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No. 68843-0-1

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

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KARM ENTERPRISES, INC., a Washington corporation, and JOHN  
SJONG, an individual and resident of the State of Washington,

Appellants,

v.

BLUE ACE, LLC, a Washington limited liability corporation, and  
MICHAEL BURNS, and his marital community,

Respondents.

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REPLY BRIEF OF APPELLANTS

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## I. ARGUMENT

The standard the trial court applied to Karm's unjust enrichment claim – requiring “a benefit conferred upon the defendant by the plaintiff” – may have been appropriate for a claim based on a “loss” to the plaintiff. However, it was not appropriate for Karm's claim based on Blue Ace's “wrongful gain” in the form of harvest shares it received from the Freezer Longline Conservation Cooperative (“FLCC”) through its use of Karm's catch history. Because the trial court erred in dismissing Karm's claim simply because Blue Ace did not receive a benefit from Karm itself, and there are no alternative grounds for affirming the court's otherwise incorrect decision, this Court should reverse and remand for further proceedings consistent with the correct standard from the Supreme Court's decision in *Young v. Young*, 164 Wn. 2d 477, 191 P.3d 1258 (2008).

A. The “A-to-B” unjust enrichment standard applied by the trial court was not appropriate for Karm's claim based on Blue Ace's wrongful gain.

In arguing that it was entitled to judgment “as a matter of law,” Blue Ace limited its summary judgment motion to only the first element of what it represented to the trial court was the standard for an unjust enrichment claim – “a benefit conferred upon the defendant by the plaintiff” (or the “A-to-B” standard). RP 9. By contrast, the actual standard articulated by the Supreme Court in *Young* only requires that “the

defendant receives a benefit”— whether from the plaintiff or a third party — as long as the benefit is “at the plaintiff’s expense.” 164 Wn. 2d at 484-85. Notwithstanding Blue Ace’s arguments on appeal, the difference between the two standards is not just “slightly different language,” and it was not appropriate for the trial court to apply the A-to-B standard “in the context of the arguments Karm advanced below.” Resp. Brief, p. 17.

1. The difference between the A-to-B standard and the *Young* standard is not “slight.”

As Karm pointed out in its opening brief, the requirement that a plaintiff show it conferred a benefit upon the defendant may suffice for a claim involving the direct transfer of a benefit from plaintiff to defendant. App. Brief, p. 22. The A-to-B requirement may be appropriate for such claims because “the benefit on one side of the transaction corresponds to an observable loss on the other.” RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (2011) (“Restatement”) § 1 cmt. a.

However, the universe of unjust enrichment claims is not limited to those involving a “loss” to the plaintiff. “[T]here can be restitution of wrongful gain in cases where the plaintiff has suffered an interference with protected interests but no measurable loss whatsoever.” Restatement § 3 note a. In “wrongful gain” cases, “the consecrated formula ‘at the expense of another’ can also mean ‘in violation of the other’s legally

protected rights,' without the need to show that the claimant has suffered a loss.'" Restatement § 1 cmt. a. Cases in that category include claims for disgorgement of profits obtained through trademark infringement or violation of other "comparable rights to control the use of" information:

Distiller sells expensive whiskey under the trademark "Black & White." Brewer starts to sell cheap beer under the same name ... The parties are not business competitors, and there is no evidence that Distiller has sustained any injury from Brewer's activities. The court determines that Brewer has earned profits of \$25,000 attributable to the infringement. Distiller is entitled to recover \$25,000 from Brewer, both by statute (15 U.S.C. § 1117) and by ordinary principles of restitution (§ 51(4)).

Restatement § 42 ("Interference With Intellectual Property and Similar Rights"), illus. 9 (emphasis supplied).

The requirement that a plaintiff show it conferred a benefit on the defendant appears to have been incorporated into Black's Law Dictionary in 1990, which was quoted by this Court shortly thereafter in *Bailie Communications, Ltd. v. Trend Business Systems, Inc.*, 61 Wn. App. 151, 159-60, 810 P.2d 12 (1991) (Div. 1). Blue Ace contends the Supreme Court "relied" on that dictionary definition in *Young*, but that is not so. The Supreme Court did quote the dictionary definition but, instead of "relying" on it, the Court also quoted one its own decisions articulating yet another standard and, not satisfied with either, announced its reformulated expense standard. 164 Wn. 2d at 484-85.

