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No. ~~655442-2-1~~

MICHAEL WATERER,

Appellant,

Vs.

ALASKA CASCADE FINANCIAL SERVICES, INC.

Respondent.

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

BRIEF OF RESPONDENT

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COUNTERSTATEMENT OF THE CASE

Summary

Edward W. Izykowski (“Edward”) wasn’t paid for the 66,785 pounds of red sea urchin he harvested in November and December, 2007. He claimed he was entitled to payment under a verbal contract between him and his buyer, a company he knew only as “Nautilus Foods.” He assigned that account to plaintiff Alaska Cascade Financial Services, Inc. (“ACFS,”) a Washington collection agency. The honorable Paris Kallas concluded after a bench trial that a contract had been formed, that the buyer breached the contract by failing to pay, and that liability should attach to defendant M. Thomas Waterer (“Waterer”), as agent for an undisclosed principal.

Waterer claimed that he and Edward had made no agreement, and that Edward’s shipments of urchin were unexpected and unsolicited. Judge Kallas made two rulings from which Waterer extracts several designations of error. She excluded his proffered evidence of urchin quality; and she found personal liability against him as agent for one of two undisclosed businesses which might have been the purchasers of the urchin harvested by Edward.

Parties

Edward has been a commercial seafood diver since 1982, and has owned his own fishing boat since 1991, (1 RP 5.) He devotes the majority of his fishing work to sea urchin harvest, (1 RP 6). Edward was born in Poland and is a Canadian citizen, (1 RP 4 – 5.)

Waterer has been in the business of processing seafood since 1973 (1 RP 145,) but first processed urchin in 2007, the year of the events at issue here (1 RP 157.) He owns seafood processing companies, (1 RP 171.) They include Waterkist Corporation (“Waterkist”) and Nautilus Marine Enterprises, Inc. (“NME”). 1 RP 171.

Waterkist is an Alaska Corporation, (1 RP 146; 1 RP 173 - 174.) No Alaska company is licensed under the name “Nautilus Foods,” (Exh. 11, p. 5; 1 RP 112 – 113.) Waterkist did not process the urchin, payment for which is at issue, (1 RP 100.) It has a Washington UBI number listed with the Washington Department of Revenue (Exh. 11, p. 3,) which mentions the name, “Nautilus Foods.” But Waterkist is not registered in Washington as a foreign corporation, eligible to legally conduct business within the state, (Exh. 11, p. 4; 1 RP 112.) Waterer’s contention that “Nautilus Foods is a licensed trade name of Waterkist, *Appellant*

Waterer's Opening Brief (herein "*Brief*")" p. 9¹, is not supported by the record. Other than the single reference in Exh. 11, above, nothing in the record supports this oft-repeated statement.

NME is a Washington corporation which processes urchin in Tacoma (1 RP 151 – 152), but it does not use the "Nautilus Foods" trade name, (2 RP 96.) It operated the processing plant in Tacoma where the subject urchin were shipped, (1 RP 215 – 216.)

As Appellant pointed out (*Brief*, p. 11,) urchin can only be sold to licensed buyers, registered and licensed with the Canadian government. The party so registered and licensed is, "*Nautilus Foods, Code C77, P. O. Box 1615, Bellevue, Washington, USA, 98008, Tom Waterer, 425.750.8887.*" (1 RP 132) The Canadian record contains no reference to either Waterkist or NME as that registered and licensed party; it mentions only "Nautilus Foods" and Tom Waterer, (1 RP 132.) The address given, PO Box 1615, Bellevue, WA, leads to both NME, (Exh. 104) and to Waterkist, (Exh. 11.) No witness testified and no exhibit demonstrates, that the "Nautilus Foods" licensed in Canada is either Waterkist or NME. Statements to the contrary in *Brief*, p. 11, are unsupported by the record.

¹ This is but the first of a multitude of statements throughout the *Brief* that "Nautilus Foods" is a trade name of Waterkist. Waterer could have equated Nautilus Foods and Waterkist in his testimony had he chosen to do so, but he did not. The puzzle remained.

When Waterer dealt with parties involved with the 2007 British Columbia urchin market he identified his company as “Nautilus Foods.” See his business card, Exh. 13; 1RP 81; 1 RP 37. Nothing in the record suggests that he mentioned the Waterkist name or the NME name in his contacts with vendors.

Despite his seafood processing history extending back to 1973, Waterer had no experience processing urchin before the 2007 season from which this action arose, (1 RP 157,) nor had he experience with the British Columbia urchin fishery in particular. He gained knowledge of how the B.C. fishery worked by quizzing Edward about it, (1 RP 39)

Plaintiff Alaska Cascade Financial Services, Inc. (“ACFS”) is a Washington corporation, licensed and bonded as a collection agency since 1982. It is the assignee by written assignment of Edward’s account for payment for his 2007 urchin fishing season, (RP 105.) To ACFS Edward identified the party owing him money as “Nautilus Foods,” (Exh. 9; 1 RP 107.) Throughout this Brief of Respondent “Edward” will be used as shorthand for the Plaintiff below, even though the Plaintiff was ACFS.

The Canadian Urchin Fishery – Moving the Product

Ken Gale, owner of the packer boat *Western Commander*, Edward and Jeffrey Alan Kannada (“Kannada”) described how the British

Columbia urchin fishery functions. Several parties participate in harvesting urchin from the ocean floor and moving it to a processor.

Divers work the seafloor from an anchored boat, breathing through a hose supplied by a compressor. Edward's dive boat is typical – a 35' aluminum boat, from which two divers and a deckhand work, (1 RP 11 – 12.) The diver rakes urchin into a bag, occasionally breaking one to check roe quality, then grabs an empty bag and returns to raking. The deckhand winches up the bag and again spot checks for quality. 1 RP 9 – 10.

Divers transfer their harvest to a packer boat once daily (1 RP 19.) A packer boat will accept product from a dive boat only if the packer has been instructed in advance by the buyer/processor to receive urchin from that diver (1 RP 19, 95.) Packer boats transport the product to Port Edward or to Prince Rupert, where it is offloaded and weighed, (1 RP 23.)

As a result of price fluctuations in the processor's uni² market and the processor's need to process stock on hand before it spoils, processors sometimes will instruct divers to temporarily reduce quantity harvested, or stop working for a while, then later instruct divers to resume harvesting, (1 RP 34.)

Thus it is necessary for divers to receive instruction from processors while on the fishing grounds, (1 RP 34.) This is frequently

² "Uni" is the Japanese name for a packet of urchin roe, the post-processing market product. 1 RP 221.

handled by the processors giving the packer boats messages by satellite phone to pass on to the dive boats. The buyers are in daily contact with the packer boats, (1 RP 31 – 32, 82, 2 RP 43 – 44.) Waterer passed instructions to Edward on a daily basis during the 2007 season through packer boats, (1 RP 41.)

All product is offloaded and weighed in the presence of personnel of D & D Pacific Fisheries Limited (“D & D”). D & D is a monitoring agent of Department of Fisheries and Oceans Canada (“DFO,”) an agency of the Canadian government. (1 RP 22 – 23.) D & D personnel inspect the product and record weights, (1 RP133 - 134.) D & D forwards information thus obtained to DFO.

