s unjust enrichment claim on the ground that Karm had not directly conferred any benefit on Blue Ace, in essence concluding that a plaintiff may only recover for benefits that it directly conferred on the defendant. The court denied Karm’s assertion that it could recover for the benefit in the form of harvest shares conferred on Blue Ace by the FLCC, a third party. In the court’s view, that benefit was “independent of anything that happened between” Karm and Blue Ace.

The court’s dismissal of Karm’s unjust enrichment claim should be reversed because Karm may recover for the benefit Blue Ace received from the FLCC, as long as that benefit came at Karm’s “expense.” Whether Blue Ace’s use of Karm’s catch history came at Karm’s “expense” was not addressed below and the record is not adequately developed on that issue. Accordingly, this case should be remanded for further proceedings in which that issue may be properly joined.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error.

1. The trial court erred in granting summary judgment dismissing Karm's unjust enrichment claim on the ground that Karm had not directly conferred a benefit on Blue Ace.

B. Issues Pertaining to Assignments of Error.

1. May Karm recover for a benefit conferred on Blue Ace by the Freezer Longline Conservation Cooperative, a third party? (Assignment of Error 1.)
2. Should this case be remanded to address whether the benefit Blue Ace received from the FLCC came at Karm's "expense"? (Assignment of Error 1.)

III. STATEMENT OF THE CASE

In the trial court, Karm asserted an unjust enrichment claim and a breach of oral contract claim against Blue Ace and Mr. Burns (together, "Blue Ace"). CP 107-08. Blue Ace moved for summary judgment on both claims. CP 23. The trial court granted Blue Ace's motion and dismissed both claims by order dated April 13, 2012. CP 158. On appeal, Karm is challenging only the dismissal of its unjust enrichment claim. Accordingly, the following discussion is limited to facts and proceedings pertinent to that claim, even though some of them also relate to the oral contract claim.

- A. Karm's unjust enrichment claim is based on the catch history of its former vessel associated with a license to harvest groundfish.

In 1998, the federal National Marine Fisheries Service ("NMFS") issued regulations that used "fishing history" to restrict access to fisheries for groundfish, including Pacific cod, in federal waters of the Bering Sea and Aleutian Islands ("BSAI"). Fisheries of the Exclusive Economic Zone Off Alaska; License Limitation Program, 63 Fed. Reg. 52,642 (Oct. 1, 1998) (codified at 50 C.F.R. pt. 679). Through the "License Limitation Program," NMFS restricted access to those fisheries to persons who qualified for "LLP licenses" based on the documented catch history of vessels in the late-1980s and 1990s. 50 C.F.R. § 679.4(k)(4)(i) and (ii) (2011) (describing "general" and "endorsement" qualification periods).

An applicant could qualify for an LLP license based on the qualifying fishing history of a vessel in two ways. First, if the applicant owned the vessel as of June 17, 1995. 50 C.F.R. § 679.2 (2011) (definition of "eligible applicant"). Second, if the fishing history of that vessel "ha[d] been transferred [to,] or retained [by, the applicant] by the express terms of a written contract that clearly and unambiguously provides that the qualifications for a license under the [License Limitation Program] have been transferred or retained." *Id.* Depending on the basis of the application, applicants were required to submit evidence of their

ownership of the vessel or, “if eligibility is based on a fishing history that has been separated from a vessel, valid evidence of ownership of the fishing history being used as the basis of eligibility for a license.” 50 C.F.R. § 679.4(k)(6)(iii)(H) (2011).

Applicants with sufficient documented fishing history received transferable LLP licenses, while other applicants initially denied by NMFS received nontransferable licenses pending agency appellate review. 50 C.F.R. §§ 679.4(k)(6)(ix) and (7), 679.43(p) (2011). A nontransferable license could be used to fish for groundfish during an appeal but “expired” upon resolution of the appeal, 50 C.F.R. §§ 679.4(k)(6)(ix), 679.43(p) (2011), unless the appeal succeeded and the license became transferable.

Karm applied for an LLP license based on the fishing history of its vessel, the STORFJORD, but NMFS initially denied the application on the ground that the vessel’s fishing history was not sufficiently documented. CP 51, 64, 70. Karm appealed that decision to an office within NMFS and received a nontransferable LLP license numbered LLG4513, which qualified the STORFJORD to continue participating in the BSAI groundfish fisheries until the appeal was resolved. CP 51, 50 C.F.R. §§ 679.4(k)(6)(ix), 679.43(p) (2011). This case concerns the fishing or “catch” history of the STORFJORD associated with that license.

B. In 2004, Karm sold its vessel to Blue Ace but retained the vessel's catch history associated with the groundfish license.

On June 30, 2004, while its appeal over LLG4513 was still pending, Karm entered into a written agreement with Blue Ace entitled "F/V STORFJORD PURCHASE AND SALE AGREEMENT" (the "Vessel Purchase Agreement"). CP 50-51, 57-62. Under that agreement, Karm agreed to sell the STORFJORD to Blue Ace for \$500,000 and also granted Blue Ace an option to purchase LLG4513 and "all catch history, catch data, and other valuable property and/or rights attached to the" license for \$2,000,000, if the license ever became transferable:

As further consideration for Buyer's agreement to purchase the Vessel, Seller grants to Buyer an irrevocable option to purchase LLG4513 and all catch history, catch data, and other valuable property and/or rights attached to the LLG4513, for Two Million Dollars (\$2,000,000) at such time as Seller receives from National Marine Fisheries Service Restricted Access Management, or such other lawfully authorized agency or court of competent jurisdiction, a fully transferable LLG4513 with all the same right and privileges as interim LLG4513. Buyer is aware that LLG4513 might never become transferable.

CP 57.

Besides granting Blue Ace an option to purchase LLG4513, Karm also allowed Blue Ace to use the license to harvest Pacific cod in 2004 and 2005 in exchange for "lease payments." *Id.* The Vessel Purchase Agreement provided that "[a]ll catch history, catch data, or otherwise

generated during [Blue Ace's] lease of the Permit shall become the property of [Blue Ace.]" *Id.*

In light of the uncertainty surrounding LLG4513, Blue Ace acquired another license, LLG4508, from a third party, in 2004 to maintain eligibility to participate in BSAI groundfish fisheries in the event LLG4513 did not become transferable. CP 52. The record does not disclose the price or other details of Blue Ace's acquisition of LLG4508, such as whether any catch history was included and, if so, how significant that history was.

LLG4513's fate was not determined until late 2007, more than three years after Karm's sale of the STORFJORD to Blue Ace, when NMFS's appellate office issued its final decision on Karm's appeal. CP 64-71. The appellate office upheld the agency's initial determination that the STORFJORD's catch history was insufficiently documented to support a permanent, transferable LLP license. CP 70-71. Karm did not further appeal and, under NMFS regulations, its nontransferable license LLG4513 "expired." 50 C.F.R. §§ 679.4(k)(6)(ix), 679.43(p) (2011).

Because LLG4513 was never rendered transferable, the condition precedent to Blue Ace's option to purchase the license and related catch history from Karm was not satisfied. Blue Ace took the position before the trial court that it has not acquired any of the catch history related to

LLG4513, apparently including any history generated during its use of the license in 2004 and 2005. CP 52. As Mr. Burns of Blue Ace put it, “Blue Ace could not and did not acquire LLG4513 or its associated fishing history from Karm Enterprises.” *Id.* Rather, Blue Ace argued that the history had “terminated” or “disappeared” upon LLG4513’s expiration. CP 30, RP 9.

- C. After acquiring Karm’s vessel but not its catch history, the undisputed record shows Blue Ace nevertheless treated that history as its own.

Notwithstanding the fact that it did not acquire Karm’s catch history, the undisputed record demonstrates that Blue Ace nevertheless treated that catch history as its own on two occasions. Blue Ace first did so in connection with the FLCC’s development of a “capacity reduction program” designed to use federal funds to compensate persons willing to exit the BSAI groundfish fisheries. CP 112-13, 123-29. Karm is not seeking to recover for Blue Ace’s use of Karm’s catch history in that context, because Blue Ace ultimately did not receive any money or other benefit through that program. However, that program is relevant to this case because the FLCC later relied on the same basis on which the capacity reduction funds were distributed – i.e., proportional catch history – to issue valuable “harvest shares” of Pacific cod and other fish to cooperative members, including Blue Ace. CP 113-15. Karm seeks to

recover for Blue Ace's use of Karm's catch history to receive FLCC harvest shares.