Because the *Young* standard only requires that the defendant receive a benefit, not necessarily from the plaintiff directly, it suffices for claims based on a loss suffered by the plaintiff and corresponding benefit to the defendant and claims based on wrongful gain to the defendant at the expense of, but not necessarily obtained directly from, the plaintiff. On the other hand, because the A-to-B dictionary definition requires the benefit to the defendant be conferred by the plaintiff, it is limited to claims based on a loss to the plaintiff. That is why “[f]amiliar statements to the effect that a cause of action for unjust enrichment or restitution requires ‘a benefit conferred by the plaintiff on the defendant’ are seriously out of place in any discussion of restitution of wrongful gain.” Restatement § 3 note a. The Supreme Court in *Young* was correct to move away from the A-to-B standard and to adopt the more versatile expense standard. The difference between the two standards is anything but “slight.”

2. This case illustrates the error that can occur by applying the A-to-B standard to a claim based on wrongful gain.

Karm’s opposition to Blue Ace’s summary judgment motion advanced a claim based on Blue Ace’s wrongful gain rather than Karm’s loss, which accordingly should have been evaluated under the *Young* expense standard rather than the A-to-B standard. Tor Tollessen’s declaration established the essential facts of Karm’s claim:

- Under the parties' Vessel Purchase Agreement, Karm retained as its "property" the catch history of the STORFJORD associated with Karm's license LLG4513 because that license was not rendered transferable to Blue Ace, CP 111 ¶ 6, 114 ¶ 14, 117;
- Blue Ace nevertheless "put forward ... the catch history of the Storfjord ... that did not belong to Blue Ace" to the company, Tagart Consulting, that calculated the FLCC's "estimated quota share[s]," CP 113 ¶ 12, 115 ¶ 17; and
- The FLCC harvest shares Blue Ace stood to receive were "in large part" based on that catch history even though, as Mr. Tollessen put it to Mr. Burns of Blue Ace, the "catch history did not belong to him." CP 114 ¶¶ 14-15, 115 ¶ 7.

On those facts, Karm contended that Blue Ace was "unjustly enriched by putting forward the catch history of the Storfjord to the FCCL [sic] in conjunction with their own license which was a transferable license ... [I]t is clear that the plaintiffs are basing their claim on the defendants use of plaintiffs' catch history to obtain fishing rights from the FCLL [sic]." CP 108.<sup>1</sup> At oral argument, Karm further explained that "if the parties agree that the qualifying information, that being the catch history of the Storfjord[,] was what got them the 1.39 quota share from the FLCC, then that is a benefit conferred on the defendants." RP 24.

The unjust enrichment of Blue Ace at the heart of Karm's claim is Blue Ace's gain in the form of FLCC harvest shares it received through its

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<sup>1</sup> Blue Ace argues that Karm has "abandoned" what Blue Ace describes as Karm's contention that Blue Ace "took" or "absconded with" Karm's catch history to obtain FLCC harvest shares. Resp. Brief, pp. 16, 20. But Karm's claim was below and is now still based on Blue Ace's "use" of Karm's catch history.

use of the catch history Karm retained under the Vessel Purchase Agreement, rather than any loss to Karm. Karm's claim is therefore analogous to the trademark claim under Section 42 illustrated above, where recovery is based on the defendant's gain through use of information subject to the plaintiff's control. Restatement § 39 cmt. a (claim based on "opportunistic breach" is "an instance of restitution for benefits wrongfully obtained (§ 3). It is identical in principle to the claims described in Chapter 5, §§ 40-44 ... and it is properly understood by analogy to those claims.").

This case illustrates the error that can result from applying the A-to-B standard to a claim based on the defendant's gain rather than the plaintiff's loss, as the trial court dismissed Karm's claim simply because Karm ("A") had not transferred its license LLG4513 or related catch history to Blue Ace ("B"):

There has to be a benefit to be conferred upon the individual for which the law would require them [in] equity to pay, and that's why I kept pushing about the catch history unconnected to the license, because there is no benefit that was conferred as a result of this. This license was nontransferable, it could not be used, and you can't just attempt to sell the catch history independent because - - well, for a number of policy reasons that wouldn't be upheld ... And that's why you have to have the license that attaches that valuable right to it. And the contract itself recognized that. It said you get the license and the catch history, if it can be transferred. And the only thing that makes it valuable to a buyer is the fact that you can transfer

it and you can use it.

