

No. 64813-6

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

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

Defendants/Appellants,¹

v.

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

Plaintiffs/Respondents

BRIEF OF RESPONDENTS

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DIVISION ONE
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¹ Appellants' moving brief incorrectly labels the Appellants (HQ entities) as Plaintiffs.

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I. INTRODUCTION

This breach of contract dispute is very simple: it boils down to the straightforward definitions of “goodwill” and “at the execution of the present agreement” under New York law.

The trial court correctly found that the HQ entities bargained for the chance that their new Vice President Trond Ringstad’s well-known name, seafood industry expertise, and customers from his former position at Pacific Supreme Seafoods—the “goodwill”—would benefit HQ.² The first goodwill payment was due on the date the contract was signed—the “execution” date—that is, June 28, 2006.

HQ breached the employment agreement when it unilaterally decided to breach the agreement and make no goodwill payments whatsoever.³ Summary judgment was properly granted.

II. ASSIGNMENTS OF ERROR

Neither Pacific Supreme nor Elite Seafood cross-appealed the summary judgment and therefore have no assignments of error.

² As has been the case throughout this lawsuit, as well as the practice of appellants, “HQ” refers to both HQ entities, collectively, unless otherwise specified. *See, e.g.*, CP 1–2.

³ Trond assigned his interest to Pacific Supreme, which assigned part of its interest to Elite Seafood. CP 2.

III. STATEMENT OF THE CASE

A. HQ recruited and hired seafood pioneer Trond Ringstad as its Executive Vice President of Sales.

In the summer of 2006, Trond Ringstad—described by HQ Sustainable Maritime Industries as “a pioneer in selling tilapia in the United States” with over ten years of seafood sales experience—accepted a job at HQ. Trond agreed to leave his prior position as president and co-owner at Pacific Supreme Seafoods, and liquidate Pacific Supreme, to become HQ’s Executive Vice-President – Sales and Distribution.⁴

Nothing in the record disputes that Trond had developed significant knowledge of the seafood sales industry and a valuable sales reputation through that knowledge and experience.⁵ Before and during his tenure with Pacific Supreme, Trond invested significant time, money, and energy into developing relationships with his customers, and he maintained both the confidentiality of his pricing to customers and his customer account histories.⁶

⁴ CP 37.

⁵ CP 21–22.

⁶ CP 2.

HQ independently researched Trond and Pacific Supreme's business before the employment agreement was signed.⁷ Its salesperson, Liam, knew that Trond had a "good background, and understood the [tilapia] business," and HQ's CEO Norbert Sporns personally visited Pacific Supreme offices half a dozen times.⁸ So after independently making all inquiries regarding Trond and Pacific Supreme's business affairs that HQ deemed necessary, HQ was satisfied that Pacific Supreme Seafoods was a seafood trading business, with desirable clients and sales network.⁹ HQ wanted to capitalize on Trond's name and experience, as well as the chance that his/Pacific Supreme's former clients would transfer loyalty from Pacific Supreme to HQ, once Trond began his new role.¹⁰

B. The HQ-drafted contract contained both a detailed goodwill purchase and sale provision and an integration clause, which the parties executed on June 28, 2006.

With a purported goal to implement its own long-term business plans to expand distribution of tilapia, shrimp and other seafood

⁷ CP 50.

⁸ CP 447–48.

⁹ CP 50, 52.

¹⁰ CP 52.

products—at least in part by hoping that Trond’s name, expertise, and former Pacific Supreme customers’ loyalty would result in seafood sales—HQ agreed (in the agreement it drafted) to purchase Trond/Pacific Supreme’s “goodwill and extensive sales network.”¹¹

1. HQ agreed to purchase Trond/Pacific Supreme’s goodwill for \$550,000.

HQ and Trond agreed on the consideration for the value of that goodwill: \$550,000 in cash and stock.¹² HQ Industries’ SEC filing later acknowledged as much:

In 2006, the Company entered into an agreement with [Trond] by which it was agreed to purchase a sales network in order for us to develop the American market for our branded seafood products. The cost of the network, established at \$550,000, is amortized on a 36 months period, starting in August 2006.¹³

2. The first goodwill payment was due the day the contract was executed: June 28, 2006, and the second goodwill payment was due 90 days later.