1. Blue Ace relied on Karm's catch history to establish its harvesting "capacity" under a federally-funded program to compensate persons willing to cease fishing.

In late 2004, Congress appropriated \$75 million to reduce "harvesting capacity" of the BSAI groundfish fisheries. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2005, Pub. L. No. 108-448, 118 Stat. 2809, § 219(b). The legislation appropriating those funds authorized participants in various harvesting "subsectors" – distinguished by participants' ownership of certain vessels or LLP licenses – to develop "capacity reduction programs" for approval by NMFS. *Id.* § 219(e). Under an approved program, subsector participants willing to cease fishing would receive a portion of the money appropriated by Congress to their subsector. *Id.* § 219(c) – (e). The legislation made payment contingent on participants first entering into "binding reduction contracts" with NMFS setting forth the terms governing their exit from the fisheries, including relinquishment of their LLP licenses. *Id.* § 219(d).

That legislative framework required subsector participants to decide how to divide the available funds among their number who were willing to cease fishing. Participants in the "longline catcher processor"

subsector – which includes Blue Ace – developed a capacity reduction program that divided the funds based on subsector participants’ catch history of Pacific cod, which established their “proportional contribution” to the subsector’s overall annual harvest of that species. CP 112-13, 123. Participants with relatively greater catch history stood to receive comparatively more money, if they chose to accept payment and cease fishing. CP 125.

To facilitate the calculation of catch history, participants in the longline catcher processor subsector formed the FLCC and hired Tagart Consulting of Olympia. CP 113. Before the trial court, Karm submitted a report by Tagart summarizing its work. That report shows Tagart compiled FLCC members’ catch records from 1995 to 2005 and then calculated each member’s “individual vessel percentage of the total fleet retained Pacific cod catch” over different time periods, with adjustments for lost vessels and fishing time and recent entry into the fishery. CP 112-13, 123-25. Tagart described a member’s “vessel percentage” of the subsector’s overall Pacific cod harvest as its “quota share.” CP 124-25.

According to the report, Tagart assigned Blue Ace a “maximum quota share” of 1.390% and a “normalized quota share” of 1.292%. CP 126. Karm submitted additional records to the trial court that, it asserted, showed Blue Ace put forth the STORFJORD’s 1995-2003 catch history,

which Blue Ace has acknowledged it never acquired from Karm, to Tagart for purposes of determining Blue Ace's quota share percentage. CP 113, 127-29. Blue Ace did not challenge the records submitted by Karm or the conclusions it drew from them.

NMFS published regulations implementing the FLCC's capacity reduction program in 2006. Fishing Capacity Reduction Program for the Longline Catcher Processor Subsector of the Bering Sea and Aleutian Islands Non-pollock Groundfish Fishery, 71 Fed. Reg. 57,696 (Sept. 29, 2006) (codified at 50 C.F.R. pt. 600) ("CRP"). That same year, Tor Tollessen of Karm and Mr. Sjong met with Mr. Burns and his brother Pat to discuss making an offer for compensation under that program based on the quota share Tagart Consulting had assigned to Blue Ace. CP 112-13.

According to Mr. Tollessen – whose account Blue Ace did not dispute – he and Mr. Sjong and the Burns brothers agreed to “put in a bid for the buy back of the temporary license [LLG4513, which was then still on appeal] and catch history of the Storfjord, and it was agreed that we would split the difference after paying [Karm and Mr. Sjong] \$2,000,000 for the catch history and reimbursing the Burns [brothers] for various expenses.” *Id.* However, one of the Burns brothers subsequently informed Messrs. Tollessen and Sjong that any offer had to include the STORFJORD, in addition to the license and related catch history. CP 113.

Blue Ace was not willing to include the vessel, too. *Id.* Consequently, no offer was submitted based on the FLCC quota share assigned to Blue Ace. CP 113, 125.

Although Blue Ace did not end up submitting an offer, four other FLCC members did. CP 124-25. Their offers ranged from \$1.5 million for a member who had been assigned no quota share to \$11.8 million for a member who had been assigned a share of 2.528%, for a total of \$35 million. *Id.* All four offers were accepted. CP 124-25.

2. Blue Ace used Karm's catch history to obtain "harvest shares" from the FLCC.

Around the time they were addressing the issue of reducing harvesting capacity in their subsector, FLCC members also began discussing terms on which they might "cooperatively" harvest Pacific cod, as opposed to competing against each other for fish on an "Olympic" or "derby" basis. CP 52, 112. Each year, NMFS allocates a certain percentage of the "total allowable catch" of Pacific cod to the FLCC's subsector for its exclusive use. 50 C.F.R. § 679.20(a)(7)(ii)(A) (2011). While that allocation is unavailable to participants in other subsectors, it does not end the "race for fish" among participants in the FLCC's subsector. Their LLP licenses qualify them for the opportunity to catch Pacific cod allocated to the FLCC's subsector, but the licenses do not

entitle them to any particular harvest amount. 50 C.F.R. § 679.4(k)(1)(i) (2011).

To end the race for Pacific cod, FLCC members had to decide how to share the fish. According to Mr. Tollessen of Karm, representatives of Blue Ace and other FLCC members met in January of 2007 to negotiate the contractual distribution of the FLCC subsector's Pacific cod allocation among FLCC members based on "harvest shares." CP 113.

Messrs. Tollessen and Sjong then met with Mr. Burns of Blue Ace. At that meeting, again according to Mr. Tollessen, Mr. Burns acknowledged Blue Ace stood to receive a harvest share of 1.39% of the FLCC subsector's Pacific cod allocation under FLCC negotiations to that point. CP 114. He also conceded that share was "in large part" derived from Tagart's calculations for the FLCC's capacity reduction program, *id.*, which, as discussed above, were based on STORFJORD catch history that Mr. Burns has admitted Blue Ace never acquired from Karm.

In response to Mr. Burns's admissions, Mr. Tollessen pointed out to him that the catch history supporting Blue Ace's 1.39% FLCC harvest share did not belong to Blue Ace. *Id.* Mr. Tollessen then proposed, as a means of resolving the dispute, that the parties "take the fair market value of [Blue Ace's] harvester share in the cooperative, pay [Karm and Mr. Sjong] the \$2,000,000 for the catch history [associated with

LLG4513], reimburse Blue Ace for various enumerated costs, and split the remainder evenly.” *Id.* Mr. Burns responded by claiming that part of the catch history supporting the 1.39% harvest share had been generated while Blue Ace owned the STORFJORD, thus justifying an “adjustment” to the payment amount. *Id.* Messrs. Tollessen and Sjong agreed and shook hands with Mr. Burns on what they understood to be “the deal.” CP 114-15.

The foregoing discussion of settlement terms formed the basis of Karm’s oral contract claim, which the trial court dismissed under a statute of frauds. RP 32. The discussion is relevant to Karm’s unjust enrichment claim because, while Mr. Burns did deny entering into the oral contract, CP 53, he did not dispute Mr. Tollessen’s account of his admissions concerning Blue Ace’s use of STORFJORD catch history belonging to Karm to obtain FLCC harvest shares for itself.

The harvest shares of Blue Ace and other FLCC members were not finalized until February 1, 2010, more than two years after the 2007 meeting between Messrs. Tollessen and Sjong and Mr. Burns, when FLCC members entered into the “Freezer Longline Conservation Cooperative Membership Agreement” (“FLCC Agreement”). CP 52-53, 73. Exhibit B to that agreement lists each member’s “harvest schedule percentage” for Pacific cod and other fish. CP 95-101. The harvest schedule percentage

multiplied by the FLCC subsector's allocation of Pacific cod and other fish results in a member's exclusive "harvest share." CP 74.

Exhibit B sets Blue Ace's harvest schedule percentage for Pacific cod at 1.400%. CP 95. That percentage is almost identical to the 1.39% figure that Mr. Burns acknowledged to Mr. Tollessen in 2007 was the amount Blue Ace stood to receive under FLCC negotiations at the time, and which Mr. Burns conceded was "in large part" based on STORFJORD catch history retained by Karm when it sold the vessel to Blue Ace. CP 114.