RP 32-33 (emphasis supplied); Resp. Brief, p. 4 (describing court's conclusion "that because Karm held no conferrable benefit with respect to LLG4513 or its catch history Blue Ace could not have been unjustly enriched as a matter of law").

The A-to-B standard's influence is evident in the Court's explanation for its decision, which shows it was searching for "the benefit on one side of the transaction [that] corresponds to an observable loss on the other." Restatement § 1 cmt. a. That transactional analysis is also reflected in the court's treatment of the actual basis of Karm's claim – Blue Ace's gain in the form of FLCC harvest shares – as "independent of anything that happened between" Karm and Blue Ace. RP 28; Resp. Brief, p. 7 (describing court's conclusion "that Blue Ace's allocation of FLCC quota was obtained 'independent of anything that happened between' the parties"). When Karm protested that "it was not independent in the sense that the catch history of the Storfjord belonging to my client was put forward for the FLCC and relied upon by the FLCC," the court responded with an "Okay" followed by a question about Karm's oral contract claim. RP 28. This case exemplifies the outcome-determinative results of applying the A-to-B standard to a case of wrongful gain, as the trial court focused on the absence of a loss-benefit "between" Karm and

Blue Ace and discounted the gain Blue Ace received from a third party, the FLCC, through its use of Karm's catch history.

3. The summary judgment record shows Karm did not advance, and the trial court did not assume it was ruling on, a claim based on Karm's loss of fishing rights.

Implicitly acknowledging the difference between the A-to-B and the *Young* expense standards may not be "slight" and that the trial court's application of the former may have been problematic, Blue Ace now re-characterizes the claim Karm presented to the trial court as one involving a loss to Karm: "Karm pleaded and consistently argued to the trial court that Blue Ace misappropriated the LLG4513 catch history and obtained FLCC quota that it should otherwise have been entitled to. CP 3, 5. Karm alleged that Blue Ace was directly enriched by obtaining a fishing right that should have been granted to Karm. [No cite.]" Resp. Brief, p. 17.

That statement is not entirely accurate, and the inaccurate portion is what matters. There is a single reference in Karm's complaint to the effect that the "quota share" that Blue Ace received "belong[ed] to plaintiffs." CP 5, ¶ 21. However, with respect to all other references to catch history and "quota" in the complaint, only catch history is alleged to "belong to" Karm. CP 3, ¶¶ 10, 11; CP 5 ¶ 20. More importantly, it is not true that Karm "argued" to the trial court on summary judgment that Blue Ace was unjustly enriched for having obtained fishing rights that Karm

should have received. That is what matters under RAP 9.12, which generally limits review of a summary judgment order to the “evidence and issues called to the trial court’s attention.”

The citation following Blue Ace’s assertion about Karm’s argument to the trial court is to Karm’s complaint (“CP 3, 5”), but that document was not made part of the summary judgment record. Blue Ace offers nothing from the record indicating that Karm sought recovery for the loss of fishing rights it should have received, or that the trial court understood Karm’s claim to be based on such a loss. If that had been the court’s understanding, it would not so quickly have moved on from the discussion of the harvest shares Blue Ace received from the FLCC.

B. Consistent with RAP 9.12, this Court may apply the correct standard to reverse the dismissal of Karm’s claim.

The first four pages of Blue Ace’s argument are dedicated not to a defense of the trial court’s decision, but rather in urging this Court to apply RAP 9.12 and not “address the substance of Karm’s argument on appeal.” Resp. Brief, p. 9. Blue Ace contends Karm waived its ability to advocate for application of the correct unjust enrichment standard on appeal because Karm’s counsel below did not expressly do so, and that Karm seeks reversal based on what Blue Ace describes as a new “contractual interference” theory of recovery. *Id.* at 3, 16. As explained

below, RAP 9.12 does not prevent this Court from reversing the trial court based on its application of the incorrect legal standard to the wrongful gain claim Karm advanced below.

1. An appellate court may apply the correct standard to issues preserved under RAP 9.12, even if that standard was not addressed before the trial court.