The parties signed the employment agreement Annex on June 28, 2006.¹⁴ It specified that HQ’s first \$150,000 goodwill payment would be

¹¹ CP 52, CP 36. HQ admits that it drafted the employment agreement. CP 6, CP 2.

¹² CP 52.

¹³ CP 400. As further described below, HQ amortized the payment it never made.

¹⁴ CP 51.

due “at the *execution* of the present agreement,” and a second \$100,000 payment would be due “90 days from the execution of these presents.”¹⁵

The Company does hereby purchase from the Executive the Goodwill which he has attached to Pacific Supreme Seafoods and to himself personally as well as to any other companies he owns or is associated with which trade in seafood products including without limitation, tilapia, shrimp, Bering Sea Crab, Dungeness crab, scallops etc., and the executive does hereby consent to sell such Goodwill to the Company for the price of USD 250,000 paid for USD 150,000 at the execution of the present agreement and another USD 100,000 90 days from the execution of these presents as well as the transfer of USD 300,000 payable in shares calculated at 80% of the trading value as of February 24th, 2006.

HQ’s CFO, Mr. Dallaire, admitted that the first payment was due on the date the agreement was signed:

Q. And the -- about the fifth line down [in Annex A], it says, “...the executive does hereby consent to sell such Goodwill to the Company for the price of USD 250,000 paid for USD 150,000 at the execution of the present agreement...” Do you see that?

A. Yes.

Q. What’s your understanding of what the term “execution of the present agreement” means?

MR. TILDEN: Same objections as before [(Object to the form)].

A. Well, *I understand it means signature of the present agreement.*¹⁶

¹⁵ CP 52 (emphasis added).

¹⁶ CP 120 (emphasis added).

HQ, however, pulled a bait and switch:

[Counsel:] Did you pay him \$150,000 at the time he signed the agreement?

[HQ's CEO:] No.¹⁷

The Annex also stated that HQ would transfer “USD 300,000 payable in shares calculated at 80% of the trading value as of February 24th, 2006.”¹⁸ It is undisputed that HQ Sustainable Maritime Marketing, Inc., does not trade in stock. But HQ Sustainable Maritime Industries, Inc., is a publically-traded corporation on the American Stock Exchange.¹⁹ It follows that the only stock that “shares” can refer to in the Annex is HQ Industries’ stock—which defendants have acknowledged in signing the judgment—and one more irrefutable indicator that HQ Marketing and HQ Industries are and always have been used interchangeably as relates to Trond’s employment.²⁰ It is undisputed that HQ never provided the stock that it promised.

¹⁷ CP 33.

¹⁸ CP 52.

¹⁹ CP 122.

²⁰ *See* CP 469–70.

3. ***The contract also contained an integration clause.***

Although HQ wants the court to go outside the four corners of the agreement to analyze what the parties meant by performing “goodwill” and the date of “execution,” the employment agreement’s integration clause stated as follows:²¹

This instrument constitutes the entire Agreement between the parties regarding its subject matter. When signed by all parties, this Agreement supersedes and nullifies all prior or contemporaneous conversations, negotiations, or agreements, oral and written, regarding the subject matter of this Agreement.²²

C. **Trond liquidated Pacific Supreme, and went to work for HQ for *three years*.**

After the parties signed the employment agreement on June 28, 2006, HQ Industries received access—with Pacific Supreme’s permission—to Trond/Pacific Supreme’s proprietary customer lists and information.²³ This included pricing information, sales history, contact names, phone numbers, and addresses for approximately 48 active customers, including QFC (part of The Kroeger Co).²⁴ Trond then

²¹ See, e.g., *Brief of Appellants* pp. 13, 19.