Exhibit B also shows that Blue Ace was using license LLG4508, which it acquired from a third party in 2004, and not Karm's license, LLG4513, which expired at the end of 2007. CP 52, 95. Although some fraction of Blue Ace's FLCC harvest schedule percentage of 1.400% may have been based on catch history associated with LLG4508, Blue Ace did not offer any evidence of that and did not dispute Karm's evidence that the percentage was largely derived from Karm's catch history.

D. The trial court dismissed Karm's unjust enrichment claim on the ground that Karm had not directly conferred any benefit on Blue Ace, and awarded Blue Ace its attorneys' fees and costs.

In support of its motion for summary judgment, Blue Ace argued that Karm's unjust enrichment claim failed as a matter of law. CP 154. According to Blue Ace, Karm could only recover for benefits it had

directly conferred on Blue Ace or which Blue Ace had otherwise “taken” from Karm. CP 41-42, 155-56. Blue Ace asserted that it had not taken anything from Karm because Karm had not transferred its license LLG4513 or related catch history to Blue Ace. CP 34-42, 154-56. Blue Ace also argued that Karm’s catch history “terminated” or “disappeared” upon LLG4513’s expiration after the unsuccessful appeal within NMFS, and therefore that there was nothing for Blue Ace to have taken from Karm. CP 41-42, 155; RP 9.

For its part, Karm explained that Blue Ace was unjustly enriched through its use of Karm’s catch history to obtain FLCC harvest shares for itself, CP 108, RP 21-24, as opposed to being unjustly enriched by directly taking anything from Karm. To support its position, Karm cited the evidence, discussed above, that the harvest shares Blue Ace received from the FLCC were, in fact, based on the catch history that Karm had retained under its Vessel Purchase Agreement with Blue Ace. *Id.* Karm also noted that while no NMFS regulation prevented Blue Ace from putting forth that catch history to receive FLCC harvest shares, it was nevertheless wrongful for Blue Ace to have done so because the history still belonged to Karm. CP 108, RP 24.

The trial court explained its reasons for dismissing Karm’s unjust enrichment claim at oral argument. According to the transcript of that

hearing, the court appears to have accepted Blue Ace's argument that Karm could only recover for benefits it had directly conferred on Blue Ace or which Blue Ace had "taken" from Karm. Because Karm had not transferred its license LLG4513 or related catch history to Blue Ace, the court concluded Blue Ace had not received any benefits for which Karm could recover. RP 32-33. The court rejected Karm's contention that it could recover for the benefit conferred on Blue Ace by the FLCC in the form of harvest shares based on Karm's catch history, on the ground that such a benefit "was independent of anything that happened between" Blue Ace and Karm. RP 28. The court did not specifically address Blue Ace's argument that Karm's catch history had somehow "disappeared" upon LLG4513's expiration, but it did comment that the catch history lacked value independent of the license. RP 27, 32-33.

Following oral argument, the court entered orders granting Blue Ace's motion for summary judgment and its motion for attorneys' fees and costs under a fee-shifting provision in the Vessel Purchase Agreement. CP 158-59, 240-42. The court entered Final Judgment and an Amended Final Judgment, with the principal judgment amount ultimately revised to total \$43,589.86. CP 238-39, 278-79.

As discussed above, Karm is only challenging the trial court's dismissal of its unjust enrichment claim. It is not seeking to reverse the

dismissal of its breach of oral contract claim or contesting that attorneys' fees and costs are available under the Vessel Purchase Agreement to the "substantially prevailing party." However, if this Court reverses the trial court's order dismissing Karm's unjust enrichment claim, Karm would respectfully request that this Court also reverse the trial court's order granting Blue Ace's motion for attorneys' fees and costs, vacate the Final Judgment and Amended Final Judgment, and remand with instructions for attorneys' fees and costs to be determined at the conclusion of this case.

IV. ARGUMENT

The only basis on which the trial court dismissed Karm's unjust enrichment claim was its conclusion that Karm had not directly conferred any benefit on Blue Ace. RP 28, 32. The court erred in dismissing the claim on that ground because Karm was not required to show it had directly conferred a benefit on Blue Ace or that Blue Ace took something from it. Rather, Karm may recover for the benefit Blue Ace received from the FLCC in the form of harvest shares based on Karm's catch history, upon showing the benefit to Blue Ace came at Karm's "expense." Accordingly, the dismissal of Karm's claim should be reversed and this case remanded for proceedings to address the "expense" to Karm.

A. An order granting summary judgment is reviewed de novo.

This Court reviews the trial court's order granting Blue Ace's motion for summary judgment de novo. *Cerrillo v. Esparza*, 158 Wn.2d 194, 199, 142 P.3d 155 (2006) (citations omitted). "Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Id.* at 200. This Court may affirm on a ground not addressed below only if it is "supported by the record and is within the pleadings and proof" and the parties "have had a full and fair opportunity to develop facts relevant to the decision." *Plein v. Lackey*, 149 Wn.2d 214, 222, 67 P.3d 1061 (2003). *See also* RAP 2.5(a) ("A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground.") (emphasis supplied).

B. The trial court incorrectly concluded that Karm may only recover for benefits that it directly conferred on Blue Ace.

Under Washington law, "[a] claim of unjust enrichment requires proof of three elements – '(1) the defendant receives a benefit, (2) the received benefit is at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment.'" *First Am. Title Ins. Co. v. Liberty Capital Starpoint Equity Fund, LLC*,

161 Wn. App. 474, 490, 254 P.3d 835 (2011) (Div. 1) (quoting *Young v. Young*, 164 Wn.2d 477, 484-85, 191 P.3d 1258 (2008)) (emphasis supplied). Washington law closely tracks the general standard from the Restatement: “A person who is unjustly enriched at the expense of another is subject to liability in restitution.” RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (2011) (“RESTATEMENT”) § 1.

The first element of the Washington standard from the Supreme Court’s decision in *Young* reasonably requires that a plaintiff prove the defendant received a benefit. However, the source of the benefit – whether conferred by the plaintiff or received from a third party – is immaterial, as long as the two other elements are satisfied.

The trial court apparently accepted Blue Ace’s argument that Karm may only recover for any benefits it directly conferred on Blue Ace or which Blue Ace “took” from Karm. RP 32. That argument was based on Blue Ace’s incomplete quotation of *Young* for the proposition that a plaintiff must prove “a benefit conferred upon the defendant by the plaintiff.” CP 34. While that language does appear in *Young*, it is not the standard the Supreme Court actually adopted and which this Court applied in *First American Title*. The relevant passage provides as follows, with emphasis on the language Blue Ace cited in the middle of the passage and the standard adopted by the Supreme Court at the end:

Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it. *See Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc.*, 61 Wash.App. 151, 160, 810 P.2d 12 (1991) (“Unjust enrichment occurs when one retains money or benefits which in justice and equity belong to another.”).

In such situations a quasi contract is said to exist between the parties. *Bill v. Gattavara*, 34 Wash.2d 645, 650, 209 P.2d 457 (1949) (stating “the terms ‘restitution’ and ‘unjust enrichment’ are the modern designations for the older doctrine of ‘quasi contracts.’ ”); *State v. Cont'l Baking Co.*, 72 Wash.2d 138, 143, 431 P.2d 993 (1967) (“If the defendant be under an obligation, from the ties of natural justice, to refund; the law implies a debt, and gives this action, founded in the equity of the plaintiff’s case, as it were upon a contract, (quasi ex contractu)’ ”) (internal quotation marks omitted) (quoting *State ex rel. Employment Sec. Bd. v. Rucker*, 211 Md. 153, 157–58, 126 A.2d 846 (1956) (quoting *Moses v. Macferlan*, 2 Burr. 1005, 97 Eng. Rep. 676, 678 (1760))).

“Three elements must be established in order to sustain a claim based on unjust enrichment: a benefit conferred upon the defendant by the plaintiff; an appreciation or knowledge by the defendant of the benefit; and the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value.”