Once the product is examined and weighed under the eyes of D & D personnel it is loaded on refrigeration trucks and transported to the processor, (1RP 23 -24.) Transport from ocean floor to Tacoma processing plant requires 3 – 4 days, (2 RP 44,) and the processor/buyer can discern quality of roe within three or four days of harvest, (2 RP 47).

The divers, packer boat operators and cooperate to move the product. Generally, 2 RP 11-12.

The Canadian Urchin Fishery – Verbal Contracts

In the Canadian urchin fishery the processors pay the divers, packer boats and trucking companies (1 RP 210; 2 RP 32.) In the Canadian urchin

fishery agreements between processors and those parties are all or “mostly”

verbal. Edward testified (1 RP 35,)

A. Over the years, I never sign one written contract with any buyer, and before then when I worked for people, they never signed any contracts. All contracts in British Columbia on seafood are verbal agreements.

Ken Gale testified (1 RP 80 – 81.)

Q. Do you customarily have contracts with buyers for your work as a packer boat?

A. No. Verbal.

.....

Q. And so what is the practice of other packer boats with respect to whether they use verbal or written contracts with processors of sea urchin?

A. Mostly verbal. It's the same, basically the same companies. Everybody works for the same companies for over the last several years.

See also Gale's testimony at (1 RP 88 - 89.)

The Canadian Urchin Fishery – Price

Edward explained typical price arrangements in the industry.

Before a diver leaves home he and the buyer/processor agree on a starting price, (1 RP 36.) That starting price will change during the course of a season and is subject to renegotiation; it is not fixed for the duration of the season.³ Never did Edward testify that divers in general, he in

³ Dennis George, another diver, had never heard of a preseason fixed price (1 RP 182.)

general, or he and Nautilus Foods in particular use fixed price contracts.⁴

To the contrary, he testified, (1 RP 35 – 37,)

A. At the moment when you talk to the buyer, there is a going market price and both sides are fully aware, if they are not fully aware, they are made fully aware, that this is the going rate, and this is how the trip – the boat is sent on the principle of the going market rate.

So the case of December of '07 , it was 60 cents paid on average to the dive boat for the product.

Q. And does that price sometimes change between a given buyer and seller over the course of a single season?

A. Yes, definitely does. It can move up or down. It's always a matter of negotiation and discussion, yes.

Q. Do you always communicate to your buyers, the processors, the minimum you will accept as a price?

A. Yes. Before I leave the home, I have a discussion with the buyer. We both are made aware about the going rate and this is accepted as a standard starting rate. If buyer decides to pay less, he's supposed to contact me and, Edward, I cannot pay you. Will you work for less? I can quit. Or he can call and send me home for the same reason. He can't make money, he sends me home. He offers lower price, I don't accept it, I go home.

Q. And does this happen?

A. Are you referring to this case?

Q. In general. No, not in this case.

Yes. It happens always on every trip. It's a standard. I will be contacted and hear, Edward, we cannot pay you. Are you willing to work for less? I will give

⁴ Waterer uses much ink raising the fixed price contract as a straw man, then disputing it. That has never been Edward's position.

myself an hour, I will talk to other boats, come back to the buyer, yes, I am willing to work. I am here, I spend money on the transportation, fuel, food, flying, crew. Yes I want to make whatever I can, yes.

Q: Or sometimes no?

A: Or sometimes no, of course.

Edward and Waterer agreed that for their sales the starting rate would be \$.60/lb., (1 RP 38.) No witness testified to a different price or a different method of computing the price of the contract between Edward and the buyer.

Kannada testified that in his experience he did not agree to an opening price before harvest, (2 RP 18-19,) but that setting a minimum price would not be unusual (2 RP 39.) Kannada had no personal knowledge of the transaction between Edward and Waterer, (2 RP 30-31.)

Nothing in the record supports the statement in *Brief*, p. 17, that buyers process urchin on consignment.

Contract Formation and Performance

Someone gave Edward the names of Waterer and of "Nautilus Foods," along with a phone number, as a potential purchaser of urchin, (1 RP 37.) Edward phoned Waterer and asked if Nautilus Foods was interested in purchasing urchin. (1 RP 37 – 38.)

The parties testified differently about specifics discussed in the initial conversation. Edward testified that they agreed that if Edward were

to fish for Waterer the initial price would be \$.60/lb. of live urchin, (1 RP 38); that they agreed when Edward would be paid, (1 RP 40;) and that they agreed that Edward would harvest and ship quantities as dictated daily by Waterer, (1 RP 41.)⁵ Waterer disputed that any agreement was reached on any subject, (2 RP 73; 2 RP 62⁶,) while Edward thought they had reached a contract in the initial conversation, (1 RP 62 – 63.) It's undisputed that Waterer and Edward never discussed the identity of the company "Nautilus Foods," (1 RP 40.)

The middle paragraph in *Brief*, p. 12, argues conclusions concerning Edward's knowledge gained from that phone call. That paragraph is argument, not a statement of the case that complies with RAP 10.3 (a). Waterer's implication in this paragraph that "Nautilus Foods" is a corporation (. . . "although he did not know the full corporate name . . .") is not unambiguously established by the record, for the record only contains hints of which business or businesses went by "Nautilus Foods." Further, none of the next *Brief* statement, that "[Edward] knew Mr. Waterer was a corporate officer of a company which was a licensed urchin buyer and processor" is in the record. The stated supporting reference, "CP 191 – 195, 199-200," does not exist.

⁵ Exhibit 8, a collection letter Edward sent to Waterer, accurately states Edward's understanding of the agreement they reached (RP 52 – 53.)

⁶ This was Mr. Weigelt's statement of his client's position, not Waterer's testimony.

Statements in the final paragraph of *Brief*, p. 14 about what the parties understood and of what Edward was “fully aware” are unsupported by the record. Edward’s testimony about “daily price” (1 RP 63) refers to the international market for processed uni, not to the price between diver and buyer. The reference given, 2 RP 15, does not support the statement. Testimony at 2 RP 17 – 19 and 18 – 22 are Mr. Kannada’s description of the market in general; he knew nothing about the transaction at issue, (2 RP 30 – 31.)

The assertion that Edward “was fully aware” Waterer was acting in a corporate capacity, *Brief*, p. 18, misstates the record.

Over the next few weeks Waterer phoned Edward twice more. In those calls Waterer pumped Edward for detailed information about how the Canadian urchin fishery functions (1 RP 38 – 39).

In early November Waterer contacted Edward – their fourth call – and told him unequivocally to go fishing (1 RP 39 - 40).

Over the course of a week following Waterer’s directive to fish, Edward engaged a crew, provisioned his boat, flew to Prince Rupert and travelled to the fishing grounds, (1 RP 40.) Waterer instructed Ken Gale to accept urchin from Edward, (1 RP 78 – 79, 81.) Waterer forwarded daily morning instructions to Edward through a packer boat, (1 RP 41.) Edward and his crew harvested 66,785 lb. of urchin (1 RP 122, 135-36;

Exh. 2, Exh. 5, Exh. 7) on 19 dives in the 27 days between Nov. 13 and Dec. 9, 2007, inclusive, (1 RP 47 – 48; Exh. 2, Exh. 3.) They transferred their daily catches to packer boats. Waterer and Edward spoke at least once mid-season, during which call Waterer directed him to reduce production, (2 RP 110 – 111). On Dec. 10, in response to a message relayed to him through a packer boat, Edward called Waterer and was told to stop fishing, (1 RP 48.)