²² CP 50.

²³ CP 22.

²⁴ *Id.*

liquidated the remaining inventory of Pacific Supreme and devoted 100% of his working hours to HQ's business.²⁵ Pacific Supreme did not generate any further seafood sales after its remaining product was liquidated—an undeniable benefit to HQ.²⁶

Even though HQ has admitted that it made all inquiries into Trond and Pacific Supreme's business that it deemed necessary, it now argues that Trond's customers and background expertise were nonexistent.²⁷ One of HQ's SEC filings directly refutes its claim that there is not "one example of where [Trond's] 'goodwill' translated into a sale for HQ".²⁸

In May 2007, we commenced sales of our "TiLoveYa" (TM) brand of frozen fillets through the QFC chain of the Kroger Company within its chain of stores in the states of Washington and Oregon. . . . Kroger is one of the nation's largest grocery retailers.²⁹

Even if the dollar amount of tilapia sales is relevant—which it is not—the record undisputably confirms that *HQ set its tilapia prices too*

²⁵ CP 22.

²⁶ *Id.*

²⁷ CP 50; *Brief of Appellants* p. 6 ("[T]he goodwill Mr. Ringstad promised to deliver did not exist.").

²⁸ *Brief of Appellants* at p. 5.

²⁹ CP 371.

high to generate substantial U.S. sales, handcuffing Trond.³⁰ HQ's CFO and Financial Controller J.P. Dallaire admitted as much, and the exorbitant pricing was not in Trond's control:

- Q. Were HQ's prices too high?
A. You mean our cost?
Q. No, your price.
A. Oh, yeah, I see your question. Could be.
Q. Was that Trond's fault?
MR. TILDEN: Object to the form.
A. Is that Trond's fault that the prices are high?
Q. Yes.
A. No.³¹

Additionally, HQ has made public explanations as to why its financial situation can fluctuate and fail to meet its goals. Here is just a taste, although the list goes on and on:

- *“A few of our customers account for a significant portion of our business;”*
- *“We may be adversely affected by the fluctuation in raw material prices and selling prices of our products;”* and
- *“Intense competition from existing and new entities may adversely affect our revenues and profitability.”³²*

The employment agreement also expressly stated that HQ “assume[d] the risk of any misrepresentation or mistaken understanding or

³⁰ CP 442–44.

³¹ CP 112–13 (emphasis added).

³² CP 276–80.

belief relied upon by . . . it in entering into [the] Agreement.”³³ And goodwill, as further explained below, is a “mere chance” of client preference, not a certainty. In short, HQ promised it had done whatever research it deemed necessary into both Trond’s and Pacific Supreme’s business and clientele, explicitly assumed the risk of any mistake(s), and agreed to pay Trond for “the *present* transfer and sale of Goodwill.”³⁴

Finally, HQ’s brief misrepresents the record by stating that Trond “never in the three-year period of his employment” requested the goodwill payment “[e]xcept for one brief conversation with Mr. Sporns.”³⁵ The record reflects that HQ’s executives acknowledged that Trond asked them at least three times.³⁶ And if Trond’s performance was so bad, it raises a compelling question: why did HQ keep him on for three years?!

D. HQ utilized Trond’s industry recognition.

Although HQ states that Trond’s goodwill added no value to its business, i.e., that Trond did not “perform,” HQ consistently advertised

³³ *Id.* at p. 12 (emphasis added).

³⁴ CP 52 (emphasis added).

³⁵ *Brief of Appellants* at p. 6.

³⁶ CP 115–17, 449–50.