Bailie Commc'ns, 61 Wash.App. at 159–60, 810 P.2d 12 (quoting *Black's Law Dictionary* 1535–36 (6th ed.1990)). *See also Lynch v. Deaconess Med. Ctr.*, 113 Wash.2d 162, 165, 776 P.2d 681 (1989) (stating elements as “the enrichment of the defendant must be unjust; and ... the plaintiff cannot be a mere volunteer.”). **In other words the elements of a contract implied in law are: (1) the defendant receives a benefit, (2) the received benefit is at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment.**

Young, 164 Wn.2d at 484-85 (emphasis supplied).

The language from the middle of the passage cited by Blue Ace – a quotation of the 1990 edition of Black’s Law Dictionary – may suffice for claims involving a benefit directly conferred by a plaintiff on the defendant. *See, e.g., Nat’l Sur. Corp. v. Immunex Corp.*, 162 Wn. App. 762, 778, 256 P.3d 439 (2011) (Div. 1) (citing *Young*, 164 Wn.2d at 484) (referencing elements from dictionary definition in dispute over insurer’s payment of defense costs to insured). But this case falls into a different category in which the defendant “wrongfully gains” through its use of something belonging to the plaintiff: “Gains realized by misappropriation, or otherwise in violation of another’s legally protected rights, must be given up to the person whose rights have been violated.” RESTATEMENT ch. 5, topic 1, intro. note. Karm’s claim is not based on anything it directly conferred on Blue Ace or which Blue Ace took from it. Instead, Karm’s contention is that Blue Ace wrongfully obtained FLCC harvest shares by using Karm’s catch history without first acquiring the right to do so from Karm.

In cases like this one, the plaintiff need not show it suffered a “loss” or that anything was taken from it, as long as the benefit to the defendant came at the plaintiff’s “expense” (element 2 from *Young*). The Restatement explains that a defendant may benefit at the plaintiff’s expense, even without an “observable loss” to the plaintiff, by violating

the plaintiff's "legally protected rights":

Liability in restitution derives from the receipt of a benefit whose retention without payment would result in the unjust enrichment of the defendant at the expense of the claimant. While the paradigm case of unjust enrichment is one in which the benefit on one side of the transaction corresponds to an observable loss on the other, the consecrated formula "at the expense of another" can also mean "in violation of the other's legally protected rights," without the need to show that the claimant has suffered a loss.

RESTATEMENT § 1 cmt. a.

The crux of this case is therefore the "legally protected rights" of Karm violated by Blue Ace, and not whether there was a "benefit conferred by the plaintiff on the defendant," as Blue Ace argued:

[T]here can be restitution of wrongful gain in cases where the plaintiff has suffered an interference with protected interests but no measurable loss whatsoever ... Familiar statements to the effect that a cause of action for unjust enrichment or restitution requires "a benefit conferred by the plaintiff on the defendant" are seriously out of place in any discussion of restitution of wrongful gain.

RESTATEMENT § 3 note a (emphasis supplied).

C. This case should be remanded to address the "expense" to Karm from Blue Ace's violation of Karm's "legally protected right" to control the use of its catch history.

The issue of Karm's "legally protected rights," the violation of which by Blue Ace would result in the required "expense" to Karm, was not addressed below. That issue requires interpretation of the Vessel

Purchase Agreement to determine whether Karm has the right to control the use of the catch history it retained under the agreement and whether Blue Ace “deliberately breached” the agreement when it used Karm’s catch history to obtain FLCC harvest shares. This case should be remanded to develop the record necessary to interpret the Vessel Purchase Agreement under the “context rule.”

1. Karm’s “legally protected rights” must be determined by reference to the Vessel Purchase Agreement.

The Restatement recognizes several categories of cases where “misappropriation” may constitute violation of “legally protected rights.” *See, e.g.*, RESTATEMENT §§ 40 (“Trespass, Conversion, And Comparable Wrongs”) and 42 (“Interference With Intellectual Property and Similar Rights”). Claims involving the wrongful use of property or information that are not covered by a specific section fall under the “residual rule” of Section 44 (“Interference With Other Protected Interests”). That section applies to interference with “legally protected interests” generally:

(1) A person who obtains a benefit by conscious interference with a claimant’s legally protected interests (or in consequence of such interference by another) is liable in restitution as necessary to prevent unjust enrichment, unless competing legal objectives make such liability inappropriate.

(2) For purposes of subsection (1), interference with legally protected interests includes conduct that is tortious, or that violates another legal duty or prohibition (other than a duty

imposed by contract), if the conduct constitutes an actionable wrong to the claimant....

RESTATEMENT § 44 (emphasis supplied).

Although Section 44(2) excludes the violation of a “duty imposed by contract” from the definition of “interference with legally protected interests,” Section 39 (“Profit From Opportunistic Breach”) provides an exception to that exclusion. That section treats a “deliberate breach” of a contract as “interference with another person’s legally protected interests”:

(1) If a deliberate breach of contract results in profit to the defaulting promisor and the available damage remedy affords inadequate protection to the promisee’s contractual entitlement, the promisee has a claim to restitution of the profit realized by the promisor as a result of the breach. Restitution by the rule of this section is an alternative to a remedy in damages.

(2) A case in which damages afford inadequate protection to the promisee’s contractual entitlement is ordinarily one in which damages will not permit the promisee to acquire a full equivalent to the promised performance in a substitute transaction.

(3) Breach of contract is profitable when it results in gains to the defendant (net of potential liability in damages) greater than the defendant would have realized from performance of the contract. Profits from breach include saved expenditure and consequential gains that the defendant would not have realized but for the breach, as measured by the rules that apply in other cases of disgorgement (§ 51(5)).

RESTATEMENT § 39 (emphasis supplied). *Id.* at cmt. a (“In exceptional cases, a party’s profitable breach of contract may be a source of unjust

enrichment at the expense of the other contracting party. The law of restitution treats such cases in the same way that it treats other instances of intentional and profitable interference with another person's legally protected interests, authorizing a claim by the injured party to the measurable benefit realized as a result of the defendant's wrong") (emphasis supplied).

Section 39's disgorgement remedy is designed to "defeat" the "opportunistic calculation" that would otherwise lead to "advantage-taking" – one party disregarding another's right when the anticipated cost of acquiring the right exceeds the expected damages liability for violating it:

In countering this form of opportunism, the rule of § 39 reinforces the contractual position of the vulnerable party and condemns a form of conscious advantage-taking that is the equivalent, in the contractual context, of an intentional and profitable tort. A restitution claim in response to a profitable tort typically operates to protect property from deliberate interference: standard examples include the claim to profits from trespass or infringement. See §§ 40 and 42. The rule of § 39 extends an analogous protection to contract rights, where what the wrongdoer seeks to acquire is not "property" but the modification or release of his own contractual obligation. The two situations have much in common. Confronted with a situation – in either context – in which the appropriate course of action would be to negotiate regarding legal entitlements, the wrongdoer takes without asking. The opportunistic calculation in either setting is that the wrongdoer's anticipated liability in damages is less than the anticipated cost of the entitlement, were it to be purchased from the claimant in a voluntary

transaction. Restitution (through the disgorgement remedy) seeks to defeat this calculation, reducing the likelihood that the conscious disregard of another's entitlement can be more advantageous than its negotiated acquisition.

RESTATEMENT § 39 cmt. b (emphasis supplied).

As applied to this case, Section 39 requires analysis of whether Blue Ace “deliberately breached” the Vessel Purchase Agreement when it used the catch history Karm retained under that agreement to obtain FLCC harvest shares for itself. Stated another way, did the agreement give Karm the right to control the use of its catch history and impose a corresponding obligation on Blue Ace not to use the catch history?

If so, the record reflects classic “advantage-taking” by Blue Ace. In 2004, Blue Ace purchased the STORFJORD without its catch history from Karm for \$500,000, only a quarter of the \$2,000,000 price of the option to purchase Karm’s license LLG4513 and related catch history. CP 57. Thereafter, Blue Ace used Karm’s catch history to obtain FLCC harvest shares for itself, without first obtaining Karm’s permission to do so. CP 112-114. To date, Blue Ace has avoided the cost of acquiring Karm’s permission to use Karm’s catch history and has enriched itself with FLCC harvest shares. Restitution is appropriate to “defeat that calculation.”

