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No: 655442-1

COURT OF APPEALS DIVISION 1
OF THE STATE OF WASHINGTON

MICHAEL WATERER,

Appellant,

vs.

ALASKA CASCADE FINANCIAL, INC. ,

Respondent.

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Appeal from decision and judgment of the Honorable Paris Kallas of the King County Superior Court related to the matter of Alaska Cascade Financial, Inc. v. Michael Waterer case number 08-2-23335-9

APPELLANT WATERER'S OPENING BRIEF

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TABLE OF CONTENTS

Table of Contents.....	i
Table of Authorities	ii
A. Introduction	1
B. Assignment of Errors.....	2
C. Statement of Issues on Appeal.....	6
D. Statement of the Case.....	8
E. Statement of Facts	9
F. Standard of Review	21
G. Argument	22
Argument Summary	22
1. An oral contract for the purchase and sale of urchins did not arise when the parties' discussions and the words used were exploratory in nature and simply expressed "an interest in" selling and buying.....	27
2. There was no contract for the purchase of urchin in the absence of any writing complying with the Statute of Frauds which conditions formation of a contract on there being a writing signed by the party against whom enforcement of the contract is sought.	28
3. There was no contract between Mr. Izykowski, as seller, and Mr. Waterer, personally as buyer, because Mr. Izykowski, knew that Mr. Waterer was acting in a representative capacity as "President" of a company and the fundamental objective of the contract was to sell to a licensed corporate buyer.....	32

4. The trial court erred by adopting a rule of law that Mr. Waterer, as President of “Nautilus Foods”, was personally liable on the contract unless he proved by a preponderance of evidence that he had fully disclosed to Mr. Izykowski “Nautilus Foods” full corporate name to wit Waterkist Corporation.	39
5. The trial court erred in refusing to consider evidence relating to the Defendants’ business licences and quality of the sea urchin which are relevant evidence material to the issues before the court.....	43
F. Conclusion	48

TABLE OF AUTHORITIES

Case Law

<u>Bacon v. Gardner</u> , 38 Wn. 2 nd 299, 303 (1951).....	41
<u>Barclay v. Spokane</u> , 893 Wn. 2 nd 698 (1974).....	28
<u>Berg v. Hudesman</u> , 115 Wn. 2d 657 (1990).....	35
<u>Bort v. Parker</u> , 110 Wn. App. 561 (2002).....	35,36
<u>City of Everett v. Estate of Sumstad</u> , 26 Wn. App. 742 (1980).....	27, 28
<u>Dwelley v. Chesterfield</u> , 88 Wn. 2 nd 331 (1977).....	28

<u>Foss v. Culbertson,</u> 17 Wash 2 nd 610 (1943).....	41
<u>Hanks v. American Pacific Sales Corporation,</u> 7 Wn. App. 316 (1972).....	22,33
<u>Janzen v. Phillips,</u> 73 Wn. 2 nd 174 (1968).....	28
<u>Jacoby v. Grays Harbor Chair and Mfg. Co.,</u> 77 Wn. 2d 911 (1970).....	29
<u>J.E. Edmonson v. Popchoi</u> 155 Wn. App. 376 (2010).....	22
<u>Johnson V. Star Iron & Steel Co.,</u> 9 Wn. App. 202, 206 (1973.	29
<u>Kloss v. Honeywell, Inc.,</u> 77 Wn. App. 294 (1995).....	36
<u>Meissner v. Simpson Timber, Co.,</u> 69 Wn. 2 nd 949, 957 (1966).....	29, 32
<u>Morgan v. Stokely-Van Camp, Inc.,</u> 43 Wn. App. 801 (1983).....	44, 47
<u>One Pacific Towners Homeowners Ass'n v.</u> <u>Hal Real Estate Inv. Inc.,</u> 108 Wa. App. 330, 350 (2001).....	43
<u>Pacific Cascade Corp. v. Nimmer,</u> 5 Wn. App. 552 (1980).....	29
<u>Rena Ware Distribs, Inc. v. State,</u> 77 Wash. 2 nd 514, 518,(1970).....	43
<u>Scott Galvanzing, Inc. v. N.W. EnviroServices, Inc.,</u> 120 Wn.2d 656, 674 (1996).....	35

<u>Seattle Association of Credit Men v. Green,</u> 45 Wn. 2 nd 139 (1954).....	41, 42
<u>Sunnyside Valley Irr. Dist. v. Dickie,</u> 149 Wn. 2d 873 (2003).....	23
<u>Tanner v. Elec. Coop v. Puget Sound Power and Light. Co.,</u> 128 Wn. 2d 656 (1996).....	36
<u>Valley National Bank v. Babylon Chrysler,</u> 53 Misc. 2 nd 1029, 280 N.Y.S. 786 (Sup. Ct.) Aff'd 28 A.D. 2 nd 1092, 284 N.Y.S. 849 (1961).....	47

Statutes

RCW 62A. 1-101.....	22
RCW 62A.1-205.....	24, 44
RCW 62A.2-201.....	22, 32, 33
RCW 62A.2-205.....	32
RCW 62A.2-301	46
RCW 62A.2-503	46
RCW 62A.2-511	46
RCW 62A.2-607.....	46

Other Authorities

Author Corbin, Contracts, Sec. 1551 at 198 (1960).....	36
L. Simpson, Contracts Sections 14 and 15 at 14-18 (1954)	29
R. Nordstrom Of The Law of Sales, Section 52, (1970)	45

A. INTRODUCTION

This case involves the personal liability of a corporate officer who spoke on the phone to a potential supplier. The supplier, a sea urchin diver, had called the “company” looking for market for sea urchin he intended to harvest in the future. During the conversation the parties expressed an “interest” in buying and selling. No quantities were discussed or agreed upon. Six weeks later the supplier forwarded urchin to the corporation and then claimed he had a purchase and sale contract with the company’s “President.” The ultimate issue in this case is whether the corporation’s President, Appellant, M. Thomas Waterer, personally (as opposed to corporately) contracted with Mr. Edward Izykowski for the purchase and sale of an unspecified quantity of Canadian sea urchin during the pre-season telephone call.

Mr. Izykowski’s claims were assigned to the Respondent, Alaska Cascade Financial, Inc., which commenced this action against Appellant M. Thomas Waterer, dba Waterkist Corporation dba Nautilus Foods. (Complaint CP 1-4). Defendants disputed whether a contract arose, the identification of the parties to it, and whether the urchin conformed to industry standards. (CP 5-6).

These roughly correspond to the issues on appeal.

Following a bench trial in King County Superior Court (the "Trial Court") Judge Kallas ruled in favor of the Respondent Alaska Cascade Financial, issued Findings of Fact and Conclusions of Law (CP 13-20) and a Judgment against the Appellant, M. Thomas Waterer, for breach of contract. (CP11-12).

B . ASSIGNMENT OF ERRORS

The Appellant assigns errors to the Trial Courts' Findings, number 3, 4, 5, 7, 8, 9, 11, 12, 13, 15, 16, and Conclusions of Law, 2, 3, 5, 6, 7, and 8. (CP 13-20)

Finding of Fact 3, in part. Appellant assigns error to Finding 3 with respect to the phrase: "Waterer owns businesses which process and resell seafood." (CP 14). There was no evidence supporting this finding.