Edward sent Waterer his invoice, Exh. 7, (2 RP 68 - 69.)

Edward never spoke to Waterer again, (RP 51.) He was not paid (1 RP 49,) for the first time in his approximately 100 trips (1 RP 30 – 31) over 19 years of fishing, (1 RP 5, 42-43.)

The bottom paragraph of *Brief*, p. 19 is troublesome. The record does not support the assertion that urchins harvested by Edward were of poor quality.⁷ Conflicting testimony was admitted about the following “facts.” NME tried to contact Edward (see 1 RP 81 – 82, 48, 2 RP 110 – 111); “all” other sellers had satellite phones (see 1 RP 32 – 33, 82.)

Collection Efforts, Assignment and Suit

Edward attempted, without success, to obtain payment from Waterer. He made at least ten phone calls to Waterer, (1 RP 50.) He phoned and sent faxes to Nautilus Foods, directing communications to the

⁷ It is acknowledged that this was Waterer’s position, but the Court excluded the evidence as irrelevant. See 2 RP 53 – 64.

NME plant in Tacoma.⁸ He was told that Waterer would call him back, but he never did, (1 RP 50 – 51.)

Edward assigned the account to ACFS, identifying the debtor as, “Nautilus Foods,” (Exh. 9; 1 RP 107, 111.)

ACFS’s president, Michael L. Kennedy (“Kennedy”) attempted to identify a Washington corporation that uses the trade name “Nautilus Foods,” (1 RP 106.) He found the information described in the third and fourth paragraphs under Parties, *supra*, pp. 2 - 3. See 1 RP 106 – 113. Based on his failure to identify a seafood processing business licensed as “Nautilus Foods” which could legally conduct business in Washington, ACFS filed suit, naming as defendant Waterer, “dba Waterkist Corp., dba Nautilus Foods,” (1 RP 113).

Waterer was served but did not appear. A default judgment was entered. Waterer moved to vacate the judgment, and on October 31, 2008 signed his Declaration filed Nov. 4, 2008, CP 109 – 115. MAR arbitration was held, in which ACFS received an award for the amount pleaded in its complaint CP 2 – 4. Waterer demanded a trial *de novo*. Edward was awarded judgment for the amount pleaded in its complaint, plus taxable costs and reasonable attorney fees.

⁸ The second letter in Exhibit 8 is addressed to “Nautilus Food” at the address for the NME processing plant in Tacoma. See also Exhibit 9.

A. RESPONSE TO APPELLANT'S ARGUMENTS

Response to "Argument Summary," Brief, 22 - 26

Edward respectfully asks this Court to view Waterer's descriptions of relevant facts and his arguments from those facts with care, in light of unchallenged Finding of Fact No. 10, CP 16.

10. Waterer's memory about key events is poor and his credibility is poor. His testimony about an important factual inquiry . . . was impeached by his prior Declaration under penalty of perjury. . . .

His arguments now are based on Waterer's version of events and ignore contrary evidence adduced by Edward and ACFS. His citations to the record are missing or misleading, and he argues from "facts" which are not in the record. His descriptions of the operative effect of statutes are inaccurate, and he ignores controlling authority cited by the trial court.

The Statute of Frauds, RCW 62A.2-201 (herein "SOF"), does not render the subject contract unenforceable, because Waterer did not plead SOF as an affirmative defense, and because he accepted the urchin.

Judge Kallas found offer and acceptance in the statements and conduct of the parties. See Findings No. 4. and 5., CP 14 – 15. Those findings were supported by substantial evidence. A finding of fact will not be overturned if it is supported by substantial evidence, *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P. 2d 183 (1959).

Substantial evidence exists “if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 675, 860 P.2d 1024 (1993).

The Court properly held Waterer liable for breach of the contract with Edward, because Waterer did not reveal the identity of the company for which he was an agent. Waterer argues (*Brief*, p. 24) that the proper parties were Edward and either NME or Waterkist. While Edward agrees he thought he was contracting with a “company,” the identity of that company was never revealed, and remains an enigma to this day. The Court’s finding that Waterer was agent for an undisclosed principal (Finding No. 8, CP 15) was well supported by the evidence, some of which evidence was summarized in Finding No. 9, CP 15 – 16.

The trial court properly rejected Waterer’s proffered evidence concerning urchin quality as irrelevant. Edward’s testimony provided the only evidence of the terms of the contract at issue: \$.60/lb. until Waterer attempts to renegotiate the price, which he never attempted. Waterer did not plead failure of consideration, setoff, or any other affirmative defenses based on the UCC under CR 8(c), nor did he plead a counterclaim.

Waterer now attempts to refute the Court’s ruling by arguing (*Brief*, pp. 24 – 25) that usage of trade and custom mandate the processor

setting the price paid the diver only after urchin is processed; and that evidence of urchin quality was necessary for that purpose. But Mr. Kannada's testimony about trade and custom conflicted with Edward's, and Edward's testimony supports the Court's ruling. Her ruling was a proper exercise of discretion.

On the same topic, it is pointed out that mandating post-processing setting of the price to divers, as now urged by Waterer, would put divers at the mercy of unscrupulous buyers/processors. The diver is not privy to the movement of the Japanese market for uni, (1 RP 64) or to the buyer's analysis of urchin quality. He is in the Pacific Ocean off the Canadian coast, 1000 miles north of Vancouver. Once the urchin are processed nothing remains but paperwork under the control of the buyer and uni shipped overseas. The diver-buyer pricing system as described by Edward is the only one that makes sense in the real world.

The Court properly placed on Waterer the burden of proof that he properly disclosed the identity of the company for which he acted as agent. The Court specified that it did so as required by *Matsko v. Dally*, 49 Wn.2d 370, 301 P.2d 1074 (1956). See Conclusion of Law 3., CP 19. Curiously, Waterer ignores this authority and makes no attempt to argue that it does not apply to this case.

Judge Kallas did not find that Edward's and Waterer's conversations were "preliminary discussions," nor were they. They agreed on subject matter, price, quantity, and timing. The Court did not disregard usage of trade and custom in the urchin fishery; she resolved conflicting evidence in favor of Edward.

1. The trial court's finding that Waterer and Edward agreed on all essential contract terms in their initial discussion is supported by substantial evidence.

Judge Kallas found that Waterer and Edward reached agreement on all elements of a contract in their initial discussion, (Finding of Fact No. 5, CP 14.) She found Edward's "offer" in that conversation; she found Waterer's acceptance of Edward's offer in his later instruction to "go fishing." Waterer's description of his initial conversation with Edward (*Brief*, p. 29 – 30) contradicts Edward's, described below. Judge Kallas was entitled to reject Waterer's testimony and believe Edward's.