2. Remand is required to develop the record necessary to interpret the Vessel Purchase Agreement.

As indicated above, the question of the violation of Karm's "legally protected rights" requires interpretation of the Vessel Purchase Agreement. RESTATEMENT § 39 cmt. h ("Whether the promisor's decision to modify or withhold a given performance infringes the contract rights of the promisee is a preliminary question of contract law and interpretation."). Under the "context rule" applied by Washington courts, interpreting the agreement will require consideration of not only its language – which describes catch history as "property," something ordinarily subject to its owner's control – but extrinsic evidence as well. *Roats v. Blakely Island Maint. Comm'n, Inc.*, 279 P.3d 943, 948 (Wn. App. 2012) (Div. 1) (citing *Shafer v. Bd. of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn. App. 267, 275, 883 P.2d 1387 (1994) (Div. 1)). Relevant extrinsic evidence includes "'circumstances leading to the execution of the contract [and] the subsequent conduct of the parties....'" *Id.* (quoting *Shafer*, 76 Wn. App. at 275).

The record has not been adequately developed to include all the extrinsic evidence relevant to interpreting the Vessel Purchase Agreement in light of Restatement Section 39. The only evidence of the circumstances leading to the agreement's execution is a statement in

Mr. Tollessen's declaration that "quota had been the objective of the parties." CP 114. As for the parties' subsequent conduct, Karm offered evidence of Blue Ace's willingness to share any proceeds from the FLCC's capacity reduction program with Karm and Blue Ace's 2007 agreement to compensate Karm for the value of the FLCC harvest shares Blue Ace received. CP 112-15. While Blue Ace's acknowledgement of its obligation not to use Karm's catch history could be inferred from that evidence, Blue Ace submitted no evidence of its own concerning the parties' subsequent course of conduct, other than Mr. Burns's declaration denying the existence of the 2007 agreement. CP 53.

This issue ultimately may not prove controversial, especially if Blue Ace, like Karm, has ever sold a vessel while retaining its catch history. In general, anyone who has done so would have reason to agree with Karm that the seller of a vessel who retains related catch history has the right to control the use of that catch history, while the vessel's buyer is obligated not to use the catch history retained by the seller.

That construction would also be consistent with the effect NMFS gives to such contracts when issuing federal fishing privileges. For example, persons eligible to use a vessel's "fishing history" to apply for LLP licenses included those who had retained "fishing history that has been separated from a vessel" by "the express terms of a written contract."

50 C.F.R. §§ 679.2 and 679.4(k)(6)(iii)(H) (2011). There is no good reason why such contracts should be given a different effect in the context of the private harvest shares at issue here. For the sake of predictability in these commercial transactions, the rights and obligations attendant to the contractual retention of catch history should be the same whether the relevant fishery is subsequently organized privately or by the government.

In any event, because the record has not been adequately developed to interpret the Vessel Purchase Agreement under the “context rule,” this case should be remanded so that task may be properly joined. *Plein*, 149 Wn.2d at 222; RAP 2.5(a).

3. Karm’s catch history did not “disappear.”

In explaining how it did not take anything from Karm, Blue Ace made one argument below that would, if supported, also apply to the issue of its use of Karm’s catch history. Rather than have Mr. Burns simply deny that Blue Ace’s FLCC harvest shares were based on Karm’s catch history and explain the shares’ actual basis, Blue Ace argued Karm’s catch history “disappeared” when Karm’s license LLG4513 expired. RP 9. Therefore, the argument went, Blue Ace could not have “taken” anything from Karm “even if” the FLCC had issued harvest shares based on that “extinguished” history because Karm “had no actual fishing history to be taken.” CP 156. Blue Ace would presumably find this argument still

relevant on the ground that it could not have used catch history that had disappeared.

Blue Ace did not attempt to support its argument about disappearing catch history with any citation to the License Limitation Program regulations under which LLG4513 “expired,” which say nothing about the ramifications of license expiration on associated catch history. Rather, Blue Ace cited a passage in the preamble of NMFS’s final rule implementing regulations for an entirely different program – the FLCC’s voluntary capacity reduction program to compensate persons willing to cease fishing. CP 155.

In the passage cited by Blue Ace – which was not a regulation, but a response to a comment on the proposed rule submitted by the FLCC’s counsel – NMFS notes that “fishing history associated with any latent permit [LLP license] that is identified on the Selected Offer (and subsequently on the Reduction Contract) should be relinquished....” *CRP*, 71 Fed. Reg. at 57,699. That note was not meant to establish a generally applicable legal principle governing catch history associated with LLP licenses under all circumstances. The agency was simply confirming that someone whose offer was accepted by the agency under the FLCC’s capacity reduction program had to “relinquish” its catch history to NMFS in exchange for payment.

That bargain was made explicit in the regulations accompanying the final rule: “Offers – Binding Agreement. An Offer from a Subsector Member shall be a binding, irrevocable offer from a Subsector member to relinquish to NMFS the Reduction Fishing Interests [including ‘Reduction Fishing History’] for the price set forth on the Offer contingent on such Offer being a Selected Offer at the closing of the Selection Process.”). *Id.* at 57,703 (codified at 50 C.F.R. § 600.1105(d)(2)(i)) (emphasis supplied).

That provision is entirely consistent with Karm’s position in this case. That is, if Blue Ace had paid for the right to use Karm’s catch history, Karm would have “relinquished” its history to Blue Ace to use within the FLCC.

The trial court did not credit Blue Ace’s argument that Karm’s catch history disappeared upon LLG4513’s expiration, but it did discount the value of the catch history without the license. RP 27, 32-33. On the same page that Blue Ace cited federal rulemaking to support its argument that the catch history disappeared, Blue Ace undercut that argument and explained why the catch history does have value independent of LLG4513 by emphasizing the private nature of the FLCC Agreement:

Both parties agree that the FLCC membership agreement is a private contract unregulated by NMFS, and that the allocations of quota [harvest shares] made under the FLCC membership agreement arise purely as a matter of agreement among the FLCC members.

CP 155. In other words, even if Karm's catch history had "disappeared" for purposes of receiving federal fishing privileges, the catch history still held value because it could be used to obtain private harvest shares. And that is what the undisputed record shows, in fact, happened. In the words of Karm's counsel below, the catch history "has a value in and of itself because the FLCC said it did." RP 26.

V. CONCLUSION

Karm would have no case if Blue Ace did not actually use Karm's catch history to obtain harvest shares from the FLCC. Yet Blue Ace treated what happened inside the FLCC as the "elephant in the room" and elected not to offer any evidence on the basis of its harvest shares. Karm filled that void by submitting evidence, not disputed by Blue Ace, that Blue Ace in fact used Karm's catch history to obtain FLCC harvest shares.

Blue Ace's approach before the trial court implicitly acknowledged that reality. It did not challenge the evidence of its use of Karm's catch history, but instead argued that it did not take anything directly from Karm. The trial court apparently accepted that argument and dismissed Karm's unjust enrichment claim on that ground.

As explained above, the trial court erred in dismissing Karm's claim because Karm may recover for Blue Ace's use of Karm's catch history, provided that on remand Karm demonstrates the use came at its

“expense.” Accordingly, Karm respectfully requests that this Court a) reverse the trial court’s order granting Blue Ace’s motion for summary judgment to the extent it dismissed Karm’s unjust enrichment claim; b) reverse the trial court’s order granting Blue Ace’s motion for attorneys’ fees and costs; c) vacate the Final Judgment and Amended Final Judgment; d) award Karm its “costs” of appeal pursuant to RAP 14.2 and 14.3; and e) remand this case for further proceedings on Karm’s unjust enrichment claim, with instructions to the trial court to revisit the issue of attorneys’ fees and costs at the conclusion of this case based on “the extent of the relief afforded the parties.” *Marassi v. Lau*, 71 Wn. App. 912, 916, 859 P.2d 605 (1993) (Div. 1), *abrogated on other grounds by Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 200 P.3d 683 (2009) (citations omitted).

Dated this 14th day of September, 2012.

Respectfully submitted,



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APPENDIX

1. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2005, Pub. L. No. 108-448, 118 Stat. 2809, § 219(b) – (e)

(b) AUTHORITY FOR BSAI CATCHER PROCESSOR CAPACITY REDUCTION PROGRAM.—

(1) IN GENERAL.—A fishing capacity reduction program for the non-pollock groundfish fishery in the BSAI is authorized to be financed through a capacity reduction loan of not more than \$75,000,000 under sections 1111 and 1112 of the Merchant Marine Act, 1936 (46 U.S.C. App. 1279f and 1279g).