Finding of Fact 4, in part. Appellant assigns error to Finding of Fact 4, that "The Contract was made in the course of four phone conversations between them [Waterer and Izykowski] which took place during October and November, 2007" (CP 14) on the basis that it is not supported by the testimony of any witnesses.

Finding of Fact 5. Appellant assigns error to Finding of Fact

5 , with respect to the findings/conclusions that: (a) "Izykowski and Waterer agreed that Waterer would pay Izykowski by the pound (live weight) of harvested urchins,... "; (b) "the parties agreed that Izykowski would harvest urchins for Waterer until either Waterer told him to stop or the price Waterer would pay fell below the price Izykowski would accept"; (c) "they agreed that a minimum price was \$.60/lb"; (d) "they agreed that Waterer would pay Izykowski"; and (e) "Izykowski "offered" to harvest urchins for Waterer", and "Waterer "accepted" that offer." (CP 14)

Findings of Fact 7. Appellant assigns error to Finding 7 with respect to the price paid for urchin was without the consideration of the quality of the urchin, and to the extent it implies that the prices were for all grades of urchin. (CP15)

Finding of Fact 8. Appellant assigns error to Finding 8 with respect to identification of Mr. Waterer as a party to the contract, to wit the finding that "Waterer, personally is the party to whom Izykowski contracted to sell urchins because Waterer contracted with Izykowski as agent for an undisclosed principal." (CP15).

Finding of Fact 8. Appellant assigns also error to Finding 8 with respect to an erroneous burden of proof adopted by the court

requiring Mr. Waterer to “establish by a preponderance of the evidence that he (Waterer) disclosed to Izykowski the name or the corporate status of the business for which he was acting as an agent.” (CP 15)

Finding of Fact 9. Appellant assigns error to Finding 9 with respect to the scope of Mr. Waterer’s disclosures and the acts attributed to Mr. Waterer being attributed to him personally as opposed to corporately. (CP 15)

Finding of Fact 11, 12 and 13. Appellant assigns error to Finding of Fact 11, 12 and 13 with respect the statements attributed to Mr. Waterer, and time frames. (CP 16-17)

Findings of Fact 15. Appellant assigns error to Finding of Fact 15 with respect to identification of whom was invoiced for the urchin. The allegations are not supported by the evidence, and inconsistent with all evidence before the court. (CP18)

Finding of Fact 16. Appellant assigns error to Finding of Fact 16 with respect to the conclusion that the price was “reasonable” when the court refused to consider any evidence as to whether its quality met minimum industry standards. (CP 18)

Conclusion 3. Appellant assigns error to Conclusions of

Law 3 with respect to the conclusion that the “Waterers are in breach of contract”, which is inconsistent with Finding of Fact 8 that Mr. Izykowski knew he was dealing with Mr. Waterer in a corporate capacity as President of a corporation.

Conclusion 5. Appellant assigns error to Conclusions of Law 5 with respect to the conclusion that Waterer “received and accepted urchins” from Izykowski for purposes of the UCC, when all evidence demonstrated that the urchin was received by Nautilus Marine Enterprises, Inc. d/b/b Nautilus Marine Products. (CP 19)

Conclusion 6. Appellant assigns error to Conclusions of Law 6 that the Respondent was entitled to judgment against Thomas Waterer and Dawn Waterer and their marital community for breach of contract in the amount of \$37,258.99. (CP19)

Conclusion 7. Appellant assigns error to Conclusions of Law 7 that Respondent (Plaintiff below) was entitled to judgment against Thomas Waterer and Dawn Waterer for costs.

Conclusion 8. Appellant assigns error to Conclusions of Law 8 with respect to the conclusion that Respondent (Plaintiff below) is entitled to judgment against Thomas Waterer and Dawn Waterer for reasonable attorney fees. (CP 19).

The Appellant also assigns error to the trial court's evidentiary rulings which precluded the Appellant from introducing evidence as to the extremely poor quality of the subject urchin which the trial court held to be "irrelevant" as to any issues in this case, including the formation of contract, the contract terms, the reasonable price of the urchin, or price adjustments. (RP vol. 2 at 53, line 20, and at 64, line 10, generally at RP vol. 2 53-64. The trial court erred again by not allowing testimony or evidence as to the quality of the urchin and refused to consider Trial Exhibits 121, 122, 123 and 125 . (RP vol. 2 at 75-77)

C. STATEMENT OF ISSUES PRESENTED

The issues on appeal relate to (a) the formation and terms of an oral contract for the purchase and sale of sea urchin, including the identification of any parties to a contract, and (b) the trial court's reliance on an erroneous legal presumption that a corporate officer (such as the Appellant, Mr. Waterer) has personal liability on a contract he negotiates unless he establishes by a preponderance of evidence that he discloses to another party to the contract the corporation's full legal name even though the other party knew he was "president" of a "company" and its trade name.

The evidentiary issues on appeal relate to the trial court's refusal to admit evidence relating to the identification of the corporate entity which processed the urchin and evidence as to the relative "quality" of urchin (roe) produced by Mr. Izykowski.

The issues in this case will be addressed in the context of the following questions:

- (a) Whether an oral contract for the purchase and sale of urchin arises when the parties' discussions are exploratory in nature and simply express "an interest in selling" and "an interest in buying" in the future?
- (b) Whether there was contract for the purchase and sale of sea urchin in the absence of any writing complying with the requirements of the Statute of Frauds which conditions the formation of a contract on there being a writing?
- (c) If there is a contract, whether the contract for the purchase of sea urchin was between Mr. Izykowski, as seller, and Mr. Waterer, personally as buyer, when Mr. Izykowski knew that Mr. Waterer was in a representative capacity as President of a company?
- (d) Whether the trial court erred by adopting a rule of law that Mr. Waterer, as the president of a company, was personally liable on the contract unless he proved by a preponderance of evidence that he had disclosed to Mr. Izykowski the company's full corporate name as opposed to simply a licensed trade name?

- (e) Whether the trial court erred in refusing to consider evidence relating to (a) the Defendants' business licenses and (b) the quality of the sea urchin when its quality was material to determining if the seller tendered conforming goods and a reasonable price or price adjustment?

D. STATEMENT OF THE CASE

The contract in dispute arises from a telephone call by Mr. Edward Izykowski to the Appellant, Mr. Michael Thomas Waterer, as president of a "company" doing business under a licensed trade name." (RP vol. 1 at 63, see also RP vol. 1 at 37, 40) Mr. Izykowski's claims against Appellant Mr. Waterer were assigned by him to the Respondent, Alaska Cascade Financial, Inc.

Respondent, Alaska Cascade, commenced this action against Mr. Waterer d/b/a Waterkist Corporation d/b/a "Nautilus Foods." (CP 1-4). Defendants contested the existence of a fixed price contract and the parties to it. (CP 5-6). Nautilus Marine Enterprises, Inc., was added as a Defendant by agreement.