Trond's name, background and expertise to entice prospective investors, even 18 months after the contract was executed:

- “Our marketing and branding of tilapia and other seafood products is headed by Trond Ringstad, a pioneer in marketing tilapia in the United States.”³⁷
- “Furthermore, we also announced recently that we have strengthened our sales force in the United States by recruiting Mr. Ringstad . . . to oversee our retain and value-added sales and branding. We expect [his] experience in servicing the fish industry to impact significantly on the demand for our products.”³⁸
- “**Trond Ringstad—Executive Vice-President, Sales and Distribution**—Mr. Ringstad joined us in June 2006. . . . He leads our sales and marketing activities from our headquarters in Seattle, Washington. Prior to joining us, from February 2004 through July 2006, he was President and the owner of Pacific Supreme Seafoods. Prior to that, Mr. Ringstad was Vice President Sales and Marketing for Royal Supreme Foods, a seafood importer and sales company, from May 2001 to February 2004. He has nine years of seafood sales experience and has been a pioneer in selling tilapia in the United States.”³⁹

³⁷ CP 149.

³⁸ CP 159.

³⁹ CP 171 (emphasis in original).

E. HQ made numerous untruthful statements about the goodwill payments to the Securities and Exchange Commission.

HQ Industries' 2006 and 2007 Form 10-Ks filed with the Securities and Exchange Commission untruthfully represent that HQ actually *paid* Trond for the goodwill, including "our" common shares, which again, cannot refer to HQ Marketing and must refer to HQ Industries:

In connection with our employment of Mr. Ringstad . . . we had entered into an agreement with him for the purchase of goodwill. Pursuant to that agreement, *we purchased* the goodwill and extensive sales network of (i) Pacific Supreme Seafoods . . . and (ii) any other companies Mr. Ringstad owns or which he associates, which trade in seafood products, including without limitation tilapia, shrimp, scallops, and other products. *The purchase price paid by us consisted of \$250,000 plus another \$300,000 paid in shares of our common stock valued at 80% of the trading price for said shares on February 24, 2006.* We believe that this goodwill and sales network acquisition will help us implement our long-term business plans to expand distribution of our tilapia, shrimp and other seafood products in the European union and the United States, and to create brand awareness of our Tiloveya™ brand.⁴⁰

If that weren't enough, HQ fallaciously *amortized* the nonexistent \$550,000 payment over three years!⁴¹

⁴⁰ CP 380 (emphasis added).

⁴¹ CP 119.

F. Procedural background.

Plaintiffs' motion for summary judgment was brought against both HQ Sustainable Maritime Marketing and HQ Sustainable Maritime Industries.⁴² HQ did not raise any argument in its memo in opposition to summary judgment or during oral argument that defendant HQ Sustainable Maritime Industries, Inc., should not be liable.⁴³ The parties devoted significant time during oral argument on December 4, 2009, with respect to the representations made by HQ Industries in its public stock offering and 10-K filings regarding its failure to pay Trond for the goodwill.⁴⁴ The trial court granted summary judgment against both defendants.⁴⁵

After the trial court granted summary judgment, the parties agreed to the form of judgment ultimately entered on December 22, 2009.⁴⁶ That form of judgment names both HQ entities as judgment debtors.⁴⁷ The form

⁴² CP 11–20.

⁴³ CP 54–67.

⁴⁴ CP 537.

⁴⁵ CP 467–70.

⁴⁶ *Id.*

⁴⁷ CP 469.

was reviewed and approved by defendants' attorneys prior to entry.⁴⁸

Neither HQ entity moved to reconsider summary judgment.

On January 15, 2010, the court denied HQ's CR 60 motion to vacate judgment against HQ Industries after HQ made all the same arguments to the trial court that it makes here.⁴⁹ This squarely refutes HQ's argument that the trial court did not intend to enter judgment against HQ Industries.

G. Issues presented.

The court faces two straightforward issues de novo:

- Under New York law, is goodwill a “mere chance” of future patronage, or a guarantee? (Answer: “mere chance” of future patronage.)
- Under New York law, does a payment due “at the execution of the present agreement” mean due on the date the parties sign the agreement, or due on any arbitrary date left up to the unfettered discretion of the party promising to pay if and when they feel like it? (Answer: on the date the parties sign the agreement.)