(2) RELATIONSHIP TO MERCHANT MARINE ACT, 1936.—The fishing capacity reduction program authorized by paragraph (1) shall be a program for the purposes of subsection (e) of section 1111 of the Merchant Marine Act, 1936 (46 U.S.C. App. 1279f), except, notwithstanding subsection (b)(4) of such section, the capacity reduction loan authorized by paragraph (1) may have a maturity not to exceed 30 years.

(c) AVAILABILITY OF CAPACITY REDUCTION FUNDS TO CATCHER PROCESSOR SUBSECTORS.—

(1) IN GENERAL.—The Secretary shall make available the amounts of the capacity reduction loan authorized by subsection (b)(1) to each catcher processor subsector as described in this subsection.

(2) INITIAL AVAILABILITY OF FUNDS.—The Secretary shall make available the amounts of the capacity reduction loan authorized by subsection (b)(1) as follows:

(A) Not more than \$36,000,000 for the longline catcher processor subsector.

(B) Not more than \$6,000,000 for the AFA trawl catcher processor subsector.

(C) Not more than \$31,000,000 for the non-AFA trawl catcher processor subsector.

(D) Not more than \$2,000,000 for the pot catcher processor subsector.

(3) OTHER AVAILABILITY OF FUNDS.—After January 1, 2009, the Secretary may make available for fishing capacity reduction to one or more of the catcher processor subsectors any amounts of the capacity reduction loan authorized by subsection (b)(1) that have not been expended by that date.

(d) BINDING REDUCTION CONTRACTS.—

(1) REQUIREMENT FOR CONTRACTS.—The Secretary may not provide funds to a person under the fishing capacity reduction program authorized by subsection (b) if such person does not enter into a binding reduction contract between the United States and such person, the performance of which may only be subject to the approval of an appropriate capacity reduction plan under subsection (e).

(2) REQUIREMENT TO REVOKE LICENSES.—The Secretary shall revoke all Federal fishery licenses, fishery permits, and area and species endorsements issued for a vessel, or any vessel named on an LLP license purchased through the fishing capacity reduction program authorized by subsection (b).

(e) DEVELOPMENT, APPROVAL, AND NOTIFICATION OF CAPACITY REDUCTION PLANS.—

(1) DEVELOPMENT.—Each catcher processor subsector may, after notice to the Council, submit to the Secretary a capacity reduction plan for the appropriate subsector to promote sustainable fisheries management through the removal of excess harvesting capacity from the non-pollock groundfish fishery.

(2) APPROVAL BY THE SECRETARY.—The Secretary is authorized to approve a capacity reduction plan submitted under paragraph (1) if such plan—

(A) is consistent with the requirements of section 312(b) of the Magnuson–Stevens Fishery Conservation and Management Act (16 U.S.C. 1861a(b)) except—(i) the requirement that a Council or Governor of a State request such a program set out in paragraph (1) of such subsection; and(ii) the requirements of paragraph (4) of such subsection;

(B) contains provisions for a fee system that provides for full and timely repayment of the capacity reduction loan by a catcher processor subsector and that may provide for the assessment of such fees based on methods other than ex-vessel value of fish harvested;

(C) does not require a bidding or auction process;

(D) will result in the maximum sustained reduction in fishing capacity at the least cost and in the minimum amount of time; and

(E) permits vessels in the catcher processor subsector to be upgraded to achieve efficiencies in fishing operations provided that such upgrades do not result in the vessel exceeding the applicable length, tonnage, or horsepower limitations set out in Federal law or regulation.

(3) APPROVAL BY REFERENDUM.—

(A) IN GENERAL.—Following approval by the Secretary under paragraph (2), the Secretary shall conduct a referendum for approval of a capacity reduction plan for the appropriate catcher processor subsector. The capacity reduction plan and fee system shall be approved if the referendum votes which are cast in favor of the proposed system by the appropriate catcher processor subsector are—

(i) 100 percent of the members of the AFA trawl catcher processor subsector; or

(ii) not less than $\frac{2}{3}$ of the members of—(I) the longline catcher processor subsector;(II) the non-AFA trawl catcher processor subsector; or(III) the pot catcher processor subsector.

(B) NOTIFICATION PRIOR TO REFERENDUM.—Prior to conducting a referendum under subparagraph (A) for a capacity reduction plan, the Secretary shall—(i) identify, to the extent practicable, and notify the catcher processor subsector that will be affected by such plan; and(ii) make available to such subsector information about any industry fee system contained in such plan, a description of the schedule, procedures, and eligibility requirements for the referendum, the proposed program, the estimated capacity reduction, the amount and duration, and any other terms and conditions of the fee system proposed in such plan.

(4) IMPLEMENTATION.—

(A) NOTICE OF IMPLEMENTATION.—Not later than 90 days after a capacity reduction plan is approved by a referendum under paragraph (3), the Secretary shall publish a notice in the Federal Register that includes the exact terms and conditions under which the Secretary shall implement the fishing capacity reduction program authorized by subsection (b).

(B) INAPPLICABILITY OF IMPLEMENTATION PROVISION OF MAGNUSON.—Section 312(e) of the Magnuson–Stevens Fishery Conservation and Management Act (16 U.S.C. 1861a(e)) shall not apply to a capacity reduction plan approved under this subsection.(5)
AUTHORITY TO COLLECT FEES.—The Secretary is authorized to collect fees to fund a fishing capacity reduction program and to repay debt obligations incurred pursuant to a plan approved under paragraph (3)(A).

2. 50 C.F.R. § 679.2 (2011)

Eligible applicant means (for purposes of the LLP program) a qualified person who submitted an application during the application period announced by NMFS and:

(1) For a groundfish license or crab species license, who owned a vessel on June 17, 1995, from which the minimum number of documented harvests of license limitation groundfish or crab species were made in the relevant areas during the qualifying periods specified in § 679.4(k)(4) and (k)(5), unless the fishing history of that vessel was transferred in conformance with the provisions in paragraph (2) of this definition; or

(2) For a groundfish license or crab species license, to whom the fishing history of a vessel from which the minimum number of documented harvests of license limitation groundfish or crab species were made in the relevant areas during the qualifying periods specified in § 679.4(k)(4) and (k)(5) has been transferred or retained by the express terms of a written contract that clearly and unambiguously provides that the qualifications for a license under the LLP have been transferred or retained; or

(3) For a crab species license, who was an individual who held a State of Alaska permit for the Norton Sound king crab summer fishery at the time he or she made at least one harvest of red or blue king crab in the relevant area during the period specified in § 679.4(k)(5)(ii)(G), or a corporation that owned or leased a vessel on June 17, 1995, that made at least one harvest of red or blue king crab in the relevant area during the period in § 679.4(k)(5)(ii)(G), and that was operated by an individual who was an employee or a temporary contractor; or

(4) For a scallop license, who qualifies for a scallop license as specified at § 679.4(g)(2) of this part; or

(5) Who is an individual that can demonstrate eligibility pursuant to the provisions of the Rehabilitation Act of 1973 at 29 U.S.C. 794 (a).

3. 50 C.F.R. § 679.4(k)(1)(i) (2011)

Licenses for license limitation (LLP) groundfish or crab species—

General requirements. (i) In addition to the permit and licensing requirements of this part, and except as provided in paragraph (k)(2) of this section, each vessel within the GOA or the BSAI must have an LLP groundfish license on board at all times it is engaged in fishing activities defined in § 679.2 as directed fishing for license limitation groundfish. This groundfish license, issued by NMFS to a qualified person, authorizes a license holder to deploy a vessel to conduct directed fishing for license limitation groundfish only in accordance with the specific area and species endorsements, the vessel and gear designations, and the MLOA specified on the license.

4. 50 C.F.R. § 679.4(k)(4)(i) and (ii) (2011)

Qualifications for a groundfish license. A groundfish license will be issued to an eligible applicant that meets the criteria in paragraphs (k)(4)(i) and (k)(4)(ii) of this section. For purposes of the license limitation program, evidence of a documented harvest must be demonstrated by a state catch report, a Federal catch report, or other valid documentation that indicates the amount of license limitation groundfish harvested, the groundfish reporting area in which the license limitation groundfish was harvested, the vessel and gear type used to harvest the license limitation groundfish, and the date of harvesting, landing, or reporting. State catch

reports are Alaska, California, Oregon, or Washington fish tickets. Federal catch reports are production reports required under § 679.5.

