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NO. 649388

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CRUISE LOGISTICS, LLC
dba FREIGHTCO, TRANSVILLE, LLC, SEATTLE LOGISTICS,
INC., AND CHARLOTTE LOGISTICS, LLC,

Appellants,

v.

TRANSFAIR NORTH AMERICA INTERNATIONAL
FREIGHT SERVICES, INC. AND TRANSGROUP
EXPRESS, INC.,

Respondents.

APPELLANT'S OPENING BRIEF

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 COURT OF APPEALS
 DIVISION I
 SEATTLE, WASHINGTON

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ORIGINAL

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I. INTRODUCTION

Appellant FreightCo (which refers, collectively, to Cruise Logistics LLC, Transville, LLC, Seattle Logistics, Inc., and Charlotte Logistics, LLC) submits this brief in support of its appeal of the trial court's erroneous conclusion of law which inserted a new provision into a fully integrated contract creating a new category of revenue (called a "giveback") that was not specified in the written agreements, was not contemplated at the time of contract, and was not supported by the course of dealing between the parties. The Court of Appeals reviews contract interpretation and construction as a matter of law de novo.

The trial court's legal conclusion was not supported by its findings of fact and is contrary to established law. Accordingly, the Court of Appeals should reverse the trial court's Conclusion of Law ("COL") No. 3 and order that Transgroup (which refers, collectively, to Transfair North America International Freight Services, Inc. and Transgroup Express, Inc.) remit to FreightCo that portion of FreightCo's revenue that it labeled as "givebacks."

II. ASSIGNMENT OF ERROR

The trial court erred in finding and/or concluding that "Transgroup is not obligated to pay any 'givebacks' to FreightCo since

FreightCo terminated the parties' contract and ICOs are not entitled to givebacks after they leave Transgroup." CP 255 (COL No. 3).

III. ISSUES ON APPEAL

1. Whether the trial court erred in modifying the fully integrated written contracts between the parties.

2. Whether Transgroup may unilaterally modify the fully integrated contracts (which apportion all revenue) to include a new category of revenue called a "giveback" which Transgroup can keep after termination.

3. Whether FreightCo's post-contract "awareness" that Transgroup seizes givebacks after termination changes a fully integrated written agreement that does not allow Transgroup to keep givebacks, despite the course of dealing between the parties during the term of the contract whereby Transgroup remitted givebacks to FreightCo.

IV. STATEMENT OF CASE

1. Summary of the Case and Procedural Posture

FreightCo filed this case on May 13, 2008. CP 1-31. The matter was tried before King County Superior Judge Julie Spector, commencing on November 2, 2009, without a jury. CP 119. The court

issued findings of fact and conclusions of law on November 29, 2009, awarding Appellants approximately \$92,000 in monetary damages for breach of contract. CP 213-221. Appellants timely moved for reconsideration, which was opposed by Appellees. CP 222-247. Pursuant to the motion for reconsideration, the court modified its findings of fact and conclusions of law to correct certain errors and awarded Appellants \$145,515.80 in monetary damages for breach of contract. CP 248-258. The trial court entered judgment on February 25, 2010. CP 272-273. Appellants timely filed a notice of appeal based upon the trial court's failure to award FreightCo that portion of its revenue under the contracts identified as "givebacks." CP 259-260.

2. Factual Background to Plaintiffs' Claims

Appellant FreightCo offers logistics and transportation forwarding services to customers who need goods shipped. Respondent Transgroup licenses its trade names and provides accounting and collections services for dozens of stations like those operated by FreightCo. CP 251 (Finding of Fact ("FOF") Nos. 1, 2). Multiple independent companies around the country offer services under the "Transgroup" name. The actual "Transgroup" corporate entity contracts with those independent companies (like FreightCo, referred to as "stations" or "ICOs") to use their trade name, and to

coordinate the payment of vendor invoices, the collection of payments, and routing and accounting of funds between the ICO, its customers, and vendors. Id. (FOF Nos. 1, 2, 3). For these and other related services, Transgroup charges eleven percent (11%) of the ICO's gross revenue or thirty percent (30%) of net revenue (11% for domestic and 30% for international shipments), which in the case of FreightCo meant revenue for Transgroup of approximately \$1.5 million per year. CP 32-137; ER 12-22 (regarding Transgroup fee under the contracts¹); see also RP 11/3/2009 at 101:4-17 (regarding annual fees to Transgroup).