The evidence supports her finding. See generally, 1 RP 37 – 40. Edward testified that they agreed that if Edward were to fish for Waterer the initial price would be \$.60/lb. of live urchin, (1 RP 38); that they agreed when Edward would be paid, (1 RP 40;) and that they agreed that Edward would harvest and ship quantities as dictated by Waterer on a daily basis, (1 RP 41.) That they had agreed on these essential terms in

their first conversation is emphasized by Edward's testimony of the simplicity of Waterer's instruction to him (1 RP 39 – 40),

Q. (By Mr. Flynn) What instruction, if any, did Mr. Waterer give you to start fishing?

A. Beginning of November I received a phone call from him telling me unequivocally, go fishing.

Waterer's and Edward's conduct manifested their contractual intent. Waterer told Edward, "... unequivocally, go fishing." Waterer instructed Ken Gale to accept urchin from Edward, (1 RP 78 – 79, 81.) Waterer forwarded daily morning notifications to Edward through a packer boat, (1 RP 41.) Waterer accepted at least 15 shipments of Edward's urchin, aggregating at least 53,461 pounds, over a period of three weeks, before finally instructing him to stop fishing, (Exh. 2.) This evidence fits comfortably within RCW 62A.2-204, which states,

62A.2-204. Formation in general

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

Waterer misstates the record (*Brief*, p. 31, first paragraph) in stating that he and Edward did not discuss quantity. See 1 RP 41. It's argued, without citation to authority, that it's requisite for formation of a valid contract that the parties agree on "quantity, delivery dates, risk of loss, place of delivery, condition of title." Apparently the parties did agree

on those items, since Waterer accepted Edward's shipments without protest.

Waterer mischaracterizes two of Judge Kallas's rulings at *Brief*, p. 31 (last paragraph.) He argues that she found, Finding 5 (CP 14,) that Waterer and Edward agreed on a fixed price. To the contrary, she actually found that the rate would be determined by market conditions, Finding Nos. 5, 6, (CP 14 - 15,) and that Edward's minimum price was \$.60/lb. He argues further that she found, Finding 7 (CP 15,) that the price, ". . . was not dependant on [urchin] quality, grade or value." That is not a reasonable inference from Finding 7. which states in its entirety,

7. During the 2007 red sea urchin season the price divers were receiving fluctuated between approximately \$.50/lb and \$.70 per pound.

Findings 5 and 6 are supported by substantial evidence. See generally 1 RP 37 – 40. Finding 7 is also supported by substantial evidence. See 1 RP 134-135 and Exh. 5.

2. The Statute of Frauds ("SOF") does not invalidate the parties contract, because (a) Waterer did not plead SOF as an affirmative defense under CR 8(c); (b) Waterer raises the issue for the first time on appeal; and (c) Waterer accepted the goods.

Judge Kallas made no findings concerning SOF because it wasn't part of the case presented to her, and it's now raised for the first time on

appeal⁹. Waterer did not plead SOF as an affirmative defense, as required by CR 8(c). Assuming, *arguendo*, the issue exists, Waterer's acceptance of Edward's urchin created an exception to application of the SOF.

(a) Waterer did not plead SOF as an affirmative defense under CR 8(c)

Waterer's Answer dated September 19, 2008 and filed June 26, 2009 is found at CP 5 – 6. Waterer alleged no affirmative defenses; he did not plead SOF as an affirmative defense.

Using the word "shall," CR 8(c) mandates the pleading of SOF:

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively . . . , failure of consideration, . . . statute of frauds, . . . and any other matter constituting an avoidance or affirmative defense . . .

Waterer did not move to amend his pleadings. "The Statute of Frauds is an affirmative defense and to be raised, it must be pleaded." *Teratron v. Institutional Investors*, 18 Wn.App. 481, 488, 569 P.2d 1198 (1977). The Court also stated, *Teratron, id.*, at 490,

"Neither was the statute of frauds ever pleaded as an affirmative defense as must be done if it is to be available as a defense. CR 8(c); *Wineberg v. Park*, 321 F.2d 214, 218 (9 CCA 1963); 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1278 (1969)."

(b) Waterer cannot raise an issue concerning the SOF for the first time on appeal.

⁹ Since Waterer's counsel mentioned it as an issue after the MAR arbitration it was touched on in trial briefs. However, Waterer made no motions nor did the Court make findings concerning the issue.

Now, on appeal, Waterer raises the SOF issue for the first time. He cannot do so. *Teratron, id.*, at 489, “A lawsuit cannot be tried on one theory and appealed on others. The issues regarding the statute of frauds and meeting of the minds were afterthoughts following the trial court's oral decision rendered in the case on the legal theories pleaded and argued.”

- (c) **Assuming, *arguendo*, an issue of SOF is before this Court, Waterer’s acceptance of Edward’s urchin created an exception to the SOF requirement that the contract be in writing.**

The subject agreement to purchase urchin was entirely verbal; the contract terms were not documented by any writing. This was the usual practice in the British Columbia urchin fishery. Waterer now claims that under the UCC the contract was unenforceable because it was not written. His position is untenable, however, because the statutory scheme provides an exception for goods which a buyer receives and accepts.

The statutory scheme follows. It begins with the basic requirement that contracts for sale of good in excess of \$500 be written.

RCW 62A.2-201 Formal requirements; statute of frauds.

(1) Except as otherwise provided in this section a contract for the sale of goods for the 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. . . .

.....

However, the statutes craft the common sense exception that if a buyer accepts the goods he has to pay for them, even if the contract was verbal only. The same statute continues,

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

.....

(c) with respect to goods . . . which have been received and accepted (RCW 62A.2-606).

RCW 62A.2-606 (1)(b) defines the “acceptance” relevant to the history of these parties’ transaction.

RCW 62A.2-606 What constitutes acceptance of goods

(1) Acceptance of goods occurs when the buyer

.....

(b) fails to make an effective rejection (subsection (1) of RCW 62A.2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; . . .

See also *Red Devil Fireworks v. Siddle*, 32 Wn. App. 521, 524, 648 P.2d 468 (1982), “. . . . Moreover, an oral contract for more than \$500 is

enforceable with respect to goods which have been received and accepted.
RCW 62A.2-201(3) (c).”

The record is clear that Waterer accepted the urchin. He lodged no complaints. He rejected none. Before Waterer directed Edward to stop fishing on December 10, 2007 Edward had shipped a stream of 19 shipments of urchin, harvested over a 27 day period that began November 13. Assuming three or four days from ocean bottom to the NME plant, Waterer allowed Edward to send at least 15 shipments, aggregating at least 53,461 pounds of urchin, over a period of at least 24 days before telling him, without stating reasons, to stop fishing.. See Exh. 2.

3. Waterer is liable for breach of the contract to buy and sell urchin, notwithstanding Edward’s knowledge that he was selling to a “company,” because Waterer was agent for an undisclosed principal.

Waterer used only the names “Nautilus Foods” and his own in his dealings with vendors in the 2007 urchin season, and in obtaining his Canadian buyer’s license. He made no attempt at trial to establish that Waterkist, NME or any other entity was the actual purchaser of the urchin. His position at trial, to the contrary, was that Edward had made no contract (1 RP 199 – 202) and that the urchins Edward harvested were unsolicited (1 RP 216 – 218, CP 109).

