

No. 64813-6

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

HQ SUSTAINABLE MARITIME MARKETING, INC. and
HQ SUSTAINABLE MARITIME INDUSTRIES, INC.

Plaintiffs/Appellants,

v.

PACIFIC SUPREME SEAFOODS, LLC and ELITE SEAFOOD, LTD.,

Defendants/Respondents.

REPLY BRIEF OF APPELLANTS

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I. ARGUMENT

A. HQ Marketing Is Not Arguing the Contract Was Illusory.

According to Pacific Supreme, HQ Marketing “is asking this Court to rule that the trial court should have interpreted the employment agreement in a way that would render it illusory.” Pacific Supreme is incorrect. HQ Marketing is arguing that Mr. Ringstad never delivered any goodwill. The genuine issue of fact that exists between the parties is whether Mr. Ringstad ever performed under Annex A by capitalizing on his alleged reputation and client base to benefit HQ Marketing.

It is Pacific Supreme’s interpretation of Annex A, adopted by the trial court, that makes the contract illusory. According to Pacific Supreme, HQ Marketing had to pay Mr. Ringstad regardless of whether Mr. Ringstad gave the company any goodwill. Under that interpretation, the contract is illusory because mere act of signing and the passage of 90 days obliged HQ Marketing to perform, while nothing obliged Mr. Ringstad to perform.

B. Whether Mr. Ringstad Performed Is a Genuine Issue of Material Fact.

Pacific Supreme completely ignores one of the mandatory elements of its claim. It has the burden to proof to show that Mr.

Ringstad performed under Annex A by (a) having goodwill to sell and (b) using his goodwill to HQ Marketing's benefit. *Hermandad Y Asociados, Inc. v. Movimiento Misionero Mundial, Inc.*, 880 N.Y.S.2d 873, 873 (2009). The fact that HQ Marketing never paid Mr. Ringstad under Annex A is undisputed. But whether Mr. Ringstad delivered any goodwill to HQ Marketing is a genuine issue of material fact.

Pacific Supreme tries to avoid this required element by arguing HQ Marketing purchased "a mere chance that a preference which has usually been extended will continue." Respondent's Brief at 17. This limited definition of goodwill ignores the particular circumstances of this case and New York law.

1. HQ Marketing Did Not Assume the Risk That Mr. Ringstad Misrepresented the Size and Scope of His Goodwill or Would Never Deliver His Goodwill.

New York law is explicit. To be enforceable, a contract's disclaimer clause must "*in the plainest language*" announce and stipulate that the party "is not relying on any representations *as to the very matter as to which it now claims it was defrauded.*" *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 320 (1959) (italics supplied). The disclaimer clause is not even part of Annex A, and it certainly does not mention goodwill. In addition, Mr. Ringstad testified he "maintained both the confidentiality" of

his “pricing to customers” and his “customer account histories” until he arrived at HQ Marketing. CP 21. The basis for Mr. Ringstad’s purported goodwill was information uniquely available to him.

Assuming Mr. Ringstad had goodwill to deliver to HQ Marketing, the company did not assume the risk he would never perform. The disclaimer clause is limited to information the parties relied on “*in entering into*” the Employment Agreement. Nowhere does it state that one party is assuming the risk of the other parties’ breach.

2. HQ Marketing Purchased Mr. Ringstad’s Guarantee that He Would Attempt to Capitalize on His Client Base, Not a Mere Chance of Future Preference.

Annex A expressly states HQ Marketing purchased the goodwill that had attached to Mr. Ringstad “**himself personally**[.]” CP 94. Unlike the goodwill in *Johnson v. Friedhoff*, 27 NY.S. 982, the 1894 case relied upon by Pacific Supreme, the goodwill purchased by HQ Marketing was attached to a person, not a storefront. It was not tied to the location of the business, a business license, or even the Pacific Supreme name because that business ceased operating when Mr. Ringstad joined HQ Marketing. Like the goodwill in *P.A. Bldg. Co. v. Elwyn D. Lieberman, Inc.*, 227 A.D.2d 277, 642 N.Y.S.2d 300 (1996), where the “Alling & Cory Company, in purchasing the assets of the Corporation, acquired what was

essentially a one-man operation in which defendant Elwyn D. Lieberman accounted for the vast majority of the Corporation's business," the goodwill in this case was tied to Mr. Ringstad himself. He accounted for the vast majority of Pacific Supreme's sales, and Pacific Supreme liquidated its inventory and discontinued business. CP 21-22. The goodwill's critical component was the customer relationships that formed the basis of Mr. Ringstad's supposed "sales network which spans the United States and extends throughout the world." CP 94. Mr. Ringstad knew that was what he was supposed to deliver to HQ Marketing: "HQ never paid me any compensation whatsoever for the **reputation and client base** I had amassed at Pacific Supreme." CP 22.