The relationship between FreightCo and Transgroup, including the flow of revenue and expenses and the division of profits, is governed by several contracts, which are identical in relevant part. The contracts were Transgroup's form contracts which were required to be identical to "secure uniformity" for all ICOs in the Transgroup system. RP 11/4/2009 at 110:6-111:18. The contracts (formally entitled Transportation Services Agreements, and referred to herein as "the contracts") address the treatment of *all revenue* and *all costs* associated with FreightCo's transactions under the Transgroup/Transfair names. Ex 12-22; CP 251 (FOF No. 1).

The contracts are comprehensive pertaining to all revenue and all expenses. For example, Section 1.1 references "all accounting

¹ Transgroup's fees are set forth in the Contracts at section 1.3, which incorporates by reference Exhibit A. Exhibit A, Section 1.A sets forth whether the applicable percentage is 11% of gross revenue or 30% of net revenue.

services as outlined in the attached Exhibit A.” In turn, Exhibit A addresses “All revenue billed by ICO” (Id.; Contracts at Exh. A, § I.B (emphasis added)) and provides for remittance of “net revenue,” defined as “revenue,” less “service fees, all carrier costs, designation charges, direct insurance costs and any other third party direct cost of the shipment.” Pursuant to the schedule of accounting services, Freightco is entitled to “net revenue” defined as gross revenue less the specifically enumerated costs. Id. Pursuant to the contracts, the only fee or payment to Transgroup is Transgroup’s percentage (11% or 30%) share of revenue. Id.; CP 251 (FOF No. 2).

The contracts are fully integrated and require that any modification must be in writing. In section 14.1, entitled “entire agreement,” the contracts state:

This Agreement constitutes the entire agreement between the parties hereto, and no party is bound in any matter by express or implied warranties, guarantees, promises, statements or representations, whatsoever, made or furnished by any agent, employee, servant or other person representing or purporting to represent any party, unless such warranties, guarantees, promises, statements, or representations are expressly and specifically set forth herein. Any inducements embodied herein shall be of no force and effect.

In addition to section 14.1, section 14.2 of the contracts states that “The Agreement may not be amended or modified except by an instrument in writing and executed by both TRANSFAIR and ICO.” (emphasis added). Ex 12-22.

At issue in this appeal is a certain category of revenue received under the contracts, which have been labeled as “givebacks” by Transgroup. Occasionally, FreightCo paid Transgroup in advance for vendor fees associated with a shipment for which Transgroup never received a vendor’s invoice for payment. This might have occurred, for example, if FreightCo had prepaid a shipment, and then cancelled it or arranged for a substitute vendor. A giveback was a vendor payable that was either mistakenly recorded as a payable to a vendor that never billed, was reserved as a contingency for future billings, or is a real payable to a vendor who never billed. CP 251-256 (FOF No. 21); RP 11/4/2009 at 88:23-24 (givebacks are “money that Transgroup charged towards FreightCo in order to compensate them for payments they are going to have to make to carriers, but the carriers did not in fact invoice Transgroup for those particular amounts of money, and so Transgroup retained those amounts of money even through they did not have to make payments for them”); *see also* RP 11/05/2009 128:8-129:10.

Prior to termination, Transgroup and FreightCo dealt with givebacks under the Contract in an entirely reasonable way. Transgroup would track givebacks annually. CP 251-256 (FOF 21). If a vendor invoice had still not arrived, after the end of the calendar year following the giveback, Transgroup returned the funds to FreightCo. *Id.* These sums were called “givebacks” because they consist of funds that were “given back” to FreightCo. CP 252 (FOF 21). Throughout

the term of the contracts, the parties considered “givebacks” the property of FreightCo, which was held back as a contingency to pay Transgroup’s expenses that may materialize. CP 254 (FOF 21-27); Ex 54; 58.

Under the contracts, FreightCo operated several stations under the Transgroup umbrella for approximately ten years. FreightCo terminated the contracts effective October 11, 2006. CP 252 (FOF 6).