In *Rahman v. State*, the Supreme Court observed that “an appellate court is entitled to consider relevant law in deciding an issue, regardless of whether any party has cited it.” 170 Wn.2d 810, 823-24, 246 P.3d 182 (2011) (citing *Ellis v. City of Seattle*, 142 Wn.2d 450, 459 n.3, 13 P.3d 1065 (2000)). Division Two recently relied on *Rahman* in *Downey v. Pierce County*, 165 Wn. App. 152, 267 P.3d 445 (2011), to apply the correct legal standard to a due process claim that, like the unjust enrichment claim at issue here, came to the appellate court on appeal of a summary judgment order dismissing the claim.

With respect to “th[e] issue” of due process, Division Two declined for various reasons to apply the authority relied on by the plaintiff. 165 Wn. App. at 163 n.11-12. Instead, the court noted that “[t]hroughout these proceedings, neither party has addressed this [due process] issue under the [U.S. Supreme Court’s] *Mathews v. Eldridge* framework.” *Id.* at 163 n.11. Recognizing its “review is limited to the facts and issues called to the trial court’s attention,” Division Two also

observed that, under *Rahman*, it was nevertheless entitled to analyze the due process issue presented to the trial court pursuant to the *Mathews* framework, even though the parties had not done so. *Id.* at 160-61, 163 n.11 (quoting *Rahman*, 170 Wn.2d at 823-24). The appellate court then proceeded to apply the three-element *Mathews* analysis and reversed the summary judgment against plaintiff's due process claim. *Id.* at 165-67.

Consistent with *Rahman* and *Downey*, this Court may apply the *Young* expense standard to the claim Karm advanced below, even though that standard was not addressed by the parties or the trial court.<sup>2</sup> *See also Pasado's Safe Haven v. State*, 162 Wn. App. 746, 760 n.8, 259 P.3d 280 (2011) (Div. 1) ("In correctly deciding cases before them, courts are not restricted to the authority cited by the parties."). This rule is particularly apt on summary judgment, which is only appropriate if "the moving party is entitled to a judgment as a matter of law," CR 56(c), and which "should not be granted" even if the motion is unopposed. *Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988) (citing *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 302, 616 P.2d 1223 (1980)).

Apart from noting that Karm's counsel below did not explicitly raise the *Young* expense standard, Blue Ace seems to suggest counsel

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<sup>2</sup> Blue Ace suggests the trial court made a conclusion regarding the "expense" to Karm, Resp. Brief, p. 3, but the court made no such conclusion.

actually endorsed the A-to-B standard. Resp. Brief, p. 30. Blue Ace cites an allegation in Karm’s complaint that benefits “were conferred on the defendants.” *Id.* But that allegation – which uses the passive voice rather than the active voice with Karm as the subject – is consistent with the *Young* standard’s first element, which only requires that “the defendant receives a benefit” from some source, and not that the plaintiff itself confer the benefit on the defendant.

2. Analyzed under the correct standard, Karm’s claim should not have been dismissed.

This Court may now apply the appropriate standard from *Young* to its de novo review of the “evidence and issues” presented to the trial court, while “viewing all evidence in the light most favorable to [Karm as] the nonmoving party” and “conduct[ing] the same inquiry as the trial court” into whether Blue Ace was “entitled to judgment as a matter of law.” *Diamond “B” Constructors, Inc. v. Granite Falls Sch. Dist.*, 117 Wn. App. 157, 161, 70 P.3d 966 (2003) (Div. 1) (citations omitted). As detailed above, Karm’s claim was based on Blue Ace’s wrongful gain in the form of the FLCC harvest shares it received through its use of Karm’s catch history, rather than on any loss to Karm, and should not have been evaluated under the A-to-B standard applied by the trial court. In applying the first element of that standard, the court erred in concluding that Blue

Ace was entitled to judgment as a matter of law simply because Karm itself, as the plaintiff, had not conferred a benefit directly on Blue Ace, the defendant. Under the first element of the correct *Young* standard, the defendant only needs to receive a benefit – which Blue Ace received in the form of FLCC harvest shares – but not necessarily from the plaintiff.