The case proceeded to trial on April 19, 20 and 21, 2010. The Trial Court issued its Findings of Fact and Conclusions of Law (CP13-20), and entered the Judgment on May 12, 2010. (CP 11-12). Appellant timely filed an appeal. (CP 21-33).

E. STATEMENT OF FACTS

1. Parties and General Background.

Mr. Edward Izykowski ("Mr. Izykowski") is a Canadian urchin diver who works for and is president of a Canadian corporation known as 479941 BC, Inc. (RP 58-61, 123).

Respondent, Alaska Cascade Financial, Inc. ("Alaska Cascade") is a collection agency and the assignee of Mr. Izykowski's claims for breach of contract. (CP 2-3)

Appellant, M. Thomas Waterer, ("Mr. Waterer") is the president of Waterkist Corporation and Nautilus Marine Enterprises, Inc.

Waterkist Corporation is an Alaska corporation in good standing which does business under the licensed trade name of "Nautilus Foods." Waterkist operates processing plants in Alaska. (RP vol. 1 148 -151) (Trial Exhibits 118 and 119.)

Nautilus Marine Enterprises, Inc. is a Washington corporation in good standing. (Trial Exhibit 101, 102, 103, 104, 105, 106, and 107) and does business under the licensed trade name "Nautilus Marine Products." It operates seafood processing plants in Washington, including the urchin processing plant in

Tacoma, Washington. (Trial Exhibits 109, 110, and trial exhibit not admitted by trial court, exhibit 108.)

2. Regulated Industry.

The purchase, sale and processing of urchin involves the sale of “live” shell fish. This is a highly regulated industry and requires a variety of licenses issued by state and federal authorities in both Canada and the United States. Urchin may only be harvested, sold, purchased, and transported across international borders by individuals or entities licensed to do so. (See generally RP vol. 1 at 122-132, buyers must be licensed, see generally, also WAC 220-69-240, WAC 220-20-012.)

The sale of urchin is documented by the seller by a Validation and Harvest Logbook Report, also known as a “fish ticket.” (See, e.g., Trial Exhibit 3.) This report must identify a licensed vessel, master, permit holder and the “buyer.” The report is then verified by a Canadian Department of Fisheries and Ocean agent. It is common for sellers to abbreviated the buyer's name or simply use a buyer's trade names as listed on a corporation's license issued by the Canadian Department of Fisheries and Oceans. (See generally, RP vol. 1 at 85-92, and at 123-132.) The

report, which is often referred to as “fish ticket” is an instrument of conveyance, transferring title to the licensed buyer named on it.

Urchin can only be sold to licensed buyers (RP vol. 1 at 123-132). All buyers must be registered and licensed by the Canadian Department of Oceans and Fisheries, and “identified” by a buyer’s identification number. (RP vol. 1 at 123-132). In this case there were two Canadian buyer validation codes, 58331 and 58340. The sales were reported under number 58340, which is Nautilus Foods identification number. (RP vol. 1 at 131-132).

Relevant to the present case is that neither identification code relates to Appellant, Mr. Waterer. He is not a licensed buyer, importer or processor. (RP vol. 2, 70-73) However, Waterkist Corporation is a licensed buyer under its trade name of “Nautilus Foods” and Nautilus Marine Enterprises, Inc. is a licensed buyer under its trade name of “Nautilus Marine Products.”

Mr. Izykowski’s harvest logs (Trial Ex. 3) reflect that he intended to sell the urchin to a licensed buyer he identified as “Nautilus” 17 times, as “Nautilus Foods” once, and as “Nautilus Marine Products” once. None of his 19 harvest logs or fish tickets identified Mr. Waterer as the “buyer.” None.

3. The Contract In Dispute: No Firm Offer or Acceptance.

In early October 2007 Mr. Izykowski called Mr. Waterer at Nautilus Marine Product's processing plant in Tacoma, Washington. The purpose behind Mr. Izykowski's call was to explore the possibility of his obtaining a market for urchin he would harvest in the future. (RP vol.1 at page 63)

At the time of the call Mr. Izykowski was already aware that Mr. Waterer was "President of Nautilus Foods" and that "Nautilus Foods" was a "company" (Trial Ex.13), although he did not personally know the full corporate name. (RP vol. 1 at page 40) Mr. Izykowski knew Mr. Waterer was a corporate officer of a company which was a licensed urchin buyer and processor. (RP vol. 1 at page 40 line 7-10) In Finding 8 the court found that: "Izykowski knew when he initially contacted Waterer that Waterer had some connection with a company." (CP 15) Mr. Waterer disclosed his corporate status to Mr. Izykowski. (CP 191-195, 199-200).

Mr. Izykowski testified that the contract for the purchase and sale of the urchin arose in his first conversation with Mr. Waterer. (RP 63) Mr. Izykowski's testimony about this conversation does not reflect that there was ever a firm offer, nor acceptance, nor

discussion about the quantity of urchin to be purchased and sold.

Mr. Izykowski described why he called Mr. Waterer and the substance of this conversation at RP vol. 1 at 37 -38.

Q: "What did you hear?"

A. "There is a new buyer called Nautilus Foods, who's looking for boats, possibly looking for boats. This was the information given to me, with a name and phone number."

Q. And what did you do then?

A. I phoned Nautilus Foods, introduced by myself, asked to speak to Mr. Waterer. It was a secretary. She gave me him on the phone. Again, we introduced each other and I ask if he's interested in buying. The answer was yes. I asked him if he was aware of the going rate. He said yes. So we kept talking and I said that for such price I would be interested in buying- in selling the product, and this was probably the end of the first conversation, when we agreed that the going rate we could start the business for 60 cents a pound, and then after calling him initially, he phoned me two [sic].

The discussions did not lead to Mr. Izykowski or Mr.

Waterer proposing any written contract, or confirmatory letter. Mr.

Izykowski acknowledges this. (RP vol. 1 at page 42 line 23):

Q. Did you and Mr. Waterer exchange any written communications of any kind about anything that was discussed in the phone calls? Price, quantity, when

you would start fishing, anything else:

- A. No. Besides me sending a copy of my license, there was no written papers exchanging hands.

The parties did not discuss any specific "quantity" of urchin at issue. (RP vol. 2 at 72-73) There was no discussion of price adjustments based on recovery rates, grade ratios, or other contract terms. They did discuss "market prices." and they each knew that market prices change daily. This is one reason no processor ever enters into a preseason fixed price contract. (RP vol. 1 223). Likewise, price is never fixed because a processor can not simply "return" or "reject" urchin of poor quality, rather the final price is always a function of quality and the international market price. (RP vol. 1 217 to 221).

The parties understood that in this industry all contract terms other than quantity, including price terms, would be supplied by the useage of trade and custom of the industry. Mr. Izykowski was fully aware that the preliminary grounds prices change daily and that final prices are tied to actual recovery rates determined at time of processing. (RP vol. 1 at 63, RP vol. 2 at 15, 17-19. Pricing is never fixed. RP vol. 2, at 18-22, and always tied to

quality, RP vol. 2 at 18-22., RP vol 2 at 72-73.)