When, following termination of the contracts, FreightCo asked Transgroup to remit givebacks, Transgroup refused. Transgroup unilaterally stated that after an ICO left the Transgroup system, it forfeited its right to givebacks. It is undisputed that Transgroup’s practice of changing its giveback policy after termination of the Contract is not objectively manifested in the contracts and was not *agreed to* by FreightCo. Rather, the Court relied upon the fact that FreightCo was made aware of the policy when it terminated the contracts and Transgroup had a policy of seizing givebacks as a “retention tool” to discourage ICOs from leaving the Transgroup system. CP 254 (FOF 26, 27, 29); RP 11/10/2009 at 9:5-9; 40:8-14. The testimony at trial was uncontroverted that the total amount of givebacks under the contracts associated with FreightCo’s shipments in 2005 and 2006 up to the time of termination had accumulated to \$239,887.10. Ex 23.

The trial court correctly found that “givebacks are not addressed or even mentioned in the parties' contracts” and that givebacks were

not contemplated in the execution of the contracts. CP 254 (FOF 24). The trial court correctly found that “Transgroup holds back enough of the revenue from the particular shipments to pay for those unbilled charges” if the vendor ultimately bills the charge. CP 254 (FOF 21) (emphasis added). However, the trial court erred in its legal conclusion that “givebacks” were a special category of revenue omitted from the contracts. In fact, the contracts are unambiguous that FreightCo was to be remitted all revenue less Transgroup’s specified fees.²

² The trial court erroneously relied upon the fact that “Transgroup takes a risk in returning the givebacks to [FreightCo] because Transgroup remains liable for the unbilled vendor expense for up to six years or even longer depending on the particular statute of limitations.” CP 254 (FOF 22). Whether or not this finding is true is immaterial to the distribution of revenue under the contracts. Transgroup’s compensation for its risk is addressed in its percentage of the revenue (11% of net or 30% of gross). Whether the court believes that risk should have been allocated differently as a matter of equity is irrelevant. The parties allocated risk and fees as specified in the fully integrated contracts.

Furthermore, the trial court’s allocation of equity is logically flawed. Under the trial court’s equitable analysis, the time for remitting givebacks should have been shifted from the end of the next calendar year (as applied during the term of the contract) to the date the statute of limitations on invoicing had expired. There is no equitable reason why Transgroup would be permitted to keep FreightCo’s givebacks forever after there is no risk that vendors would collect on the invoices.

V. THE COURT MADE A MISTAKE OF LAW INTERPRETING THE CONTRACTS WARRANTING REVERSAL

A. The trial court erred as a matter of law in interpreting the fully integrated contracts.

Appellants do not assign error to the findings of fact made by the trial court. Rather, Appellants allege that the trial court erred in rendering the legal conclusion that Transgroup may keep accrued givebacks after termination of the contracts.

It is undisputed that the contracts provide that, during their term: (i) FreightCo is required to run all shipping transactions through Transgroup's accounting system; (ii) the distribution of "all revenue" is governed by the contracts; and (iii) Transgroup's fees are either 11% of net revenue or 30% of gross. The trial court correctly found that term "givebacks" is not referenced at any place in the contract and was not part of the negotiations or circumstances that led to the parties executing the contracts. CP 254 (FOF 24). The trial court erred, however, in its legal conclusion that "givebacks" are not revenue under the contracts and subject to the fee structure specified in the written agreements. As a matter of law, "givebacks" are part of "all revenue" under the contracts and should have been subject to the distribution of funds set forth in the contracts.

Washington follows the “objective manifestation” theory of contracts. Hearst Commc'ns, Inc. v. Seattle Times, 154 Wn.2d 493, 502 (2005). A court gives words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. Freestone Capital Partners, LP v. MKA Real Estate Opportunity Fund I, LLC, 155 Wn. App. 643, 671 (2010). This Court recently articulated the court’s role in interpreting contracts as follows:

The court gives words their ordinary, usual, and popular meaning unless the entirety of the agreement evidences a contrary intent. If relevant for determining mutual intent, surrounding circumstances and other extrinsic evidence may be used to determine the meaning of specific words and terms used, but not to show an intention independent of the instrument or to vary, contradict, or modify the written word. Where, as here, interpretation does not depend on the use of extrinsic evidence, interpretation of a contract provision is a question of law reviewed de novo.