(i) *General qualification periods (GQP)*. This table provides the GQP documented harvest requirements for LLP groundfish licenses:

A groundfish license will be assigned...	if the requirements found in the table at § 679.4(k)(4)(ii) are met for the area endorsement and at least one documented harvest of license limitation groundfish was caught and retained in...	during the period...
(A) One or more area endorsements in the table at § 679.4(k)(4)(ii)(A) or (B)	the BSAI or waters shoreward of the BSAI	(1) Beginning January 1, 1988, through June 27, 1992; or (2) Beginning January 1, 1988, through December 31, 1994, provided that the harvest was of license limitation groundfish using pot or jig gear from a vessel that was less than 60 ft (18.3 m) LOA; or (3) Beginning January 1, 1988, through June 17, 1995, provided that, during the period beginning January 1, 1988, through February 9, 1992, a documented harvest of crab species was made from the vessel, and, during the period beginning February 10, 1992, through December 11, 1994, a documented harvest of groundfish species, except sablefish landed using fixed gear, was made from the vessel in the GOA or the BSAI using trawl or longline gear.
(B) One or more area endorsements in the table at § 679.4(k)(4)(ii)(C) through (O)	the GOA or in waters shoreward of the GOA	(1) Beginning January 1, 1988, through June 27, 1992; or (2) Beginning January 1, 1988, through December 31, 1994, provided that the harvest was of license limitation groundfish using pot or jig gear from a vessel that was less than 60 ft (18.3 m) LOA; or (3) Beginning January 1, 1988, through June 17, 1995, provided that, during the period beginning January 1, 1988, through February 9, 1992, a documented harvest of crab species was made from the vessel, and, during the period beginning February 10, 1992, through December 11, 1994, a documented harvest landing of groundfish species, except sablefish landed using fixed gear, was made from the vessel in the GOA or the BSAI using trawl or longline gear.

(ii) *Endorsement qualification periods (EQP)*. This table provides the documented harvest requirements for LLP groundfish license area endorsements:

A groundfish license will be assigned...	if...	during the period...	in...	from a vessel in vessel length category...	and that meets the requirements for a...
(A) An Aleutian Island area endorsement	at least one documented harvest of any amount of license limitation groundfish was made	beginning January 1, 1992, through June 17, 1995	the Aleutian Islands Subarea or in waters shoreward of that area	"A", "B", or "C"	catcher/ processor designation or a catcher vessel designation.
(B) A Bering Sea area endorsement	at least one documented harvest of any amount of license limitation groundfish was made	beginning January 1, 1992, through June 17, 1995	the Bering Sea Subarea or in waters shoreward of that area	"A", "B", or "C"	catcher/ processor designation or a catcher vessel designation.
(C) A Western Gulf area endorsement	at least one documented harvest of any amount of license limitation groundfish was made in each of any two calendar years	beginning January 1, 1992, through June 17, 1995	the Western GOA regulatory area or in waters shoreward of that area	"A"	catcher/ processor designation or a catcher vessel designation, or
(D) A Western Gulf area endorsement	at least one documented harvest of any amount of license limitation groundfish was made	beginning January 1, 1992, through June 17, 1995	the Western Area of the Gulf of Alaska or in waters shoreward of that area	"B"	catcher vessel designation, or
(E) A Western Gulf area endorsement	at least one documented harvest of any amount of license limitation groundfish was made in each of any two calendar years	beginning January 1, 1992, through June 17, 1995	the Western Area of the Gulf of Alaska or in waters shoreward of that area	"B"	catcher/processor vessel designation; or
(F) A Western Gulf area endorsement	at least four documented harvest of any amount of license limitation groundfish were	beginning January 1, 1995, through June 17,	the Western Area of the Gulf of Alaska or in waters shoreward of that	"B"	catcher/processor vessel designation; or

	made	1995	area		
(G) A Western Gulf area endorsement	at least one documented harvest of any amount of license limitation groundfish was made	beginning January 1, 1992, through June 17, 1995	the Western Area of the Gulf of Alaska or in waters shoreward of that area	"C"	catcher/processor designation or a catcher vessel designation.
(H) A Central Gulf area endorsement	at least one documented harvest of any amount of license limitation groundfish was made in each of any two calendar years	beginning January 1, 1992, through June 17, 1995	the Central area of the Gulf of Alaska or in waters shoreward of that area, or in the West Yakutat District or in waters shoreward of that district	"A"	catcher/processor designation or a catcher vessel designation; or
(I) A Central Gulf area endorsement	at least one documented harvest of any amount of license limitation groundfish was made in each of any two calendar years	beginning January 1, 1992, through June 17, 1995	the Central area of the Gulf of Alaska or in waters shoreward of that area, or in the West Yakutat District or in waters shoreward of that district	"B"	catcher/processor designation or a catcher vessel designation; or
(J) A Central Gulf area endorsement	at least four documented harvest of any amount of license limitation groundfish were made	beginning January 1, 1995, through June 17, 1995	the Central area of the Gulf of Alaska or in waters shoreward of that area, or in the West Yakutat District or in waters shoreward of that district	"B"	catcher/processor designation or a catcher vessel designation; or
(K) A Central Gulf area endorsement	at least one documented harvest of any amount of license limitation groundfish was made	beginning January 1, 1992, through June 17, 1995	the Central area of the Gulf of Alaska or in waters shoreward of that area, or in the West Yakutat District or in waters shoreward of that district	"C"	catcher/processor designation or a catcher vessel designation.

(L) A Southeast Outside area endorsement	at least one documented harvest of any amount of license limitation groundfish was made in each of any two calendar years	beginning January 1, 1992, through June 17, 1995	in the Southeast Outside District or in waters shoreward of that district	"A"	catcher/processor designation or a catcher vessel designation; or
(M) A Southeast Outside area endorsement	at least one documented harvest of any amount of license limitation groundfish was made in each of any two calendar years	beginning January 1, 1992, through June 17, 1995	in the Southeast Outside District or in waters shoreward of that district	"B"	catcher/processor designation or a catcher vessel designation; or
(N) A Southeast Outside area endorsement	at least four documented harvest of any amount of license limitation groundfish were made	beginning January 1, 1995, through June 17, 1995	in the Southeast Outside District or in waters shoreward of that district	"B"	catcher/processor designation or a catcher vessel designation; or
(O) A Southeast Outside area endorsement	at least one documented harvest of any amount of license limitation groundfish was made	beginning January 1, 1992, through June 17, 1995	in the Southeast Outside District or in waters shoreward of that district	"C"	catcher/processor designation or a catcher vessel designation.

5. 50 C.F.R. § 679.4(k)(6)(iii)(H) (2011)

Application for a groundfish license or a crab species license.

...

(iii) *Contents of application.* To be complete, an application for a groundfish license or a crab species license must be signed by the applicant, or the individual representing the applicant, and contain the following, as applicable:

...

(H) Valid evidence of ownership of the vessel being used as the basis for eligibility for a license (for USCG documented vessels, valid evidence must be the USCG Abstract of Title), or if eligibility is based on a fishing history that has been separated from a vessel, valid evidence of ownership of the fishing history being used as the basis of eligibility for a license

6. 50 C.F.R. § 679.4(k)(6)(ix) (2011)

Issuance of a non-transferable license. The Regional Administrator will issue a non-transferable license to the applicant on issuance of an IAD if required by the license renewal provisions of 5 U.S.C. 558. A non-transferable license authorizes a person to deploy a vessel to conduct directed fishing for license limitation groundfish or crab species as specified on the non-transferable license, and will have the specific endorsements and designations based on the claims in his or her application. A non-transferable license will expire upon final agency action.

7. 50 C.F.R. § 679.4(k)(7) (2011)

Transfer of a groundfish license or a crab species license—

(i) *General.* The Regional Administrator will transfer a groundfish license, Aleutian Island area endorsement as described under paragraph (k)(7)(viii)(A) of this section, or a crab species license if a complete transfer application is submitted to Restricted Access Management, Alaska Region, NMFS, and if the transfer meets the eligibility criteria as specified in paragraph (k)(7)(ii) of this section. A transfer application form may be requested from the Regional Administrator.