The Court also reviews one straightforward issue for abuse of discretion:

⁴⁸ *Id.*, CP 542–43.

⁴⁹ CP 556.

- Are HQ Marketing and HQ Industries so intertwined in the undisputed facts of this lawsuit that both entities should be liable to prevent injustice, i.e., did the trial court abuse its discretion when it denied HQ's CR 60 motion to vacate judgement against HQ Industries? (Answer: the trial court did not abuse its discretion.)

IV. ARGUMENT: THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT

A. Standards of review and applicable law.

This Court is undoubtably well aware that it reviews the trial court's award of summary judgment de novo, and the denial of HQ's motion to vacate under CR 60(b) for abuse of discretion.⁵⁰

As appellants' brief points out, the substantive issues arising under the employment agreement are governed by New York law.⁵¹ New York courts adhere to the almost universal principle that parties are free to contract regarding most any aspect of their relationship and that courts should refrain from adding to or taking away from clear contract language.⁵²

⁵⁰ *In re Guardianship of Adamec*, 100 Wn.2d 166, 173, 667 P.2d 1085 (1983).

⁵¹ CP 49.

⁵² *See, e.g., Shames v. Abel*, 529 N.Y.S.2d 344, 346 (1988).

B. The trial court properly found that the contract was not illusory.

The first flaw in HQ’s argument is asking this Court to rule that the trial court should have interpreted the employment agreement in a way that would render it illusory. New York law states that “courts will not adopt an interpretation of a contract that would render the benefit bestowed by the contract illusory.”⁵³ And typically, “a court will not inquire into the adequacy of consideration supporting the parties’ agreement since even the ‘slightest consideration is sufficient to support the most onerous obligation.’”⁵⁴ It has been said “[a] cent or a pepper corn, in legal estimation, would constitute a valuable consideration.”⁵⁵

Here, Trond’s industry expertise, customer base, and the chance that his customer base would switch loyalty to HQ were certainly worth more than a pepper corn. HQ has not argued—because it could not—that

⁵³ *Quantum Maint. Corp. v. Mercy College*, 798 N.Y.S.2d 652, 8 Misc.3d 885, 890 (June 15, 2005).

⁵⁴ *Rooney v. Tyson*, 91 N.Y.2d 685, 701 (1998); *see also* 1 PROSKAUER, ROSE, GOETZ AND MENDELSON, NEW YORK EMPLOYMENT LAW § 2.03[2] (“New York courts have rarely refused to uphold an employment contract for lack of consideration”); BAKALY AND GROSSMAN, MODERN LAW OF EMPLOYMENT CONTRACTS § 3.2 (2d ed.) (“adequacy of consideration is rarely an issue in employment contracts”).

⁵⁵ *Whitney v. Stearns*, 16 Me. 394 (1839).

Trond was inexperienced or without a proven track record in seafood sales.

C. There was no issue of material fact relating to whether HQ breached the Agreement’s Goodwill provision by failing to make the promised payments.

I. New York courts’ definition of the term “goodwill.”

The trial court properly disagreed with HQ’s (mis)interpretation of the definition of goodwill as a guarantee of future sales. Notably, appellants’ brief provides no citation for its claim that the “[t]ransfer of goodwill, when it is attached to salespersons, must include a component of capitalizing on personal relationships with customers” (although we know, as discussed above, that at least QFC—part of “one of the nation’s largest grocery retailers”—transferred its business from Pacific Supreme to HQ).⁵⁶

Under New York law, the seller of goodwill guarantees nothing:

The vender who sells the good will of a business guaranties nothing, for, in the nature of things, he can give no assurance that the patronage of the place will continue. *It is the sale of a mere chance that a preference which has usually been extended will continue.*⁵⁷

⁵⁶ *Brief of Appellants* p. 15; CP 371.