Because the lack of a benefit to Blue Ace from Karm itself was the sole basis of the trial court’s decision, it is, consequently, the only basis on which Karm seeks reversal. Blue Ace set up reversal on this narrow ground by urging the trial court to apply a standard that was fundamentally flawed for the type of claim advanced by Karm. Because reversal is warranted under the correct standard, Karm does not need to switch theories, as Blue Ace suggests it is doing, to prevail on appeal. *See Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 508-09, 182 P.3d 985 (2008) (Div. 1) (refusing to consider “rescue doctrine” and contractual duty theories of liability on appeal when plaintiff argued “premises liability” to trial court).

The “new theory” Blue Ace contends is the basis on which Karm seeks reversal – “whether Blue Ace violated Karm’s ‘legally protected rights,’ thereby resulting in an ‘expense’ to Karm,” Resp. Brief, p. 10 – is not in fact that basis. Karm seeks reversal on the basis of the trial court’s application of the first element of the incorrect A-to-B standard – “a

benefit conferred upon the defendant by the plaintiff – while the “new theory” goes to the second element of the *Young* standard – “the received benefit is at plaintiff’s expense.” That issue concerns whether there are alternative grounds to affirm the trial court, rather than the question of whether the trial court erred.

C. Remand is required under RAP 2.5(a) because there are no alternative grounds for affirming the trial court’s decision.

Under the correct standard from *Young*, which does not require that the plaintiff itself confer a benefit on the defendant, the trial court erred by dismissing Karm’s claim simply because Karm did not confer a benefit on Blue Ace. Accordingly, under RAP 2.5(a), the dismissal of Karm’s claim should be reversed unless there is an alternative ground to affirm for which “the record has been sufficiently developed to fairly consider the ground.” As explained below, there are no such grounds, and so this case should be remanded to the trial court for proceedings consistent with *Young*.

1. The record as presently developed shows expense to Karm.

Karm took the position in its opening brief that the record was not sufficiently developed on the second element from the *Young* standard – the “expense” to Karm of Blue Ace’s use of Karm’s catch history to obtain FLCC harvest shares for itself – and therefore that this case should

be remanded. App. Brief, pp. 28-29. Blue Ace now criticizes Karm for not further developing the record below. Resp. Brief, p. 13. That criticism is ironic because one of the main reasons Karm gave for the record not being sufficiently developed was the absence of Blue Ace's version of the parties' course of conduct subsequent to entering the Vessel Purchase Agreement. App. Brief, p. 29. Although Blue Ace could have submitted a supplemental declaration of Mr. Burns on reply below, simply to establish "for the record" any disagreements it may have had with Karm's version of events set forth in Mr. Tollessen's declaration, it chose to forego such a declaration and instead opted for denials by its counsel. RP 15, CP 41.

The record, as it stands now, shows the "expense" to Karm from Blue Ace's use of the catch history Karm retained under the Vessel Purchase Agreement in violation of its obligations under that Agreement. By the terms of the Agreement, as between Karm and Blue Ace, the retained catch history was Karm's "property." CP 57. Blue Ace does not dispute that "property" is "ordinarily subject to its owner's control," or that "Blue Ace's acknowledgment of its obligation not to use Karm's catch history could be inferred from" the extrinsic evidence currently in the record. App. Brief, pp. 28-29.

Blue Ace's only response to the Agreement's terms and available extrinsic evidence appears to be that any obligation it may have had was "implicit." Resp. Brief, p. 23 n.1. The Agreement's designation of the catch history as Karm's "property" makes Blue Ace's obligation not to use it explicit. But even if that obligation were implicit, Blue Ace would be in no better position because "[n]ecessary implications are as much a part of an agreement as though the implied terms were plainly expressed." *Suess v. Heale*, 68 Wn.2d 962, 966, 416 P.2d 458 (1966) (citations omitted). "[U]pon regarding the contract as a whole," "[t]he parties cannot have intended" for Blue Ace, which paid only \$500,000 for Karm's vessel and which had not acquired Karm's license LLG4513 and related catch history priced at \$2 million, to nevertheless remain free to use for Blue Ace's own purposes the catch history that Karm retained as its property. *Id.*

As presently developed, the record shows Blue Ace's deliberate breach of the Vessel Purchase Agreement through its use of Karm's catch history/"property" to obtain FLCC harvest shares for itself, resulting in the required "expense" to Karm. App. Brief, p. 25. This Court would be justified on the current record not only in reversing the trial court's dismissal of Karm's claim, but also in remanding for entry of judgment in Karm's favor on liability. *Diamond "B"*, 117 Wn. App. at 159.