State v. R.J. Reynolds Tobacco Co., 151 Wn. App. 775, 783 (2009) (internal citations omitted)(emphasis added). Extrinsic evidence is unnecessary in the present matter because the treatment of all revenue (including that portion of revenue that is held back and labeled by Transgroup as a “giveback”) is addressed by the objective manifestation of the contracts, which governs “all revenue.”

Accordingly, the Court of Appeals should review the trial court's interpretation of the contracts de novo.

The plain language of the contracts clearly specifies for the distribution of all revenue for FreightCo shipments within the Transgroup system. Transgroup collects funds from customers, pays vendors, takes its percentage and remits the remaining portion of revenue to FreightCo. The contracts do not provide for a special category of FreightCo's revenue called "givebacks" which Transgroup may keep after termination of the contracts.

B. Even if the trial court looks beyond the objective manifestation of the contracts, interpretative and contract construction maxims do not support the trial court's legal conclusion.

The trial court's Conclusion of Law states only that FreightCo is not entitled to givebacks because FreightCo terminated the contracts. CP 255 (COL 3). The trial court's justification in looking outside the four corners of the contracts is not specified.

Where the court looks beyond the objective manifestation of the contracts, it looks to determine the mutual intent of the parties *at the time of contract*. Hearst Commc'ns, 154 Wn.2d at 504. As the Washington Supreme Court recently stated,

Specifically, the court may consider the context of the language in the agreement. The parol evidence rule precludes the use of extrinsic evidence to add to, subtract from, modify, or contradict the terms of a fully integrated written contract; that is, a contract intended as a final expression of the terms of the agreement. DePhillips v. Zolt Constr. Co., 136 Wn.2d 26, 32, 959 P.2d 1104 (1998). But a party may offer extrinsic evidence in a contract dispute to help the fact finder interpret a contract term and determine the contracting parties' intent regardless of whether the contract's terms are ambiguous. Berg v. Hudesman, 115 Wn.2d 657, 667-69, 801 P.2d 222 (1990). Extrinsic evidence is not admissible, however, to show intention independent of the contract. Hollis v. Garwall, Inc., 137 Wn.2d 683, 695, 974 P.2d 836 (1999). Washington courts focus on objective manifestations of the contract rather than the subjective intent of the parties; thus, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used. Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 504, 115 P.3d 262 (2005).

Brogan & Anensen, LLC v. Lamphiear, 165 Wn.2d 773, 775-776

(2009). Extrinsic evidence is admissible only for the purpose of elucidating the meaning of the terms of a contract and is inadmissible for the purpose of adding to, modifying, or contradicting these terms.

Berg v. Hudesman, 115 Wn.2d 657, 669 (1990). When ascertaining the intent of the parties, the court may consider: (1) the circumstances of the parties at the time the contract was executed; (2) the circumstances under which the contract was executed; and (3) the subsequent conduct of the parties. Id. at 668-69. As asserted above,

the objective manifestation of the contracts governs the distribution of all revenue, including givebacks.

Even if the court were to look past the objective manifestation of the contracts, the trial court mistakenly considered the understanding of the parties *after entering into the contracts*. CP 255 (FOF 29) (finding that “FreightCo was aware of Transgroup’s policy regarding givebacks *during the parties’ contractual relationship*”)(emphasis added). The record is uncontroverted that the parties did not discuss “givebacks” at the time of contract formation. CP 254 (FOF 24); RP11/02/2009 at 41:23-42:5. In fact, it is undisputed that the contract was a form contract that FreightCo could not negotiate. RP 11/4/2009 at 110:6-111:18 (Transgroup’s executive director of operations testifying that ICO contracts are the same “because [Transgroup has] to secure consistency across the system”); RP 11/2/2009 at 41:1-44:15; 62:5-9. The court did not consider the circumstances *at the time of contract* and, if it had, those circumstances would not have supported Transgroup’s practice of seizing givebacks after contract termination, which FreightCo was made aware of after signing the contracts and joining the Transgroup system. *See also* 11 RICHARD A. LORD, WILLISTON ON CONTRACTS § 32:7, at 434-35 (4th ed. 1999) (“In constructing a contract, a court seeks to ascertain the meaning of the

contract *at the time and place of its execution*") (emphasis added).