Preliminary prices are subject to adjustments at time of processing because the actual quality and value can never be ascertained until the shell is opened and the roe is graded. (RP vol. 2 at 72-73.) Consistent with the standard and custom of the industry, neither Nautilus Foods nor Nautilus Marine Products ever enter into preseason fixed contracts: and did not in this case. Mr. Waterer testified at RP vol. 2 at pages 72-73:

Q. Have you ever, ever entered into a preseason fixed price contract with a diver any place?

A. No.

Q. Why not?

A. There are too many unknowns in the future, its too big of a gamble for the processor to absorb, and you can't do such without knowing both the market, which is not predictable, and quality, and in this case the quality is unseen.

Q. What about quantity? Did you and Mr. Izykowski talk about quantity figures, that you would buy X number of urchin?

A. Of course not. And that's the conversation of October, I guess, when he dove in mid to late November and

December. I didn't mean too (inaudible). No.

Q. Was there any aspect of the conversation that was in sum and substance that you would buy 50,000, 200,000 or a million pounds of urchin from him?

A. No.

Q. Was there any discussion relating to quantity figures at all that you would purchase, you being Nautilus would purchase.

A. No, because we didn't make a final agreement to purchase anything.

(RP vol. 2, at 72-73, see also RP vol. 1 at 223, and 217-221)

The parties' communications were at best preliminary and did not lead to a contract.

4. Custom and Trade.

It is extraordinary for processors to agree in advance to pay harvesters fixed prices because it is absolutely impossible for a harvester or a processor to have any concept of the value of urchin until processing. (RP vol. 2, at 15, 18-22, 53, 72.) The value of sea urchin is dependant on two factors: the quality of urchin roe and the daily price on a commodities market. (RP volume 2 at, 15, 17-18, prices not fixed, 18-22, tied to recovery rates 53.)

The standard of the industry is for urchin processors to either (a) process urchin on consignment or (b) purchase urchin with an open price or provisional price with the final price being determined later based on the "recovery percentage" of the urchin roe, the grade of the roe, and the resale price on the Japanese commodities market. (RP vol. 2 at 15-29) Mr. Waterer testified as to the type of contracts used at RP Vol. 2 at page 72, as follows:

Q. Did you enter into any preseason contracts with divers at a fixed price?

A. Not one of 16, and not any in Canada. I just have never done than. It is illogical.

He went on to explain:

Q. Have you ever, ever entered into a preseason fixed price contract with a diver anywhere?

A. No.

Q. Why not?

A. There are too many unknowns in the future, its too big of a gamble for the processor to absorb, and you can't do such without knowing both market, which is not predictable, and quality, and in this case, quality was unseen.

Appellant, Waterer also explained that he never, ever buys urchin personally and that such is always purchased by a licensed buyer,

which in this case was a corporation. (RP vol. 1 at 191-192)

Q. Mr. Waterer, in the context of your operating processing companies for over 30 years, do you ever buy fish or urchin or seafood product personally?

A. I never have.

Q. When you buy seafood products—fish, urchin whatever—are they bought appropriately?

A. In all cases.

Q. And are those corporations duly licensed?

A. Yes, in all cases.

Q. As corporations?

A. As corporations.

Q. As buyers?

A. As buyer—as corporations with buyer's licenses in all cases.

Mr. Waterer clearly testified that Mr. Izykowski was fully aware that he was acting in a corporate capacity. (RP vol. 1 at 192-194, and RP vol 1 at 198-199).

Q. In your opinion, did you ever enter into a contract with Mr. Izykowski?

A. Of course not.

Q. Did you ever indicate to him that you were a representative of a corporation.

A. Yes.

5. Value of Urchin Tied To Roe.

The quality of the urchin is based on its roe (RP vol. 1 152-159). Roe is graded and sold by the gram, by highly qualified technicians wearing surgical gloves, masks and using tweezers. (RP vol 1 152-159). It is air shipped and sold fresh in Japan.

Nautilus Marine Products received the urchin forwarded by Mr. Izykowski. The urchin were of poor quality. When the product arrived Nautilus Marine Products made every effort to contact the Izykowski for instructions, but he had no satellite phone unlike all other sellers, and was fishing 1000 miles away at an unknown location.. No one knew where he was at. As required by law, Nautilus Marine Products then processed the sea urchin at the shipper's expense, and then sold fresh in its traditional market it to mitigate damages. Urchin can not be "rejected" (RP vol. 1 at 217-221). The urchin was processed because it can not be returned due to it being a live product and only sold "fresh", and it can not be frozen. (RP vol. 2 generally at 22-29) It is sold fresh in Japan.

The trial court did not allow testimony or evidence as to the quality of the urchin produced by Mr. Izykowski (RP vol. 1 at 53:20, 64:10, and discussion generally at pages 53-64), and refused to consider related Trial Exhibits 121, 122, 123 and 125. (RP vol. 2 at 75-77, (RP vol. 2 at 53-55, RP vol.1 54 to 64). Ddefendants proffered evidence that the urchin in dispute was of poor quality, had very low recovery rates, and that the costs of processing, sale and disposing of unmarketable roe were substantial relative to the low prices it generated when sold at auction. (Court refused Exhibits 121, 122, 123, 125 at RP vol. 2 at 76-77, and refused 126 and 127 at RP vol. 2 at 78.)

The quality of the urchin is material to determining whether conforming goods were delivered, relevant to setting the price (open price contract), relevant to adjusting a provisional price, or adjusting a price when the quality or grade does not comport to express or implied market standards. The quality is relevant to price adjustments in accordance with the usage of trade. (RP vol. 2 at 15, 16- 22, price always tied to quality at time of processing, since this is the only time the quality of the roe can be ascertained.)

6. Other Factors Identifying Buyer.

The undisputed facts relating to the purchasing and handling of the urchin can be summarized as follows:

	Waterer	Waterkist Nautilus Foods	Nautilus Marine Products
Employees	no	Yes	Yes
Licensed Buyer	no	Yes	Yes
Licensed Name	no	Yes	Yes
Processes Urchin	no	No	Yes
Processing Plants	no	Alaska	Washington
FDA license	no	Yes	Yes
Pays Fish Taxes	no	Yes	Yes

Mr. Waterer did not contract with Mr. Izykowski personally. (RP 198-199). If there is a contract, then the buyer was the entity identified on the harvest report/fish ticket, which is either Nautilus Foods or Nautilus Marine Products, but not Appellant, Mr. Waterer personally, who is not a licensed buyer, did not receive the urchin, did not process it, and did not sell it.

F. STANDARD OF REVIEW

On a bench trial, the findings of fact are reviewed to determine whether they are supported by substantial evidence and if so, whether the findings support the conclusions of law.

Unchallenged findings of fact are verities on appeal. See, e.g.,

J.E. Edmonson v. Popchoi, 155 Wn. App. 376 (Div. 1 2010).

Substantial evidence is evidence sufficient to persuade a fair minded person that the premises are true. If the standard is not satisfied the appellate court may vacate the finding. Sunnyside Valley Irr. Dist. v. Dickie, 149 Wn. 2d 873 (2003). The conclusions of law are de novo.

G. ARGUMENT

Argument Summary

The issues relating to the formation of the contract and its terms are governed by Article 2 of the Uniform Commercial Code which are set forth at RCW 62A.2-101 et seq.