2. Karm's right to control the use of its catch history is not "illusory."

After asserting to the trial court that Karm's catch history "disappeared" upon the expiration of its license LLG4513, RP 9, Blue Ace now acknowledges the catch history "may not have 'disappeared.'" Resp. Brief, p. 26. That is not much of a concession, however, because Blue Ace substitutes that argument with a similar contention that Karm's right to control its catch history became "illusory" upon LLG4513's expiration. *Id.* Blue Ace's proposition is that a party's right to control the use of catch history depends on that party being eligible to receive fishing rights based on the catch history. *Id.* at 26. As with the authority Blue Ace cited for its argument on "disappearing" catch history, App. Brief, pp. 31-32, the single law review article it cites for its "illusory" argument, Resp. Brief, p. 25, actually supports Karm's position: "When people speak of 'transferring' catch histories, what they are referring to, precisely, is transferring the right to use a history of participation in the fishery to apply for a fishing permit or quota share." Bruce A. King, *Ships as Property: Maritime Transactions in State and Federal Law*, 79 Tul. L. Rev. 1259, 1321 (2005) (emphasis supplied).

That statement does not stand for Blue Ace's proposition that a party must be eligible for the permit or quota share before it may exercise

control over use of the catch history. Rather, the statement recognizes the right to use catch history is subject to contract and supports Karm's position that a party must first obtain the right to use catch history before actually using it. The statement is also consistent with the federal regulations Karm highlighted in its opening brief, under which retention of fishing history through "the express terms of a written contract" was a prerequisite to eligibility for a license and not the other way around, as Blue Ace proposes. App. Brief, pp. 4-5, 29.

3. Karm's ineligibility for FLCC harvest shares is irrelevant.

Blue Ace's "illusory" argument is just another way of framing its assertion that its use of Karm's catch history to receive FLCC harvest shares could not have been at Karm's expense because Karm was not eligible for the FLCC. Resp. Brief, pp. 27-29. However, as discussed above, the required expense to Karm does not depend on Karm's loss of harvest shares it should have otherwise received. Instead, Karm may support its claim by demonstrating Blue Ace's interference with Karm's contractual right to control the use of the catch history it retained under the Vessel Purchase Agreement, regardless of Karm's ineligibility for the FLCC, as the following illustration makes clear:

Analyst develops a pricing model enabling it to appraise complex financing leases which it acquires at auction for investor clients. Bank and Analyst discuss the possibility

of Bank's retaining Analyst to acquire such leases as agent for Bank. To enable Bank to evaluate its services, Analyst communicates full details of its pricing model; Bank promises that it will neither disclose the information nor bid on its own in future lease auctions. Advising Analyst that it has decided against investing in leases, Bank surreptitiously enters its own bid at auction and purchases leases in competition with Analyst. The nondisclosure and noncompetition agreement is valid and enforceable, and Bank's breach of contract is deliberate. Bank argues that Analyst has not proved damages: Analyst was only the third highest bidder, so Analyst would not have won the auction even if Bank had not participated. Analyst has a claim in restitution to the profits realized by Bank from the purchase of leases in breach of its contract with Analyst.

Restatement § 39, illus. 3 (emphasis supplied).

4. Karm lacks an adequate "damage remedy."

Blue Ace correctly notes that Section 39 of the Restatement recognizes a restitution claim based on "opportunistic breach" of a contract only to the extent the plaintiff's "damage remedy," if any, "affords inadequate protection" to its "contractual entitlement." However, contrary to Blue Ace's suggestion, the fact Karm seeks "monetary relief," Resp. Brief, p. 23, does not mean Karm has an adequate "damage remedy" within the meaning of Section 39.

The Restatement's comments demonstrate that "damage remedy" does not mean "money" generally, but specifically "compensatory damages" for "injury" or "loss." Restatement § 39 cmt. a ("§39 describes a *disgorgement* remedy: a claimant under this section may recover the

defendant's profits from breach, even if they exceed the provable loss to the claimant from the defendant's defaulted performance."), cmt. f ("The basic calculation of compensatory damages makes it highly unlikely, in any transaction for which there are market-based substitutes, that the gain to the defendant as a result of default will exceed the injury to the plaintiff from the same cause."); Restatement, ch. 4, intro. note ("§ 39 describes another alternative to damages measured by expectation: a claim to disgorgement of profit realized by the defendant, in consequence of the defendant's opportunistic breach.") (first emphasis in original).