It bears repeating (see *supra* p.24,) that Waterer ignores the controlling decision of *Matsko v. Dally*, 49 Wn.2d 370 (1956). His reliance on *Bort v. Parker*, 110 Wn. App. 561, 42 P.3d 980 (2002), is misplaced.

(a) Waterer is liable because he acted as agent for an undisclosed principal.

Waterer did not disclose to Edward the name of the company for which he acted. An agent who fails to disclose the name of the company for which he acts is personally bound by the obligations of the contract. *Matsko v. Dally, supra*, at 374.

NME processed urchin and is a Washington corporation, but it didn't use the name "Nautilus Foods." Waterkist, an Alaska corporation, did not register the trade name "Nautilus Foods" in Alaska. Waterkist apparently used the "Nautilus Foods" name in at least some capacity (Exh. 11, p.3,) but Waterkist couldn't conduct business in Washington and didn't process urchin. The buyer licensed in Canada to buy urchin went by the name Nautilus Foods, but that license lists only Waterer's name, not NME's or Waterkist's. (Please see pp. 24; *supra*, for citations to the record.)

In the context of the corporate muddle described in the preceding paragraph, Waterer dealt with Canadian urchin vendors using only his

disclosed to any vendor the identity of the company for which he acted. Never did he mention "Waterkist" to Edward or to any other vendor; never did he mention NME.

His business card, Exh. 13, calls him "President"¹⁰. His own testimony concerning how he passed out that card, however, implies that his failure to mention any particular corporation to vendors was a deliberate choice. While he had trouble remembering events in a number of contexts throughout his testimony, he remembered this well, (2 RP 102):

Q. (BY MR. FLYNN) So Mr. Waterer, your business card that says Nautilus Foods was passed out in connection with the sea urchin market for NME, correct?

A. Your choice of words is troubling to me. I have testified I passed them out at a PUHA meeting.

Q. And you did it on behalf of NME, correct?

A. I don't know that I gave it on behalf of anybody. I just gave them out. I didn't say, hey, this is X, Y or Z.

Thus the record amply supports the portion of Finding No. 8, (CP 15) that "Waterer failed to disclose . . . the name . . . of the business for which he was acting as agent."

(b) An agent who fails to disclose the name of the company for which he acts is personally bound by the obligations of the contract.

¹⁰ There is no testimony that Edward or any other diver actually saw the card. Waterer testified, (2 RP 101) that he didn't give his card to any divers.

The Supreme Court held in *Matsko v. Dally*, 49 Wn.2d 370, 374, 301 P.2d 1074 (1956), that

Based upon these findings, the rule to be applied is that an agent who acts for an undisclosed principal will be personally bound by the obligations of the contract as principal if the name of the principal is not disclosed.

The Court's description of the findings referred to in the quote above reveal significant similarities to this case. Plaintiff Matsko obtained a personal judgment against Dally and his marital community for nonpayment, under an oral contract by which Matsko installed drywall. It was not made clear to Matsko in the conversation in which they reached agreement, whether the party for whom he would install the drywall was Dally individually or one of his businesses, although he knew Dally had businesses.

The circumstances in *Matsko* would appear to be even less conclusive on the issue of agent liability than those in this case, for unlike the present case the identity of the business for which Dally acted was plain (*Matsko* at 373):

In the case at bar, it is not disputed that at the time the parties entered into the oral contract, appellant was, in fact, acting as agent for the Dally Corporation. The issue is whether these circumstances were sufficiently disclosed to respondent at the time the contract was made to put him on notice of the agency relationship, or whether respondent was entitled to believe appellant was acting solely for himself.

The rule stated at 2A CJS, Agency, Sec. 362, "Sufficiency of Disclosure," is in accord with the rule stated in *Matsko, supra*:

To avoid personal liability on a contract entered into on behalf of another, an agent must disclose, to the party with whom the agent deals, both the fact that he or she is acting in a representative capacity, and the identity of the principal for whom he or she acts.

.....

In other words, if at the time of contracting, the other party has notice that the agent is acting for a principal, but has no notice of the principal's corporate or other business organization identity, the agent will be considered a party to the contract. . . .

Thus Judge Kallas properly placed personal liability on Waterer for the buyer's failure to pay, even though Edward knew he was selling to a "company," because Waterer did not disclose the buyer's identity to Edward,

Bort v. Parker, 110 Wn. App. 561 (2002), relied upon by Waterer in this section of his *Brief*, is distinguishable from our case and from *Matsko*. *Bort* was not an appeal from a trial verdict placing personal liability on an agent for an undisclosed principal. Rather, *Bort* was an appeal from a summary judgment motion in which agent liability was not an issue, and this Court returned the case to trial because material issues of fact precluded summary judgment. *Bort* was not a case such as ours or *Matsko*, in which a party sought damages from a smorgasbord of

potentially responsible payors. Rather it was a case where the party seeking payment incorrectly identified his own business entity as Plaintiff. His mistake raised the basic issue before this Court, which was whether the named Plaintiff could properly bring suit in light of the prohibition in RCW 18.27.080, against unregistered contractors commencing action for payment for construction work.

Waterer asks this Court (*Brief*, pp. 35 – 36) to analyze the evidence of formation of this contract from the perspective of the parties' mutual intent and the context of the contract's formation. The record contains substantial evidence from which contractual intent consistent with the Court's decision can be extracted. Please review the second paragraph under "Contract Formation and Performance," *supra*, p.9 – 10. The parties discussed price, quantity and payment, with sufficient specificity that Edward thought they had reached a contract. Apparently Waterer's intent also was contractual, for in their fourth call he told Edward, "unequivocally to go fishing." 1 RP 39 – 40. See RCW 62A.2-204, *supra*, p. 18.

Waterer argues, *Brief*, pp. 37 – 38, that he, personally, was not a licensed buyer, so he could not have intended to sell to Waterer. His argument ignores the issues tried and decided below. It attempts to distract this Court from the applicable principles. Waterer's personal

liability for the sale is founded not on a theory that he was the buyer, but rather that he was the undisclosed agent for the buyer. But no party other than Waterer and the elusive “Nautilus Foods” is registered as a buyer with the Canadian government. 1 RP 132.

4. Judge Kallas applied settled law in placing on Waterer the burden of proving that he disclosed to Edward the identity and corporate status of “Nautilus Foods”.

Waterer argues, “The trial court erred by wrongfully shifting the burden of proof to the Appellant with respect to establishing the identify [sic] of the parties to the contract.” (*Brief*, pp. 39 – 40.) This paraphrases the argument Dally made in *Matsko, supra.*, (49 Wn.2d at 373), rejected by the Supreme Court:

Appellant's [Dally's] first argument discusses assignments of error Nos. 1, 2, 6, and 9 together, under a heading which reads as follows:

"The plaintiff, Steve A. Matsko, has failed to sustain the burden of proving that his contract was made with Fred Dally, the president of Dally Construction & Engineering Co., Inc., in Mr. Dally's individual capacity, rather than with the corporation." [Italics in original.]