Under Berg and its progeny, the court cannot rely upon the "awareness" of FreightCo "*during the parties' contractual relationship*" about a practice that was not raised during the formation of the contracts.

Second, the trial court's factual findings about the "subsequent conduct" of the parties does not support the trial court's conclusion of law that Transgroup could keep givebacks. The trial court found that the parties were operating under a policy that givebacks were remitted to FreightCo at the end of the calendar year after the underlying invoice was issued. CP 254 (FOF 21, 25). There is no course of dealing history of the parties' conduct of modifying the giveback policy *after termination*. Indeed, by definition, the parties had no history of a giveback policy after termination. The contracts were terminated on a single occasion and Transgroup's practice of seizing givebacks was only implemented once.

Furthermore, to the extent that there is any ambiguity to the contract, it is the clear and long-standing law of Washington that any ambiguity in a contract must be construed against the drafter of the contract. See *e.g.* Parry v. Hewitt, 68 Wn. App. 664 (1992); *see also* Jones Assocs. v. Eastside Properties, 41 Wn. App. 462, 468 (1985)

("ambiguous contract language is strictly construed against the drafter"). The testimony at trial was undisputed that the contract was Defendants' form contract, and was "non-negotiable." Thus, the Court is asked to determine whether Defendants' contract clearly excludes givebacks from revenue after the termination of the contract (as distinct from during the term). However, givebacks are not addressed in the contract (nor were they discussed at the time of contract). Because the contracts govern the remittance of all revenue less the enumerated costs, Plaintiffs are entitled to all revenue unless the costs are specifically enumerated under the agreement. Diamond "B" v. Granite Falls Sch. Dist., 117 Wn. App. 157 (2003) ("Where the contract provides a general and a specific term, the specific controls over the general."). As the givebacks are not addressed in the contracts (and are not a cost), the trial court have should construed the contracts to provide that Appellants are entitled to remittance of givebacks.

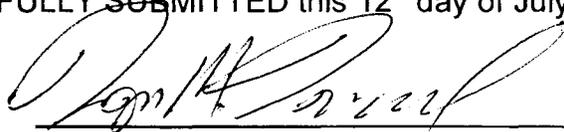
VI. CONCLUSION

The fully integrated contracts specify that all revenue is to be remitted to FreightCo, less expenses and the specified percentage to Transgroup. The trial court ordered that Transgroup may seize additional revenue after FreightCo terminates the contract.

Transgroup's post-termination practice was not specified in the

contracts and was not even discussed at the time the parties entered into the contracts. Furthermore, the practice was inconsistent with the course of dealing between the parties which provided for remitting givebacks annually. The trial court erred in looking outside the objective manifestation of the contract and relying upon its finding FreightCo was "aware" of (but did not consent to) Transgroup's practice *after* Freightco had entered the contracts and joined the Transgroup system. FreightCo's post-contract awareness that Transgroup would seize an additional category of its revenue is not a proper ground to modify the language of the contracts.

RESPECTFULLY SUBMITTED this 12th day of July, 2010



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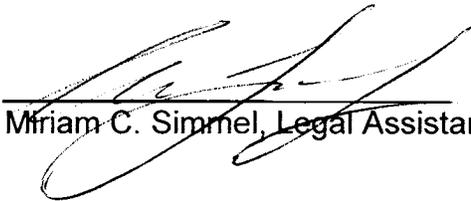
CERTIFICATE OF SERVICE

I, Miriam C. Simmel, certify and declare:

I am over the age of 18 years, make this Declaration based upon personal knowledge, and am competent to testify regarding the facts contained herein. On this 12th day of July 2010, I served true and correct copies of the document to which this Certificate is attached on the following in the matter listed below.

Kevin A. Bay, WSBA #19821	<input type="checkbox"/>	VIA FACSIMILE
Bryan C. Graff, WSBA #38553	<input type="checkbox"/>	Via First Class Mail
RYAN, SWANSON, CLEVELAND	<input type="checkbox"/>	Via Electronic Filing
1201 Third Avenue, Suite 3400	<input type="checkbox"/>	Via Email
Seattle, WA 98101	<input checked="" type="checkbox"/>	Via Messenger

I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.


Miriam C. Simmel, Legal Assistant

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