⁵⁷ *Johnson v. Friedhoff*, 27 N.Y.S. 982, 982 (1894) (emphasis added).

Here, HQ bargained \$250,000 plus stock for the use of Trond's name and experience, as well access to Trond/Pacific Supreme's client base and the chance—not certainty—that Trond's clients would transfer their loyalty to HQ.

2. *New York courts' definition of the term "execution."*

The trial court properly agreed that in New York, the execution of a written instrument occurs when the agreement is reduced to writing, signed by the parties, and thereafter enforceable by law.⁵⁸ Here, that date was June 28, 2006. HQ's appellate brief even admits that "[t]he language of the agreement appears to support [the] position" that "HQ Marketing

⁵⁸ See, e.g., *Helvering v. N.W. Steel Rolling Mills*, 311 U.S. 46, 49, 61 S.Ct. 109, 85 L.Ed. 29 (1940) ("The natural impression conveyed by the words 'written contract executed by the corporation' is that an explicit understanding has been reached, reduced to writing, signed and delivered."); *Mun. Consultants & Publishers v. Town of Ramapo*, 390 N.E.2d 1143, 1144 (N.Y. App. Ct. 1979) ("Where all the substantial terms of a contract have been agreed on, and there is nothing left for future settlement, the fact, alone, that it was the understanding that the contract should be formally drawn up and put in writing, did not leave the transaction incomplete and without binding force, in the absence of a positive agreement that it should not be binding until so reduced to writing and formally executed."); see generally *Triboro Coach Corp. v. N.Y. State Labor Relations Bd.*, 36 N.E.2d 315 (N.Y. App. Ct. 1941); N.Y. FINANCE LAW § 179-q (2005) ("Fully-executed contract' means a contractual agreement signed by both a state agency and a not-for-profit organization, subsequently approved by the office of the state comptroller and placed on file in that office, which is thereafter enforceable by law.") See also *Hansen Mech. v. Superior Court*, 47 Cal.Rptr.2d 47, 40 Cal.App.4th 722, 729–31 (App. Ct. 1995) ("a written agreement is 'executed' when all parties sign the agreement").

breached Annex A because the first goodwill payment was due the date Annex A was signed, and the second was due 90 days thereafter.”⁵⁹

D. The goodwill payment was never conditional or tied to sales like Trond’s base salary.

The trial court properly disagreed with HQ’s assertion that the goodwill payment was dependent upon future sales, possibly due at some date to be arbitrarily decided by HQ in its sole discretion. Although the agreement tied Trond’s *salary* to sales, there is no such language tying sales to the goodwill payments in Annex A, and New York courts have cautioned against adding nonexistent language to a clear contract.⁶⁰ It “is generally understood that the purpose of an integration clause ‘is to require full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to vary or contradict the terms of the writing.’”⁶¹

In this case, the contract language at issue is clear and unambiguous; accordingly, its construction presents a question of law.⁶²

⁵⁹ *Brief of Appellants* at p. 18.

⁶⁰ *See, e.g., Shames*, 529 N.Y.S.2d at 346 (“It is beyond cavil that courts enforce rather than rewrite contracts.”).

⁶¹ *Dujardin v. Liberty Media Corp.*, 359 F.Supp.2d 337, 356 (D.N.Y. 2005) (quoting *Primex Int’l Corp. v. Wal-Mart Stores*, 89 N.Y.2d 594, 600 (1997)).

⁶² *Shames*, 529 N.Y.S.2d at 346.