Of particular import is the Statute of Frauds set forth at RCW 62A.2-201. This section of the UCC mandates that any contract involving goods with a value of \$500 shall be in writing and shall specify the "quantity." This statute renders an oral contract unenforceable. It is well settled law that oral conversations or even agreements are not enforceable contracts under the statute of fraud and the requirements of RCW 62A.2-201. Hanks v. American Pacific Sales Corporation, 7 Wn. App. 316 (1972).

An exception to this rule applies to goods which are

“received and accepted.” However, this exception does not apply to the case before the court. It is undisputed in this case that there is no written contract and that Appellant, Mr. Waterer, did not personally receive or accept any urchin. While an argument may be made that Nautilus Marine Products has liability since urchin was delivered to Nautilus Marine Products’ plant in Tacoma, Nautilus Marine Products’ receipt of urchin can not be the basis of Appellant’s, Waterer’s, liability.

Notwithstanding the lack of any writing, the UCC does not abrogate the traditional contract rules that there must be an offer and acceptance, and that general discussions do not give rise to a contract. Rather, at most, such are simply preliminary negotiations. In the present case, Mr. Waterer and Mr. Izykowski spoke about having an “interest in” selling or buying on behalf of their respective corporations, as opposed to firm and unequivocal language conveying an offer or acceptance.

Compliance with the Statute of Frauds (RCW 62A. 62-201) is even more imperative in circumstances where, as here, the parties never meet face to face and spoke generally. A writing in this instance could have confirmed the quantity and also each of

the parties to the contract.

Assuming the parties had contractual intent, the parties to the contract were Mr. Izykowski, as seller, and then either Nautilus Foods or Nautilus Marine Products, as buyer. The trial court's conclusion that the buyer was Mr. Waterer was based on an erroneous burden of proof which required Mr. Waterer to prove by a preponderance of the evidence that he had advised Mr. Izykowski of the full corporate names of Nautilus Foods or Nautilus Marine Products notwithstanding that Mr. Izykowski already had actual knowledge that he was dealing with Mr. Waterer in a representative capacity as "President" of a corporation, and that the fundamental contractual objective was to sell the product to a licensed buyer, which was Nautilus Foods or Nautilus Marine Products, but not Mr. Waterer. The trial court thus erred in rendering a judgment against Mr. Waterer personally.

The trial court also erred in not allowing any evidence as to the quality of the urchin, as determined at the time of processing. This is the standard of the industry since it is impossible to ascertain the color, size, quantity, firmness of the roe until processing, and these characteristics are the factors which

determine its value, and hence always key factors in (a) determining whether the urchin conform with the contract and (b) setting the price paid to harvesters and (c) setting or adjusting preliminary prices as is and was the useage of trade and custom, which under the UCC are additional contract terms unless expressly excluded in the written contract.

At the end of the day, what happened in this case boils down to this: Mr. Izykowski becomes aware that there was a new urchin buyer seeking to purchase urchins from divers. Mr. Izykowski is given one of Mr. Waterer's business cards which identifies him as "President of Nautilus Foods." (Exhibit 13) Mr. Izykowski knows this was a corporate entity and intends to sell to only a licensed buyer, such as Nautilus Foods. (Nautilus Foods is a licensed trade name of Waterkist Corporation.) Mr. Izykowski then called Mr. Waterer at his corporate offices. After harvesting Mr. Izykowski reports the sale as being to Nautilus as a short hand name for "Nautilus Foods" and/or "Nautilus Marine Products", which are licensed buyers. The urchin was shipped to and processed by Nautilus Marine Products in Tacoma, Washington. Sales can only be to licensed buyers. (CP`122-131)

Notwithstanding whether a contract ever arose in the first place, the object of any contract Mr. Izykowski entered into was either to sell urchin to Nautilus Foods or Nautilus Marine Products, and not a corporate officer in his personal capacity. The court erred by finding that Mr. Waterer personally was the contracting party because he bore the burden of proof that he disclosed a full corporate name, which is an error of law, and inconsistent with Mr. Izykowski's knowledge that he dealt with Mr. Waterer in a corporate capacity as "president" of a company, and knowledge that the trade names used were for a corporate entity.

The court also erred in finding that preliminary discussion gave rise to a contract, when the alleged contract was not evidenced by a writing, and the terms of the contract provided for a fixed price for an unspecified quantity and an unspecified quality. This is not a contract. It also disregards the provisions of the UCC which render useage of trade and custom in the urchin industry that all prices in all cases are open prices or provisional and subject to adjustment based on actual quality and actual market prices at the time of sale in Japan . However, the court refused to consider evidence of the poor quality of this urchin which itself

would affect the price. The court thus erred.

1. An oral contract for the purchase and sale of urchins did not arise when the parties' discussions and the words used by them were exploratory in nature and simply expressed a vague "an interest in selling" and "an interest in buying" in the future.

The trial court erred in finding that there was a contract for the purchase and sale of the urchin between Mr. Izykowski and Appellant Mr. Waterer, and that Mr. Waterer breached that contract. (Findings 4, 5, and 8 Conclusion 6.) There was no substantial evidence supporting these findings since as a matter of law vague expressions of general intent do not rise to the level of a firm offer or acceptance nor rise to the level of a contract.

Fundamental to the formation of any contract is that there is a meeting of the minds on the material terms as embodied in an "offer" and an "acceptance." The Uniform Commercial Code does not change this well established rule of law. City of Everett v. Estate of Sumstad, 26 Wn. App. 742 (1980).

A meeting of the mind occurs if and only if there are objective manifestations by both parties that would be understood by a reasonable person to indicate assent by each of them. These

manifestations must be present at the time the contract arises. City of Everett v. Estate of Sumstad, supra. As such, preliminary discussions, negotiations and price quotations do not give rise to a contract. See e.g. Barclay v. Spokane, 893 Wn. 2nd 698 (1974).

Under this standard, the court considers objective evidence such as the words spoken, and the parties' conduct, and not their subjective beliefs. Jacoby v. Grays Harbor Chair and Mfg. Co., 77 Wn. 2d 911 (1970). These are measured at the time of the "offer" and its acceptance, and not at some other time.

Under the objective manifestation standard, the role of the court is to impute to a person an intention corresponding to the reasonable meaning of his words and acts, and his unexpressed impressions and subjective intent are meaningless and irrelevant. Janzen v. Phillips, 73 Wn. 2nd 174 (1968); Dwelley v. Chesterfield, 88 Wn. 2nd 331 (1977).

The hallmark of an offer, as opposed to preliminary discussions, is that it meets three characteristics: first, the statement must manifest a present intention to contract; second, it must be definite and certain; and third, it must be communicated to the offeree. These elements will be considered in turn.

Present intent to contract is viewed from an objective standard of whether a reasonable person in the position of the offeree's shoes concluded that he only needed to accept to create a contract. Here the court looks at the words used by the parties, do they suggest negotiation or solicitation of an offer, and the circumstances. If further manifestations of the parties' intent is required, then no offer was made or accepted. Pacific Cascade Corp. v. Nimmer, 5 Wn. App. 552 (1980).