The Court's ruling on the issue thus posed is authority for Judge Kallas's decision (49 Wn.2d at 373):

The italicized portion of appellant's statement concerning the burden of proof is erroneous. It is true that he who seeks recovery on a contract has the burden of proving that the defendant was a party to that contract, but once this initial determination has been established, the

burden shifts to the defendant, who, in order to escape liability, must show his promise was made solely in the capacity of agent for a disclosed principal. . . . [Internal Citations omitted.]

Waterer's reliance on *Seattle Association of Credit Men v. Green*, 45 Wn.2d 139, 273 P.2d 513 (1954), is misplaced. It is not a decision that involved agents for undisclosed principals. The corporation in *Seattle Association* had properly registered trade names. The corporation was insolvent, and it executed a "common law assignment to Plaintiff for the benefit of creditors." It paid a creditor while it was insolvent, using a registered trade name, which resulted in that creditor receiving a greater share of assets than other creditors of the same class. Plaintiff sued the payee for recovery of a preferential transfer. 45 Wn.2d at 141. The Defendant payee argued that use of the trade name obscured the identity of the corporation, and that since they were without that notice they should not have to return the funds. 45 Wn.2d 141-42. In that context, where the corporation's trade name was a public record, the Court said, 45 Wn.2d at 143,

Being unable to rely upon any deceptive statements made, or acts done, by anyone on behalf of the corporation to obtain credit from them, defendants cannot well say that they were misled by the words chosen for its assumed name. Had they been in doubt regarding the identity or legal status of the party with whom they were dealing at the critical time, when credit was extended, they could and should have made further inquiry.

That holding does not overrule the controlling principal relevant here, assigning burden of proof in cases dealing with the liability of agents for undisclosed principals, as set forth by the Court in *Matsko v. Dally, supra*, 49 Wn.2d at 373.

5. Judge Kallas correctly rejected evidence of urchin quality.

The proffer, challenge and decision are found at 2 RP 53 – 64. Edward objected properly that relevance of evidence of allegedly poor quality urchin was limited to issues which should have been pleaded as affirmative defenses under CR 8 (c). Although the trial court incorrectly rejected the CR 8(c) argument, she properly excluded the evidence as irrelevant to the issues as pleaded by the parties.

- (a) The evidence was inadmissible because Waterer waived the issues for which it was offered by failing to plead affirmative defenses under CR 8 (c).**

Waterer offered evidence which he contended would show that the recovery rate of Edward's urchin was lower than that of other divers. 2 RP 53. He wanted to show that the value of Edward's urchin, when predicated on the quality, recovery rate and resale price was less than \$.60/lb. 2 RP 57 – 58; 2 RP 60. Notably, although Waterer now argues that the urchin were "nonconforming goods" as defined by the UCC, he did not make that argument to Judge Kallas.

It was incumbent on Edward to prove that he delivered urchin under the contract. RCW 62.A.2-301. But after he did so defenses for nonpayment based on Edward's alleged poor performance should have been pleaded as affirmative defenses under CR 8 (c).

Allis-Chalmers Corp. v. Sygitowicz, 18 Wn.App. 658, 571 P.2d 224 (1977), is instructive. Sygitowicz bought a tractor, then returned it and stopped paying, claiming that it leaked oil. The Seller's assignee, a finance company, sued for a deficiency balance but, after the Court allowed the jury to hear testimony of revoked acceptance (RCW 62A.2-608) it lost at trial. The Court of Appeals reversed because the buyer had failed to plead revocation of acceptance as an affirmative defense. It held, 18 Wn.App. 658 at 660 - 661,

CR 8(c) enumerates several defenses which must be specifically pleaded and includes "any other matter constituting an avoidance or affirmative defense." **The complaint clearly seeks recovery of the contract price from Sygitowicz. Revocation of acceptance is therefore an affirmative defense** which must be set forth in the pleadings. . . . Allis-Chalmers' objections to the introduction of evidence on the question of revocation of acceptance, therefore, should have been sustained as a matter of law. . . **The defense of revocation of acceptance was therefore waived**, and should not have been considered at trial. [Emphasis added.]

Defendant's Answer, CP 5 – 6, simply denied that the contract existed. Waterer maintained that position throughout trial and did not move to amend his Answer. He did not plead "failure of consideration" or

“setoff” as an affirmative defense, or “any other matter constituting an avoidance or affirmative defense,” necessary under CR 8(c) if he wished to challenge the sufficiency of Edward’s performance.

(b) Judge Kallas properly ruled that the evidence was irrelevant to the issues.

Judge Kallas ruled that the proffered evidence was not relevant to the issues. Evidentiary rulings concerning relevancy of evidence are reviewed under an abuse of discretion standard. *Miller v. Peterson*, 42 Wn.App. 822, 714 P.2d 695 (1986).

The court correctly recognized that only relevant evidence is admissible. ER 402. “Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401.

The Complaint, CP 2 -4, and the Answer, CP 5-6 established the issues for trial. It is accurate to summarize the issues in the pleadings relevant to the exclusion of evidence as, “Edward said there was a contract with Waterer and Waterer breached it, and Waterer denied a contract existed.” No party moved to amend the basic pleadings. Waterer did not plead in any fashion that Edward breached the contract.

Evidence that urchin harvested by Edward were “nonconforming” or of poor quality would not have tended to prove or disprove the existence of the contract and therefore is irrelevant to prove that issue.

To prove damages Edward testified to the terms of the contract and nonpayment, while Waterer offered testimony by Mr. Kannada, who knew nothing about this particular contract, of an industry custom that some contracts used a different price determining mechanism.

What was the “price” term of the contract? The only evidence of the agreed price was Edward’s testimony. Edward testified that the agreed price was \$.60/lb. pending renegotiation, which never occurred. This was substantial evidence, supporting Judge Kallas’s finding that such was the contract price term, Findings No. 15 and 16, CP 18. Evidence that urchin harvested by Edward were “nonconforming” or of poor quality would not have tended to prove or disprove this price term.

Waterer wanted to admit evidence of Edward’s performance to establish a “reasonable price” if the court should adopt Mr. Kannada’s version of an “open price” term instead of what the parties actually agreed. He argues that evidence of urchin quality would be relevant to price if the Court were to find that the contract included an “open price,” to be set only after the urchin was processed. He argues that Mr. Kannada’s

testimony that such was the industry custom requires inclusion of that custom as a contract term.

The flaw in this argument, however, is that Edward too testified about industry pricing standards, 1 RP 35 - 37, and that those standards were consistent with the price agreed to by these parties in the contract at issue. Edward's testimony constitutes substantial evidence, supporting the Court's ruling that the contract price term was \$.60/lb.

The trial court got it exactly right when she refused to adopt Waterer's argument. She said, RP 62 – 63, that she had to determine the contract price term “based on the evidence presented, and right now there's no evidence that it was an open price contract.” The contract price term would have become an issue had Waterer, the only other witness to the making of their oral contract, testified that they had agreed on an open price term. Then the existence of an open price term would not have been purely speculative, and the proffered evidence of urchin quality would have tended to prove or disprove a relevant fact – the value of the urchin, hence the price to be paid Edward -- and it would have been admissible. But Waterer continued to insist that he and Edward had agreed on nothing; that insistence left the court with only one credible (Finding 11, CP 16 – 17) version of contract terms.