3. Pacific Supreme Must Show Mr. Ringstad Used (or at Least Attempted to Use) His Reputation and Client Base for HQ Marketing's Benefit.

HQ Marketing did not pay Mr. Ringstad for his reputation and client base because he never delivered them. Pacific Supreme argues Mr. Ringstad's lack of sales to his former customers is not evidence of his failure to deliver goodwill, but Pacific Supreme offers no other evidence that Mr. Ringstad ever used his reputation or client base to benefit HQ Marketing. In the very least, Pacific Supreme must put forth evidence that Mr. Ringstad attempted to capitalize on his former client base and customer relationships, such as emails announcing his new position, logs

of calls or visits to former customers, and quote sheets to former Pacific Supreme customers.

Pacific Supreme attempts to avoid the lack of evidence showing Mr. Ringstad used his customer relationships to HQ Marketing's benefit by arguing he worked for HQ Marketing for three years, gave HQ Marketing his customer list, liquidated Pacific Supreme's inventory, and devoted all of his working hours to HQ Marketing. First, except for delivery of the customer list, none of these activities show Mr. Ringstad used his reputation and client base to attempt to generate sales for HQ Marketing. Second, these activities were required under Mr. Ringstad's separate employment agreement:

The Company offers to employ the Executive, and the Executive agrees to be employed by the Company, in accordance with the terms and subject to the conditions of this Agreement, commencing on the Effective Date and terminating on the **third anniversary** of the Effect Date[.]

The Executive agrees to devote substantially all of his working time, skill, energy and best business efforts during the term of his employment with the Company, and the Executive shall not engage in activities outside the scope of his employment with the Company is such activities would detract form or interfere with his ability to fulfill his responsibilities and duties under this Agreement or require substantial amounts of his time or of his services.

The Executive covenants and agrees that for so long as he is employed by the Company, he shall inform the Company of each and every business opportunity related to the business of the Company of which he becomes aware, and that he will not, directly or indirectly, exploit any such opportunity for his own account, nor will he render any services to any other person or business, acquire any interest of any type in any other business or engage in any activities that conflict with the Company's best interest or which is in competition with the Company.

The Executive hereby agrees and covenants that he shall not, directly or indirectly, ... (i) Engage, own, manage, operate, control, be employed by, consult for, participate in, or be connected in any manner with the ownership, management, operation or control of any business in competition with the "Business of the Company."

CP 81, 82, 89, 90. As these activities were required by the Employment Agreement, the agreement to purchase goodwill must have required Mr. Ringstad to perform in a different way or deliver something else.

Giving HQ Marketing his customer list and history is not sufficient to show Mr. Ringstad performed under Annex A. New York law is clear that good will is more than a customer list. *Robert's Service Station, Inc. v. Narula*, 601 N.Y.S.2d 960, 961 (1993). If the parties intended to merely

buy/sell customer information, they would have used those words in the agreement, not the term goodwill. To show Mr. Ringstad delivered goodwill, Pacific Supreme must show he either generated new sales from the former customers, or at least made meaningful efforts to generate sales from them.

4. HQ Marketing Disputes Mr. Ringstad Was Responsible for the QFC Sale—Another Genuine Issue of Material Fact.

Next Pacific Supreme attempts to claim Mr. Ringstad was responsible for the May 2007 sales of “TiLoveYa” to the QFC chain of Kroger. Although the SEC filing cited by Pacific Supreme shows HQ Marketing was selling fish through QFC, it does not attribute the sale to Mr. Ringstad. Nor did Mr. Ringstad testify in his declaration—the obvious place for this information—that he sold fish on behalf of HQ Marketing to QFC. The record is silent on who generated the sale to QFC, and HQ Marketing disputes Pacific Supreme’s suggestion that Mr. Ringstad is entitled to credit.