It is well settled that mere intentions to do something do not rise to the level of a contract. A "mere intention to do a thing is not a promise to do it. Meissner v. Simpson Timber, Co., 69 Wn. 2nd 949, 957 (1966). Intention to do a thing is simply evidence of a future contractual intent, but this does not satisfy the requirement that there be "present contractual intent essential to an operative offer." L. Simpson, Contracts Sections 14 and 15 at 14-18 (1954) approved in Meissner v. Simpson Timber Co., id at 556. An agreement to negotiate a contract in the future is nothing more than negotiations and does not rise to the level of a contract Johnson v. Star Iron & Steel Co., 9 Wn. App. 202, 206 (1973).

In the present case, the parties never met. They spoke only

on the phone. They spoke generally. There was no meeting of the minds. Mr. Izykowski claims that he called Mr. Waterer six weeks before the sea urchin season. The general substance of their conversation is not disputed. Mr. Izykowski and Mr. Waterer discussed general market conditions, anticipated future market trends and possible future prices, and general harvest projections. At most the parties' discussion, as Mr. Izykowski stated, were only an expression of "interest." Mr. Izykowski's contacted Mr. Waterer as president of Nautilus Foods, a "company" he claimed he was "familiar with". (CP 40:4-9)

While Mr. Izykowski claims he had entered into an "oral contract" for the purchase and sale of sea urchin there was no discussion about the quantity of sea urchin involved in the contract. Quantity is a critical term. Mr. Izykowski does not state or describe the words used by Appellant, Mr. Waterer, and he. There was no testimony relating to a definite offer, nor acceptance, and conceitedly there was no discussion of any terms, other than Mr. Izykowski's allegation that they talked about price. To the contrary, the language used by the parties was simply that the seller was "interested in selling" and the prospective buyer "interested in buying." This language does not convey a present contractual

intent. An “interest” is not a promise.

The lack of contractual intent is further reflected by the limited nature of the conversation. Mr. Izykowski concedes that Mr. Waterer and he did not discuss key aspects of a purchase and sale contract which are necessary for the formation of a contract, such as quantity, delivery dates, risk of loss, place of delivery, condition of title. Section 2.-205 requires a firm offer and acceptance. The parties’ use of the words “interested” in buying and “interested” in selling, and lack of discussion on other points, reflect preliminary discussions, and not an offer or acceptance.

The trial court’s failure to distinguish between preliminary discussions, and firm offers and acceptance, lead to a series of errors, including findings of fact 4 that a “contract arose”, finding 5 that Mr. Waterer personally agreed to purchase urchin and pay a fixed price, and finding 7 that the price of the urchin (assuming a contract arose) was not dependant on its quality, grade or value. These findings are not supported by the evidence that the parties’ communications failed to express contractual intent. There was no mutuality of contract which would have empowered the Defendants to sue for breach of contract when the parties failed to even discuss the most basic contract term: quantity.

In the context of the parties' negotiations the trial court erred as a matter of law in concluding that there was a contract. As the Supreme Court has noted the "mere intention to do a thing is not a promise to do it. Intention to do a thing is simply evidence of a future contractual intent, but this does not satisfy the requirement there be present contractual intent essential to an operative offer." In Meissner v. Simpson Timber Co., id at 556. Likewise, Mr. Waterer and Mr. Izykowski lacked present intent to contract.

2. There was no contract for the purchase and sale of sea urchin in the absence of any writing complying with the requirements of the Statute of Frauds.

The trial court also erred in concluding that a contract arose despite the parties' failure to have any signed writing reflecting their agreement, i.e., there was no signed contract and no confirmatory memos, faxes, and even e-mails, and concluding a contract can arise in the absence of the parties agreeing on the "quantity term."

The UCC requires that a contract for the purchase and sale involving goods with a value of more than \$500.00 meet two requirements which are found in Section 2.201. (RCW 62A.2-201)

This section is commonly known as the statute of frauds. Hanks v. American Pacific Sales Corporation, 7 Wn. App. 316 (1972).

The first requirement under Section 2.201 is that contract must be evidenced by a writing signed by the party against whom enforcement is sought. Subsection (1) provides:

Except as otherwise provided for in this section a contract for the sale of goods for a price of five hundred dollars or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.

The fundamental purpose of this rule is to prevent misunderstandings and confusion which unfortunately result from preliminary negotiations which a persons later claims to be an "oral contract." The section imposes duty on the seller to secure his buyer's signature on a writing.

The second aspect of this statute is the requirement that the writing must state a quantity term.. The statute states:

".. the contract is not enforceable under this paragraph beyond the quantity shown in such writing."

In the present case, the parties did not agree upon a

specified quantity nor did the parties sign a written contract or a confirmatory memo or even email. Nothing. A contract does not arise in this circumstance.

3. There was no contract for the purchase and sale of sea urchin between Mr. Izykowski, as seller, and Mr. Waterer, personally as buyer, because Mr. Izykowski knew that Mr. Waterer was acting in a representative capacity as President of a company.

The trial court erred in finding that Appellant Mr. Waterer was personally liable. (Findings of fact 8, Conclusion 5 and 6). To reach this conclusion the trial court fundamentally ignored the rules of contract interpretation which required the court to consider the context in which the contract, if any, arose. This error was then compounded by the court's shifting the burden of proof which required Mr. Waterer to establish by a preponderance of evidence that he disclosed either Nautilus Foods or Nautilus Marine Products full corporate names. The court then erred again by concluding that Mr. Waterer accepted and received the urchin in Conclusion 5 and breached the contract, Conclusion 6. The later two conclusions are not supported by any evidence.

In concluding that Mr. Waterer had personal liability, the trial court ignored fundamental rules of contract interpretation to

properly identify the parties to the alleged oral contract. Mr. Izykowski unequivocally testified that Mr. Waterer worked for a “company” known to him as “Nautilus Foods” and had in his possession a business card which identified Mr. Waterer as President of Nautilus Foods. These facts put Mr. Izykowski on notice of Mr. Waterer acting in his representative capacity.

Under Washington law, the proper identification of the parties to a contract can be determined by traditional rules of contract interpretation. Bort v. Parker, 110 Wn. App. 561 (2002). It is settled Washington law that the touchstone of contract interpretation is the parties’ mutual intent. Scott Galvanizing, Inc. v. N.W. EnviroServices, Inc., 120 Wn.2d 656, 674 (1996). Mutual intent is to be ascertained through due consideration of the context in which the contract was formed, which is commonly known as the “context rule” of contract interpretation as enunciated in the seminal case of Berg v. Hudesman, 115 Wn. 2d 657 (1990).

Under this analytical framework, the intent of the parties is determined by viewing the contract as a whole in the context of its formation. This may be discerned from: (a) the actual language of the contract, (b) the subject matter of the contract, (c) the objective of the contract, (d) the factual circumstances surrounding the

making of the contract, (e) the parties' subsequent acts, and (f) the reasonableness of the respective interpretations advocated by the parties. Tanner v. Elec. Coop v. Puget Sound Power and Light Co., 128 Wn. 2d 656 (1996). Of import to the present case is that these factors and contractual language "must be interpreted in light of existing statutes and rules of law." Tanner v. Electric Cooperative, 128 Wn. 2nd at 674, citing 3 AUTHUR L. CORBIN, CONTRACTS Section 551, at 198 (1960). These rules apply to all contracts. Kloss v. Honeywell, Inc., 77 Wn. App. 294 (1995).