Waterer can't seem to decide between colorful hats, in deciding to argue which corporation was the principal for which he acted. He assumes in argument (*Brief*, p. 46, last two lines) that NME was the buyer; he argues at *Brief*, p. 25, that Waterkist was the buyer. Neither proposition is supported by the record. Waterer stated in his Declaration, CP 110, that, "The proper party, if any, is [NME], UBI number 602501199." But the only reference in the record to "Nautilus Foods" is Exh. 11, p. 3, containing UBI # 601670655.

Waterer argues (*Brief* p. 46) that RCW 62A.2-301 requires the Seller "to transfer and deliver conforming goods." Actually, that isn't what the statute says at all. It says,

62A.2-301. General obligations of parties

The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract.

No mention is made of "conforming goods." Edward met his obligation to transfer. Waterer did not meet his obligation to pay.

Waterer accurately states (*Brief*, p. 46) that RCW 62A2-503 (1) mentions "conforming goods," and that the UCC allows a buyer to reject or to revoke acceptance of nonconforming goods. The facts here, however, unambiguously demonstrate acceptance of the urchin. Further, Waterer did not argue "nonconforming goods" at trial; he raises the issue

on appeal for the first time. Had he wished to argue it at trial he would have been required to plead it as an affirmative. Cr 8 (c).

Waterer states, *Brief*, p. 46 – 47, that NME’s practice is to determine price only after processing. No one testified to such at trial, and this assertion is not supported by the record.

Waterer argues, *Brief*, p. 47, that a Plaintiff seller must prove in its case in chief that delivered goods conform to the contract. He cites no case supporting this contention, nor is it in the UCC. That position is exactly contrary to the holding in *Allis-Chalmers Corp. v. Sygitowicz*, *supra*. Waterer states, “open or provisional price provisions are always used.” That is clearly contrary to the record. Edward testified to a contrary industry price scheme.

B. EDWARD SHOULD BE AWARDED ATTORNEY FEES ON APPEAL.

This case went to Judge Kallas as a trial *de novo* following MAR arbitration. Waterer failed to improve his position at the *de novo* trial, and Judge Kallas consequently awarded Edward reasonable attorney fees incurred in prosecuting the trial *de novo*, under MAR 7.3. See unchallenged Finding No. 17, CP 18.

If this Court affirms the trial verdict, then Edward should be awarded his attorney fees for this appeal. *Tribble v. Allstate Prop. & Cas. Ins. Co.*, 134 Wn. App. 163, 174, 139 P.3d 373 (2006).

C. CONCLUSION

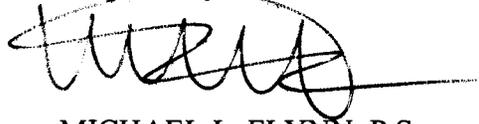
Judge Kallas held a trial that was absolutely fair in all respects. Her evidentiary rulings were proper exercises of judicial discretion. She listened attentively to witnesses and understood the evidence. She properly applied the law governing the personal responsibility for breaches of contract of an agent for undisclosed principals.

She decided, as had the MAR arbitrator before her, that Edward was entitled under the sales contract to be paid \$40,071 for 66,785 lb. of urchin, at a rate of \$.60/lb, less credit for an earlier garnishment, and she properly awarded Edward reasonable attorney fees. She explicitly decided that Waterer's testimony couldn't be believed, but that Edward's could.

Waterer made the tactical decision to challenge only the making of the contract and not to plead issues concerning quality of urchin. Unanticipated evidentiary problems engendered by that decision were solely the result of his choice.

Edward should be awarded attorney fees on appeal.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M. Flynn', with a long horizontal line extending to the right.

MICHAEL L. FLYNN, P.S.
Attorney for Respondent
WSB #9054

APPENDIX

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

ALASKA CASCADE FINANCIAL)
SERVICES, INC.,)

NO. 08-2-23335-9 SEA

Plaintiff,)

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

vs.)

THOMAS WATERER, *et ux.* dba)
WATERKIST CORP., dba Nautilus)
Foods,)

Defendants)
_____)

This matter having come before the court for a nonjury trial, the Court having heard testimony, examined evidence and heard argument, the Court now deems itself fully advised and makes and enters the following

FINDINGS OF FACT:

1. This is an action for money owed on a verbal contract ("The Contract") between Edward Izykowski and defendants Waterer. Defendants Thomas Waterer and Dawn Waterer ("Waterer") are husband and wife. They reside in King County, Washington. They were duly served by personal service of summons and complaint in King County, Washington. Defendant Nautilus Marine Enterprises, Inc. was added as a party defendant by stipulation of the parties.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

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2. Plaintiff is a licensed, bonded collection agency and a Washington corporation. Plaintiff is the assignee by written assignment of the account between Edward Izykowski and Waterer for money owed on The Contract.

3. Izykowski is a commercial diver, a Canadian citizen and a resident of British Columbia, Canada. Waterer owns businesses which process and resell seafood.

4. The Contract was made in the course of four phone conversations between them which took place during October and November, 2007. The series of conversations was initiated by Izykowski. Izykowski had been given Waterer's phone number and been told that Waterer was looking for divers who could supply his business, "Nautilus Foods," with red sea urchins for the season which was to commence in November, 2007.

5. Izykowski and Waterer agreed that Waterer would pay Izykowski by the pound (live weight) of harvested urchins, at a rate which would be determined by market conditions. The quantity would also be determined by market conditions. The parties agreed that Izykowski would harvest urchins for Waterer until either Waterer told him to stop or until the price Waterer would pay fell below the price Izykowski would accept. They agreed that the minimum price was \$.60/lb. They agreed that Waterer would pay Izykowski every two weeks, but that if harvesting were to continue for a relatively short time, payment would be due not later than two weeks after the final delivery.

In their initial phone conversation Izykowski "offered" to harvest urchins for Waterer according to the terms described in the preceding paragraph hereof. Waterer "accepted" that offer when, in a very brief fourth conversation, he contacted Izykowski and told him to start harvesting urchins for him.

1 6. Incorporating market conditions as the determinant of price and quantity, as opposed
2 to agreeing in advance to price and quantity, was and is customary in the British Columbia red
3 sea urchin fishery. The processor's market for processed roe is in Japan. The price in Japan can
4 fluctuate daily. The price the purchaser can obtain in Japan for processed roe determines the
5 price the purchaser will pay divers for live urchins, and that price too fluctuates. If the price in
6 Japan falls below a point at which the processor can make a satisfactory profit, then the
7 processor stops purchasing urchins from divers; if the price a processor will pay falls below a
8 level at which the diver can make a reasonable profit, then the diver will stop selling. It is also
9 customary in that trade that contracts between divers and processors are oral.

10 7. During the 2007 red sea urchin season the price divers were receiving fluctuated
11 between approximately \$.50/lb and \$.70 per pound.