Extrinsic evidence cannot be admitted to interpret the language and change the date the first goodwill payment was due.⁶³

Regardless of the clear integration clause and language in Annex A, HQ continues its attempt to open the door to whether or not Trond generated \$15 million in tilapia sales. While there are two sides to every story, the amount of sales in the U.S. was irrelevant to the disposition of the issue and so failed to raise an issue of *material* fact because of the definitions of goodwill and execution. And even if the level of seafood sales were relevant, “a party to a contract cannot rely on the failure of another to perform a condition precedent where he has frustrated or prevented the occurrence of the condition”—here, HQ admits its high prices were out of Trond’s control.⁶⁴

E. If the employment agreement is ambiguous—which it is not—any ambiguities are construed against the drafter (HQ).

HQ also incorrectly argued at summary judgment that the term “execution” is ambiguous, and does so indirectly in its appellate brief,

⁶³ *Transport Properties v. ABC Treadco, Inc.*, 589 F.Supp. 445, 448 (S.D.N.Y.1984); *Bethlehem Steel Co. v. Turner Constr. Co.*, 141 N.E.2d 590, 593 (N.Y. 1957).

⁶⁴ *Kooleraire Service & Installation Corp. v. Bd. of Ed. of City of New York*, 268 N.E.2d 782, 784 (N.Y. 1971) (citing *Stern v. Gepo Realty Corp.*, 45 N.E.2d 440, 441 (N.Y. 1942)), in which it was observed “one may not take advantage of a condition precedent, the performance of which he himself has rendered impossible.”).

which is how the debate about whether and when payment was due arose.⁶⁵ But even if “execution” can mean two different things in New York, contractual ambiguities are construed against the drafter—in this case, HQ.⁶⁶ The first payment was thus due on the day the agreement was signed. Summary judgment was appropriate on that point alone.

F. Neither HQ Industries nor HQ Marketing pled fraudulent misrepresentation or suppression of fact.

Another flaw is that HQ’s brief slings the terms “fraud” and “defrauded” without ever alleging the elements of fraud in its amended answer.⁶⁷ Under New York law, “[f]raud has generally been defined by behavior involving intentional, false representations and other connotations of scienter such as willfulness, knowledge, design and bad faith.”⁶⁸ HQ never pled that Trond had any intention to deceive, or misrepresented a material fact that was collateral to the contract and served

⁶⁵ *Brief of Appellants* at p. 19.

⁶⁶ *In re Saranac Cent. Sch. Dist.*, 686 N.Y.S.2d 869, 871 (App. Ct. 1998) (“It is also well settled that contract ambiguities should be construed against the drafter.”) (internal citation omitted); CP 2, 6.

⁶⁷ CP 8–10.

⁶⁸ *Gaidon v. Guardian Life Ins. Co. of America*, 94 N.Y.2d 330, 348 (1999).

as an inducement for the contract.⁶⁹ Neither does the record reflect facts supporting such a claim.

If anything in this case could amount to fraud, it is HQ Industries' numerous public assertions that it actually paid Trond for the goodwill. HQ's public misrepresentations suggests that HQ knew full well it was supposed to pay Trond when the contract was signed by both parties.

G. The trial court did not abuse its discretion by denying HQ's motion to vacate judgment against HQ Industries.

HQ Industries now tries to extricate itself from any connection with Trond's employment. But HQ Industries cannot have it both ways: on the one hand advertising Trond as its Executive Vice President to investors and on the other hand disclaiming all ties whatsoever. *The HQ entities admitted in their Amended Answer that Trond was an employee of both HQ Marketing and HQ Industries collectively.*⁷⁰ And HQ Marketing was a dormant corporation in 2006.⁷¹

⁶⁹ See, e.g., *WIT Holding Corp. v. Klein*, 724 N.Y.S.2d 66, 66 (App. Ct., April 9, 2001).

⁷⁰ CP 1–2 (“ . . . both [HQ entities] are hereinafter collectively referred to as HQ.”), CP 2 (“Between June 28, 2006 and the current date, Ringstad has been employed by HQ as the Executive Vice President of Sales); CP 6 (“Paragraph 6 is admitted.”).

⁷¹ CP 257.