The applicability of rules of law can aid in the interpretation of the contract and has been used by the courts to aid in identifying the proper parties to a contract. Compliance with rules of law is deemed to be a fundamental objective of contracts. This was the key factor in how the court in Bort v. Parker, id identified the proper parties to the contract. In fact, the court placed dispositive weight on the object of the contract to identify the parties.

The issue in Bort v. Parker , id. centered on whether Louie Bort personally or corporately was a party to a construction contract. This issue arose since the contract identified the contractor as "Louie Bort d/b/a LB Construction." Mr. Bort, however, was not a licensed contractor. Rather, his company,

“Louie Bort Company”, was a licensed contractor.

The Court of Appeals held that the identity of the contracting party should be determined by the object or context of the contract’s objective. In this regard the court held that Mr. Parker’s interpretation of the contract (that he had hired Mr. Bort personally based on the reference “Louie Bort d/b/a LB Construction” was fatally flawed because it necessitated an interpretation ignoring the contractor registration laws. However, in Washington:

“Contractual language also must be interpreted in light of existing statutes and rules of laws” and that parties “are presumed to contract with reference to existing statutes.” *Id* at 575.

In concluding that the corporate entity was the party to the contract and not Mr. Bort personally, the Supreme Court expressly rejected Parker’s argument that it would be “unfair to expect him to determine the identity of the contractor” (*id.* at 576). This was the exact argument Respondent Alaska Cascade made to the trial court and which was in error was then adopted by the trial court.

Mr. Izykowski dealt with Mr. Waterer in a corporate capacity and with the intent that the “buyer” he sells to be a licensed buyer. The fact that Mr. Izykowski did not know the full corporate name does not change the fact that the intended party to the contract

was to be the entity licensed to buy urchin. Mr. Izykowski could not legally sell the urchin to Appellant Mr. Waterer personally.

The courts finding number 8 and Conclusions 3,5,6 7 and 8 are inconsistent with the aforementioned decisions, and the court erred by not identifying the parties to the contract (assuming one arose) by the contract's fundamental object (purchase and sale between licensed sellers and buyers) and further erred by shifting the burden of proof on these issues to the Defendants.

Under the useage of trade and custom, the seller's harvest report/fish ticket is a contract document which is required to identify the seller and buyer which must be between licensed parties. In this case, Exhibit 3 identifies "Nautilus" as the buyer, and the sales were reported under Waterkist Corporation's Nautilus Foods' license. In summary, Mr. Izykowski's harvest reports (Trial Exhibit 3) identified the buyer of the urchin as follows:

<u>Report No.</u>	<u>Name of Buyer</u>	<u>Reference To Waterer</u>
	<u>Licensed Buyer</u>	<u>Not Licensed Buyer</u>
588331	Nautilus	None
588332	Nautilus	None
588333	Nautilus	None
588334	Nautilus Marine	None
588335	Nautilus	None
588336	Nautilus	None

588337	Nautilus	None
588338	Nautilus	None
588339	Nautilus	None
588340	Nautilus Foods	None
588341	Nautilus	None
588342	Nautilus	None
588343	Nautilus	None
588344	Nautilus	None
588345	Nautilus	None
588346	Nautilus	None
588347	Nautilus	None
588348	Nautilus	None
588349	Nautilus Foods	None

The Canadian harvest logs or fish tickets signed by Mr. Izykowski evidence his contract intent to sell to the licensed buyer of either Nautilus Foods or Nautilus Marine Products, which are licensed trade names on the licenses of Waterkist Corporation and Nautilus Marine Enterprises, Inc., respectively. Mr. Izykowski did not and could not lawfully sell to Appellant Mr. Waterer, personally.

4. The trial court erred by adopting a rule of law that Mr. Waterer, as President of “Nautilus Foods”, was fully liable on the contract unless he proved by a preponderance of evidence that he had fully disclosed to Mr. Izykowski “Nautilus Foods” full corporate name, to wit Waterkist Corporation.

The trial court erred by wrongfully shifting the burden of proof to the Appellant with respect to establishing the identify of the

parties to the contract. This error of law is noted in Finding of Fact 8, and carried through to Conclusions of Law 3, 5, 6, 7 and 8.

These reflect the court's incorrect understanding of the legal issues in this case as well as the burden of proof.

Finding of Fact 8 correctly recognized that Mr. Izykowski knew he was dealing with Mr. Waterer in some corporate capacity, but then mis-states the law, when it states:

“All Izykowski knew when he initially contacted Waterer was that Waterer had some connection with a company called “Nautilus Foods.” Waterer failed to establish by a preponderance of the evidence that he disclosed to Izykowski the name or corporate status of the business for which he was acting as agent. “

Based on the court's findings above, the court then erred again in concluding that Waterer received and accepted urchin from Izykowski for purposes of the UCC (conclusion 5) and that the Respondent was entitled to judgment against Mr. Waterer and his wife for breach of contract. (Conclusions 3 and 6.) There is no evidence that Mr. Waterer received and accepted any sea urchin.

The trial court erred in imposing an evidentiary burden on Mr. Waterer. To the contrary, Mr. Izykowski's knowledge that Mr. Waterer was a president of some company was sufficient to inform

him that he dealt with Mr. Waterer in a representative capacity, even if he did not know the full corporate name, and created an affirmative duty on Mr. Izykowski to ascertain the corporate name. This issue was addressed in the Supreme Court's decision of Seattle Association of Credit Men v. Green, 45 Wn. 2nd 139 (1954).

In this case the plaintiff, Seattle Association of Credit Men, used a "trade name" which differed from its corporate name. The court's analysis began with the observation that a corporation is permitted to use an assumed name and that it "may contract and do business under an assumed name as well as can an individual, and be bound thereby in a corporate capacity." *id* at 142.

The court rejected the argument that the use of an assumed name is the basis of personal liability or grounds to pierce the corporate veil. In reaching this conclusion, the court also noted that the registration of an assumed name or trade name is not necessary except in the limited context of conveying legal standing to sue as a plaintiff. (Citing Bacon v. Gardner, 38 Wn. 2nd 299, 303 (1951); Foss v. Culbertson, 17 Wash 2nd 610 (1943).)

In Seattle Association of Credit Men v Green, *id* the Supreme Court expressly rejected the contention that the use of an assumed name such as "Seattle Association of Credit Men" is

deceptive because it fails to denote corporate status. In this particular case the claim of possible deception was bolstered by the use of the word "Association" which suggests a "partnership."

The Supreme Court held that such names raise a question of the identify of the person or entity and triggers a duty of inquiry on the part of the party dealing with them. In the Supreme Court's words:

"[Defendants] cannot well say that they were misled by the words chosen for its [plaintiff's] name. Had they been in doubt, regarding the identify or legal status of the party with whom they were dealing at this critical time, when credit was extended to them, they could and should have made further inquiry. They cannot now contend successfully that it be said that they intended to do business with a partnership at the time." *Id* at 143.