12 8. Waterer, personally, is the party to whom Izykowski contracted to sell urchins because
13 Waterer contracted with Izykowski as agent for an undisclosed principal. All Izykowski knew
14 when he initially contacted Waterer was that Waterer had some connection with a company
15 called "Nautilus Foods." Waterer failed to establish by a preponderance of the evidence that he
16 disclosed to Izykowski the name or the corporate status of the business for which he was acting
17 as agent.
18

19 9. If Waterer disclosed to Izykowski information about the business he represented, then
20 he disclosed to Izykowski simply that the business was "Nautilus Foods." This is underscored
21 by the fact that when Izykowski assigned the obligation to Alaska Cascade, he provided the
22 name "Nautilus Foods." At that stage, Izykowski was plainly motivated to accurately and
23 correctly name his debtor.
24
25

1 Waterer has been a principal owner of and he operated "Waterkist Foods, Inc." at all
2 relevant times. Waterkist is an Alaska corporation which was not registered to do business in the
3 state of Washington. Waterkist owned the trade name "Nautilus Foods". The lease or rental
4 agreement on the Tacoma processing facility to which Waterer shipped urchins was held by
5 Waterkist. Waterer arranged with packer boats to receive urchins harvested by Izykowski and
6 with trucking companies to ship urchins harvested by Izykowski; Ken Gale, owner of the packer
7 boat *Western Commander* testified that Waterer told him "Nautilus Foods" would buy urchins
8 harvested by Izykowski. Freshly harvested urchins were inspected and weighed by personnel of
9 D & D Pacific Fisheries, Ltd., a Canadian corporation, as agent of the Canadian Dept. of
10 Fisheries; records of D & D identified "Nautilus Foods" as the buyer of urchins harvested by
11 Izykowski. "Nautilus Foods" was listed with the Canadian Dept. of Fisheries and Oceans as a
12 seafood processor for the 2007-08 season. When promoting his urchin processing business to
13 persons involved in the Canadian urchin harvesting industry, Waterer passed out business cards
14 identifying his business as "Nautilus Foods."

16 10. Waterer's memory about key events is poor and his credibility is poor. His
17 testimony about part of an important factual inquiry – the initial conversation with Izykowski in
18 which Waterer claims to have disclosed the identity of the principal company for which he acted
19 as agent – was impeached by his prior Declaration under penalty of perjury. His testimony that
20 Nautilus Marine Enterprises, Inc. was lessee of the premises where urchin processing took place
21 was impeached by Waterkist's check for rent and the corresponding statement of Waterkist's
22 bank account.

24 11. Izykowski's version of events is more credible than Waterer's because his version is
25 both supported by and consistent with the facts of the case. For example, Ken Gale testified he

1 would not have accepted urchin from Izykowski had Gale not been informed to do so by
2 Waterer. In addition, given that it takes only 3-4 days for a catch to be transported from the
3 fishing grounds to the processor, Waterer could have rejected additional deliveries much earlier
4 than December 10. His failure to do so contradicts his testimony that Izykowski made
5 unsolicited/unexpected deliveries. Lastly, the testimony establishes that oral contracts are the
6 norm in the industry. Thus, the absence of written documents confirming the contract does not
7 cast doubt on the existence of the oral contract.

8 12. In reliance on Waterer's promise to purchase urchins from him, Izykowski retained a
9 crew, provisioned and fueled his boat, the *Harvest Isle*, traveled to the fishing grounds in the
10 general vicinity of Prince Rupert, B.C. and proceeded to harvest urchins. Izykowski harvested
11 66,785 pounds of live red sea urchins on 19 days of diving between Nov. 13, 2007 and Dec. 9,
12 2007, inclusive. He transferred those urchins to packer boats which Waterer had notified in
13 advance to receive urchins from Izykowski. Those urchins were transported to a processing
14 plant in Tacoma, Washington, where they were processed. Transport required 3 - 4 days, from
15 harvesting to processing plant.
16

17 13. Waterer could have instructed Izykowski to cease harvesting at any time but he did
18 not do so until December 10, 2007. Izykowski did not have a satellite phone but the packer boats
19 hired by Waterer to receive Izykowski's catch all had satellite phones. They and Waterer were
20 in regular, almost daily contact throughout the season; the packer boats and Izykowski's boat
21 moored together at night. It was customary for processors to instruct dive boats by messages
22 passed through packer boats. In light of these circumstances, Waterer's contention that
23 Izykowski made unsolicited/unexpected deliveries lacks credibility.
24
25

14. Waterer did not pay Izykowski for the urchins. Izykowski attempted to contact Waterer to encourage payment. Waterer did not answer calls Izykowski made to him or return numerous phone messages Izykowski left him. Waterer did not acknowledge or respond in any way to demand letters Izykowski mailed and faxed to him.

15. Izykowski invoiced Waterer for \$40,071.00, pricing the urchins at \$.60/lb. Although the parties had agreed that Waterer would set a price he failed to do so, and as a result of his failure to do so Izykowski then set the price at \$.60/lb.

16. \$.60/lb was a reasonable price, and the Court finds that it was the contract price. It was the price Waterer and Izykowski agreed would be the minimal price Izykowski would accept. It was midway between the \$.50 and \$.70/lb prices that prevailed in that season, as testified to by Daren Macey of D & D. By the terms of their contract, Izykowski was entitled to be paid \$40,071.00, the product of \$.60/lb. and 66,785 lbs. of urchins harvested and shipped to Waterer. Waterer is entitled to credit of \$2,812.01 against the total owed, for money that was garnished from his account before the initial default judgment was vacated, net of garnishment costs and clerk's fee.

17. Plaintiff is the prevailing party. Defendant has not improved its position in this trial *de novo* from the earlier MAR arbitration award, and Plaintiff is entitled to reasonable attorney fees incurred after Defendant's application for trial *de novo*.

18. Plaintiff's counsel's hourly rate of \$200 is a reasonable rate, given counsel's 30 years experience, the typically higher rates charged by collection attorneys in the Seattle area with similar experience, and the difficulty inherent in proving the terms of, breach of, and damages for a wholly verbal contract. Plaintiff's counsel's billings for 81 hours is a reasonable amount of professional time for preparation for and conduct of this bench trial.

Having made its Findings of Fact, the Court now makes and enters the following

CONCLUSIONS OF LAW:

1. The Court has jurisdiction over the parties and the subject matter.
2. Plaintiff has carried its burden of proving, by a preponderance of the evidence, the following legal conclusions and facts upon which the conclusions rest.
3. Thomas Waterer and Dawn Waterer, Husband and Wife and their marital community are personally liable for breach of The Contract described in the above Findings. *See, e.g., Matsko v. Dally*, 49 Wn.2d 370 (1956).
4. Plaintiff is Izykowski's assignee.
5. The court adopts plaintiff's legal analysis regarding the Statute of Frauds challenges raised by defendants. In particular, the court determines that Waterer received and accepted urchins from Izykowski for purposes of the UCC.
6. Plaintiff is entitled to judgment against Thomas Waterer and Dawn Waterer, Husband and Wife and their marital community for breach of contract in the amount of \$37,258.99.
7. Plaintiff is entitled to judgment against Thomas Waterer and Dawn Waterer, Husband and Wife and their marital community for costs.
8. Plaintiff is entitled to judgment against Thomas Waterer and Dawn Waterer, Husband and Wife and their marital community for reasonable attorney fees in the amount of

\$ 16,200⁰⁰

(PKK) DONE IN OPEN COURT this 12 day of May, 2010.

Paris K. Kalas
PARIS KALIAS
Judge

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

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