5. Pacific Supreme Concedes the Reasons for Mr. Ringstad’s Poor Performance Is a Genuine Issue of Material Fact.

Pacific Supreme then argues Mr. Ringstad did not sell much tilapia because HQ Marketing set its prices too high. Again, this argument does not address Pacific Supreme’s burden to show Mr. Ringstad attempted to

sell tilapia to his former customers. For this argument to be relevant, Pacific Supreme needs to produce evidence that Mr. Ringstad attempted to sell tilapia to his former customers, and they refused because the price was too high. This argument goes to the heart of the genuine issue of material fact that exists between HQ Marketing and Mr. Ringstad. HQ Marketing claims Mr. Ringstad did not sell much fish because he never delivered any goodwill. Pacific Supreme claims Mr. Ringstad did not sell fish because the price was too high. At trial, one side will prevail.

6. The Prospectus and 10-K Forms Are Not Evidence of Performance by Mr. Ringstad or Breach by HQ Marketing

Pacific Supreme points to the 2007 public stock offering by HQ Marketing's parent company, HQ Sustainable Industries, as evidence that Mr. Ringstad performed. Describing Mr. Ringstad's experience in a stock offering is unrelated to whether he ever attempted to capitalize relationships with former customers to benefit HQ Marketing.

Likewise, the two 10-K forms of HQ Sustainable Industries, stating Mr. Ringstad had been "paid," do not support Pacific Supreme's claim for breach. The forms, which presented the consolidated financials of HQ Industries and all of its subsidiaries, recited the terms of Annex A and concluded Mr. Ringstad had been paid. CP 319. Their preparer apparently never confirmed with HQ Marketing that payment had been

made. Although HQ Sustainable Industries could have been more diligent in preparing its forms, the accuracy of the parent company's 10-K forms is not conclusive of whether Mr. Ringstad delivered goodwill to the subsidiary.

Finally, Pacific Supreme misstated the record when it claimed HQ Marketing amortized a \$550,000 payment for goodwill. CP 116-17. HQ Marketing amortized the alleged asset—the goodwill, not the payment. Had HQ Marketing known Mr. Ringstad was not going to deliver the goodwill, the asset “would have been written off day one.” CP 117.

C. The Court Abused Its Discretion by Affirming Judgment Against HQ Sustainable Industries When the Parties Dispute the Relationship Between the Companies.

Pacific Supreme responds to the CR 60 arguments by trying to show that HQ Industries is the same entity as HQ Marketing, despite the fact that the companies explicitly denied that type of relationship in their answer to the complaint and disputed it with the plaintiffs from the outset. CP 1 (“HQ Sustainable Maritime Marketing and HQ Sustainable Maritime Industries, Inc. are alter egos of one another”), CP 5 (“the second sentence [of paragraph 3] is denied”). *See also* CP 494 (we “would be amazed if your clients had any information from which one could fairly conclude that” the two companies are alter egos”). Pacific Supreme’s argument

shows why the trial court abused its discretion: when the court affirmed entry of judgment against HQ Sustainable Industries, the court inherently found that both companies were intertwined and liable on an incomplete, disputed record. No evidence, testimony, or argument on the relationship was presented on the relationship of the two companies below. As to the fact that Annex A compensated Mr. Ringstad with shares of stock, nothing prohibits a subsidiary from buying the shares of its parent company on the open market and using them to compensate its employees.

This Court exercises “a supervisory role to ensure that discretion is exercised on articulable grounds.” *Eagle Point Condo. Owners Ass’n v. Coy*, 102 Wn. App. 697, 715, 9 P.3d 898 (2000). The trial court, by making a finding on disputed, undeveloped record, did not act on articulable grounds. HQ Sustainable Industries disputes the trial court’s finding and should have the opportunity to create a record and present argument, and the trial court should be required to make the necessary findings of fact.

II. CONCLUSION

HQ Marketing and HQ Sustainable Industries respectfully request this Court reverse the order of summary judgment and the order denying HQ Sustainable Industries relief from the judgment. Plaintiffs have not met their burden to show Mr. Ringstad performed his contractual

obligations under Annex A. The court, when it refused to grant HQ Industries relief from the judgment, inherently the two companies were the same without the necessary factual record to support such a finding.

DATED this 9th day of June, 2010.

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The undersigned hereby certifies that on June 9, 2010, a copy of

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I declare under penalty of perjury under the laws of the state of

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