The significance of these cases in the context of the present case is that they do not create a presumption of personal liability nor shift the burden of proof to require a corporate officer to prove by a preponderance of evidence that he disclose a full corporate name. The trial court erred by imposing such a burden on Mr. Waterer, which lead to errs in Findings of Fact 5, 8, 9, and related Conclusions imposing personal liability on Mr. Waterer, Conclusions 3, 5, 6, 7 and 8.

The trial court seemed influenced by the fact that Mr. Waterer was president of both Nautilus Foods and Nautilus Marine Products. However, common ownership of stock, the same officers, employees etc., does not justify the disregarding of separate identities. Rena Ware Distribs, Inc. v. State, 77 Wash. 2nd 514, 518,(1970); One Pacific Towers Homeowners Ass'n v. Hal Real Estate Inv. Inc., 108 Wa. App. 330, 350 (2001). (the court will not imply an intent to disregard the corporate form from the presence of common directors, shareholders or common business address.)

5. The trial court erred in refusing to consider evidence relating to the quality of the sea urchin when its quality was material to determining if the seller tendered conforming goods and whether the alleged fixed price applied to it.

The trial court refused to consider relevant, admissible, and material evidence relating to the quality the subject urchin.. The quality of the urchin is relevant to: (a) its price: (b) determining whether Mr. Izykowski, as seller, had tendered conforming goods which triggered an obligation to pay, (c) adjustments to a price relating to express or implied warranties by the seller, and (d) a buyer's right to a price adjustment. The trial court precluded the Appellant from introducing any evidence on these issues. This

was clear error.

Fundamental to this case is that the sale of urchin is distinguishable for the sale of other goods since the actual quality can only be ascertained at time of processing when the shell is opened . Since a buyer cannot reject or even “revoke acceptance” or urchin, the prices are always “open” or provisional subject to adjustment. This is the useage of trade and custom. of the entire industry (RP vol. 1 at 63, vol. 2 at 15, 18-22, 53, and 72.).

Useage of trade and custom regarding the setting of a price and price adjustments are contractual terms since they create “an expectation that it will be observed with respect to the transaction.” RCW 62A.1-205. Morgan v. Stokely-Van Camp, Inc. 43 Wn. App. 801 (1983). The significance of this useage of trade and custom is that it governed Mr. Izykowski’s and Mr. Waterer’s understanding of the words they used and how prices are set or adjusted. Open prices or adjustment of preliminary prices is part and parcel of the industry, because a buyer can not reject or even revoke acceptance of the goods. This expectation is fundamental to the entire industry. Robert Nordstrom noted the importance of useage of trade and custom in these situations in his treatise, Handbook Of The Law of Sales, Section 52, 1970 at page 154 as follows:

Perhaps the most important part of the definition is the emphasis placed on justified expectations. One of the primary reasons for enforcing promises is to protect the justified expectations for those to whom the promises were made. Therefore, if one member of the trade makes a promise to another member of the same trade, general contract (and now the Code) requires that the promisee's justified expectation arising out of the promise be enforced. To the extent that this particular trade has a practice which is so regularly observed and followed as to create in the promisee that the promisor had that practice in mind when he made the promise, the trade practice ought to be—and does under the Code—become part of the agreement between these parties.

The trial court erred by not taking relevant evidence into account to ascertain the obligations to pay or determine the price or price adjustment without consideration of its quality. The usage of trade and custom was that any price was at most was provisional which is why it is regarded as an “open price” and/or a provisional price subject to adjustment.

The final price and/or adjustment to any preliminary price, as well as the entitlement to any offsets or credits relating to the seller's failure to tender or deliver conforming goods meeting quality standards, necessarily entails consideration of its quality as determined at time of processing. (The urchin produced by Mr. Izykowski was of such poor quality that it was disposed of at a net

loss.) The court erred by refusing to consider any evidence on these issues, including testimony, (RP vol. 2 at 53-64) and its failure to consider Defendants' exhibits 121, 122, 123, 125, 126, and 127. (RP vol. 2 at 77-78.)

Under the UCC the Seller has certain obligations to the Buyer. The Seller's basic obligations are found in RCW 62A. 2-301 which requires the Seller to transfer and deliver conforming goods. Under Section 2-511 the Seller's obligations to tender conforming goods is described as a "duty."

In RCW 62A. 2- 503 (1) tender is defined in the context of conforming goods, and under RCW 62.A. 2-601, the buyer has the right to reject "if either the goods or the tender of delivery fail in respect to conform to the contract", and if acceptance has occurred, may revoke acceptance under RCW 62A..2-607. Conforming goods are those which meet the contract's express specifications or requirements, and implied warranties arising under the UCC which includes standards of the industry.

The urchin harvested by Mr. Izykowski did not meet the buyer's specifications regarding quality. The usage of trade and indeed Nautilus Marine Products' practice is that the "price" of the urchin for every single contract is tied to the actual quality which

can only be determined after processing. This is a standard of the industry, custom and usage of trade. Under the UCC the usage of trade is to meet gives meaning to the terms of the agreement and supplement the terms of the agreement. Morgan v. Stokely-Van Camp, Inc. 43 Wn. App. 801 (1983). For discussion of history of usage of trade, see Valley National Bank v. Babylon Chrysler, 53 Misc. 2nd 1029, 280 N.Y.S. 786 (Sup. Ct.) Aff'd 28 A.D. 2nd 1092, 284 N.Y.S. 849 (1961).

Relevant to this case is that any action for price is predicated on the seller first proving that he has tendered and delivered conforming goods, and by usage of trade that any price is tied to quality which can only be ascertained at time of processing, which is exactly why open or provisional prices are always used. The usage of trade and custom in this industry is consistent with the UCC's recognition that certain industries rely on provisional or open prices when the goods are to be produced or delivered in the future (e.g., crops, timber, fish, sea urchin,) or when the value of the goods is tied to a fluctuating market (commodities, crops, fish, timber, etc.) or when quality of the goods cannot be ascertained at the time of contract formation. This is the situation with the present case.

CONCLUSION

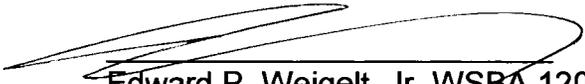
Mr. Izykowski called Mr. Waterer as the “president” of a “company.” He knew that he dealt with Mr. Waterer in a corporate capacity. In concluding that Mr. Waterer had personal liability in Finding 8 and Conclusions 3 and 5 trial court erred by using an erroneous burden of proof and by ignoring the fundamental object of any contract involving the sale of urchin that it must be between licensed parties. As held in Bort v. Parker, id. the trial court erred by not looking at the object of the contract to identify the parties.

The trial court also erred by finding that preliminary discussions of being “interested” and which were not supported by a writing can rise to the level of a contract. The failure of the parties to discuss “quantity” is fatal to formation of a contract.

The court also erred by not considering evidence of the quality of the subject urchin which by useage of trade and custom is material to the final price and the amount of the judgment.

For the reasons stated, the Court should reverse the trial court and vacate the judgment against the Appellant, Waterer.

Dated this 27 day of February, 2011


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