(ii) *Eligibility criteria for transfers.* A groundfish license, Aleutian Island area endorsement as described under paragraph (k)(7)(viii)(A) of this section, or crab species license can be transferred if the following conditions are met:(A) The designated transferee is eligible to document a fishing vessel under Chapter 121, Title 46, U.S.C.;(B) The parties to the transfer do not have any fines, civil penalties, other payments due and outstanding, or outstanding permit sanctions resulting from Federal fishing violations;(C) The transfer will not cause the designated transferee to exceed the license caps in § 679.7(i); and (D) The transfer does not violate any other provision specified in this part.

(iii) *Contents of application.* To be complete, an application for a groundfish license, Aleutian Island area endorsement as described under paragraph (k)(7)(viii)(A) of this section transfer, or a crab species license transfer must be legible, have notarized and dated signatures of the applicants, and the applicants must attest that, to the best of the applicant's knowledge, all statements in the application are true. An application to transfer will be provided by NMFS, or is available on the NMFS Alaska

Region website at <http://alaskafisheries.noaa.gov>. The acceptable submittal methods will be specified on the application form.

(iv) *Incomplete applications.* The Regional Administrator will return an incomplete transfer application to the applicant and identify any deficiencies if the Regional Administrator determines that the application does not meet all the criteria identified in paragraph (k)(7) of this section.

(v) *Transfer by court order, operation of law, or as part of a security agreement.* The Regional Administrator will transfer a groundfish license, Aleutian Island area endorsement as described under paragraph (k)(7)(viii)(A) of this section, or a crab species license based on a court order, operation of law, or a security agreement if the Regional Administrator determines that the transfer application is complete and the transfer will not violate any of the provisions of this section.

(vi) *Voluntary transfer limitation.* A groundfish license, Aleutian Island area endorsement as described under paragraph (k)(7)(viii)(A) of this section, or a crab species license may be voluntarily transferred only once in any calendar year. A voluntary transfer is a transfer other than one pursuant to a court order, operation of law, or a security agreement. An application for transfer that would cause a person to exceed the transfer limit of this provision will not be approved. A transfer of an Aleutian Island area endorsement as described under paragraph (k)(7)(viii)(A) of this section to another LLP license, or the transfer of a groundfish license with an Aleutian Island area endorsement as described under paragraph (k)(7)(viii)(A) of this section attached to it will be considered to be a transfer of that Aleutian Island area endorsement.

(vii) *Request to change the designated vessel.* A request to change the vessel designated on an LLP groundfish or crab species license must be made on a transfer application. If this request is approved and made separately from a license transfer, it will count towards the annual limit on voluntary transfers specified in paragraph (k)(7)(vi) of this section.

(viii) *Severability of licenses.* (A) Area endorsements or area/species endorsements specified on a license are not severable from the license and must be transferred together, except that Aleutian Island area endorsements on a groundfish license with a trawl gear designation issued under the provisions of paragraph (k)(4)(ix)(A) of this section and that are assigned to a groundfish license with an MLOA of less than 60 feet LOA

may be transferred separately from the groundfish license to which that Aleutian Island area endorsement was originally issued to another groundfish license provided that the groundfish license to which that Aleutian Island endorsement is transferred:(1) Was not derived in whole or in part from the qualifying fishing history of an AFA vessel;(2) Has a catcher vessel designation;(3) Has a trawl gear designation;(4) Has an MLOA of less than 60 feet LOA; and(5) A complete transfer application is submitted to the Regional Administrator as described under this paragraph (k)(7), and that application is approved.(B) A groundfish license and a crab species license issued based on the legal landings of the same vessel and initially issued to the same qualified person are not severable and must be transferred together.

(ix) *Other transfer restrictions.* The transfer of a LLP license that was issued based on the documented harvests from a vessel that did not have an FFP during the period beginning January 1, 1988, through October 8, 1998, must be accompanied by the vessel from which the documented harvests were made or its replacement vessel, or if the LLP license and vessel were separated by transfer prior to February 7, 1998, then by the vessel that is currently being deployed by the license holder. The Regional Administrator will deny a transfer application that requests the transfer of a LLP license that was issued based on the documented harvests from a vessel that did not have an FFP during the period beginning January 1, 1988, through October 8, 1998, if the appropriate vessel is not being transferred as part of the same transaction. A license holder of an LLP license that was issued based on the documented harvests from a vessel that did not have an FFP during the period beginning January 1, 1988, through October 8, 1998, may replace the vessel from which the documented harvests were made with another vessel that meets the vessel designation and MLOA requirements specified on the LLP license if the original qualifying vessel is lost or destroyed.

8. 50 C.F.R. § 679.20(a)(7)(ii)(A) (2011)

Non-CDQ allocations—(A) Sector allocations. The remainder of the BSAI Pacific cod TAC after subtraction of the CDQ reserve for Pacific cod will be allocated to non-CDQ sectors as follows:

Sector	% Allocation
(1) Jig vessels	1.4
(2) Hook-and-line/pot CV <60 ft (18.3 m) LOA	2
(3) Hook-and-line CV ≥60 ft (18.3 m) LOA	0.2
(4) Hook-and-line CP	48.7
(5) Pot CV ≥60 ft (18.3 m) LOA	8.4
(6) Pot CP	1.5
(7) AFA trawl CP	2.3
(8) Amendment 80 sector	13.4
(9) Trawl CV	22.1

9. 50 C.F.R. § 679.43(p) (2011)

Issuance of a non-transferable license. A non-transferable license will be issued to a person upon acceptance of his or her appeal of an initial administrative determination denying an application for a license for license limitation groundfish, crab species under § 679.4(k) or scallops under § 679.4(g). This non-transferable license authorizes a person to conduct directed fishing for groundfish, crab species, or catch and retain scallops and will have specific endorsements and designations based on the person's claims in his or her application for a license. This non-transferable license expires upon the resolution of the appeal.

10. RAP 14.2

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review. If there is no substantially prevailing party on review, the commissioner or clerk will not award costs to any party. An award of costs will specify the party who must pay the award. In a criminal case involving an indigent juvenile or adult offender, an award of costs will apportion the money owed between the county and the State. A party who is a nominal party only will not be awarded costs and will not be required to pay costs. A "nominal party" is one who is named but has no real interest in the controversy.

11. RAP 14.3

(a) Generally. Only statutory attorney fees and the reasonable expenses actually incurred by a party for the following items which were reasonably necessary for review may be awarded to a party as costs: (1) preparation of the original and one copy of the report of proceedings, (2) copies of the clerk's papers, (3) preparation of a brief or other original document to be reproduced by the clerk, as provided in rule 14.3(b), (4) transmittal of the record on review, (5) expenses incurred in superseding the decision of the trial court, but not ordinarily greater than the usual cost of a commercial surety bond, (6) the lesser of the charges of the clerk for reproduction of briefs, petitions, and motions, or the costs incurred by the party reproducing briefs as authorized under rule 10.5(a), (7) the filing fee, and (8) such other sums as provided by statute. If a party has incurred an expense for one of the designated items, the item is presumed to have been reasonably necessary for review, which presumption is rebuttable. The amount paid by a party for the designated item is presumed reasonable, which presumption is rebuttable.

(b) Special Rule for Cost of Preparing Brief or Other Original Document. The costs awarded for preparing a brief or other original document is an amount per page fixed from time to time by the Supreme Court. The cost for preparing a brief or other original document will only be awarded for a brief or document which substantially complies with these rules and only for the actual number of pages of the brief or document including the front cover and appendix. If a brief or document is unreasonably long, costs will be awarded only for a reasonable number of pages.

(c) Special Rule for Indigent Review. An Indigent may not recover costs from the State for expenses paid with public funds as provided in Title 15. The clerk or commissioner will claim costs due from other parties which reimburse the State for expenses paid with public funds as provided in Title 15.

Certificate of Service

I certify that I arranged for a copy of the foregoing "Brief of Appellants" to be delivered via legal messenger to counsel for respondents, Mr. R. Shawn Griggs of Holmes Weddle & Barcott, P.C., at 999 Third Avenue, Suite 2600, Seattle, Washington 98104, on September 14, 2012.



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