If the Court does consider whether the judgment against HQ Industries should have been vacated pursuant to CR 60, that review is based on abuse of discretion.⁷² HQ arguments about clerical oversight are also given the same review, although it is again surprising that HQ argues that the trial court did not mean to impose judgment on HQ Industries. The trial court unambiguously denied HQ's CR 60 *Motion to Show Cause Re: Relief from Judgment/Order on Summary Judgment*.⁷³

HQ's common refrain is that someone else is responsible for the errors that it made: from the level of its tilapia sales after Trond shut Pacific Supreme's doors, to HQ Industries' numerous SEC filings, to amortizing the phantom goodwill payments, to approving the form of judgment against both HQ entities. Each error appears to compound the next. Meanwhile, it has been nearly four years since HQ promised payment and almost as long since it represented to its investors that payment had been made. The trial court did not abuse its discretion when it denied HQ's motion to set aside the judgment against HQ Industries.

⁷² *In re Guardianship of Adamec*, 100 Wn.2d 166 at 173.

⁷³ CP 556.

Finally, even if this Court disagrees that summary judgment against HQ Industries was proper, that does not preclude it from affirming summary judgment against HQ Marketing.

V. CONCLUSION

HQ's first Goodwill payment was due upon the date the written agreement was signed by both parties—June 28, 2006—the date the agreement became enforceable by law. The second payment was due 90 days later.

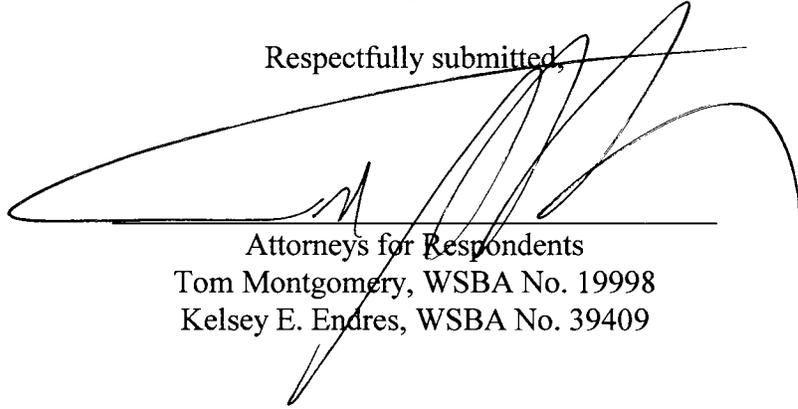
HQ persistently ignores the fact that the very contract it drafted says “The Executive and the Company independently have made all inquiries regarding the qualifications and business affairs of the other which either party deems necessary.”⁷⁴ HQ was satisfied that the goodwill—the liberal use of Trond's name and experience, as well as Trond's network, would result in the chance of future patronage to HQ—existed and was valuable, as it told the world in its numerous SEC filings. They should not now be allowed to say otherwise.

Pacific Supreme and Elite Seafoods respectfully request that this Court affirm summary judgment against both HQ entities.

⁷⁴ CP 50.

Dated May 10, 2010

Respectfully submitted,

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke that extends to the left.

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CERTIFICATE OF SERVICE

I am over the age of 18; and not a party to this action. I am the assistant to an attorney with Montgomery Scarp MacDougall, PLLC, whose address is 1218 Third Avenue, Suite 2700, Seattle, Washington, 98101.

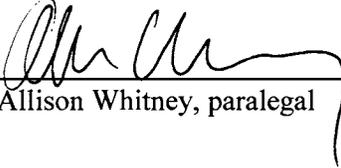
I hereby certify that the original and one true and correct copy of BRIEF OF RESPONDENTS has been filed with the Court of Appeals of the State of Washington Division One via legal messenger and a copy served upon the following via legal messenger:

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I declare under penalty under the laws of the State of Washington that the foregoing information is true and correct.

DATED this 10th day of May, 2010, at Seattle, Washington.


Allison Whitney, paralegal

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