Here, Karm suffered no discernible "injury" or "loss" when Blue Ace breached the Vessel Purchase Agreement by using the catch history Karm retained to obtain FLCC harvest shares. Blue Ace was not obligated under the option in the Agreement to pay Karm for license LLG4513 and associated catch history because the license was not rendered transferrable. Restatement § 39, illus. 12 ("[T]he breach of an obligation to pay money is the paradigm case in which money damages furnish an adequate remedy."). And, as explained above, Blue Ace did not obtain harvest shares that Karm should have received. Accordingly, Karm has not suffered an injury or loss for which there is an adequate "damage remedy." *Cf.* Restatement § 39, illus. 15 (A has adequate "cover damages" remedy for difference between \$5 per bushel contract price with

Farmer and \$6 market price A paid after Farmer breached; A not entitled to Farmer's profits on sale to B at \$10 per bushel).

Blue Ace cites a section of Mr. Tollessen's declaration in which he recounts a discussion with Mr. Burns of Blue Ace as evidence that Karm believes it is owed true compensatory damages for Blue Ace's breach of the Vessel Purchase Agreement, Resp. Brief, p. 23 n.1, but that section actually describes a restitutionary disgorgement remedy. Mr. Tollessen referred to Blue Ace's option to purchase Karm's license LLG4513 and related catch history, if the license became transferrable, as being "essentially invoked" because "quota had been the objective of the parties and Blue Ace was to receive the quota" based on catch history Karm still held under the option, which Blue Ace had not exercised because LLG4513 had not become transferable. CP 114. However, Mr. Tollessen did not assert that Blue Ace was somehow obligated under the terms of the Agreement to pay the \$2 million option price.

Rather, he recognized the "new circumstance" – Blue Ace's use of the catch history without having acquired it and the license from Karm – and proposed that Blue Ace pay Karm the \$2 million option price plus half the remainder of the fair market value of the harvest shares less the option price and certain costs, *id.*, an amount greater than the damage remedy for failure to pay the option price. Mr. Tollessen's proposal was essentially a

disgorgement remedy to address Blue Ace's receipt of "quota" through use of "catch history that did not belong" to it. *Id.*

5. Karm's claim is not barred by the statute of limitations.

Blue Ace is correct that statutory limitations periods begin to run "when the party has the right to apply for relief," Resp. Brief, p. 14, but it is incorrect about when that occurs. In addressing the same three-year statute of limitations relied upon by Blue Ace – RCW 4.16.080(3) – this Court observed that "[t]he statute of limitations ... begins to run when all elements necessary to the claim exist." *Murphey v. Grass*, 164 Wn. App. 584, 589, 267 P.3d 376 (2011) (Div. 1) (citing *Sabey v. Howard Johnson & Co.*, 101 Wn. App. 575, 592-93, 5 P.3d 730 (2000) (Div. 1)).

The event Blue Ace cites – a potential date of its breach of the Vessel Purchase Agreement through its use of Karm's catch history in connection with FLCC negotiations in 2007 – may have given rise to a declaratory judgment action at the time, but not to Karm's unjust enrichment claim. The first element of that claim – "the defendant receives a benefit" – did not exist until February 1, 2010, when the FLCC Membership Agreement became effective and Blue Ace received the FLCC harvest shares at issue here.<sup>3</sup> And the third element – "the

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<sup>3</sup> Blue Ace's statement that Karm "alleged" in its opening brief that Blue Ace "immediately benefitted" from its January 2007 breach is not correct. Resp. Brief, p. 14. The phrase "immediately benefitted" is Blue Ace's editorialization that conflicts with its

circumstances make it unjust for the defendant to retain the benefit without payment” – did not exist until Blue Ace repudiated its alleged oral agreement to pay Karm a portion of the value of the harvest shares once issued. Restatement § 70, cmt. f (“Just as there is no unjust enrichment before there has been enrichment, there is no unjust enrichment before the defendant’s retention of a benefit becomes unjust.”). The record does not reflect when that repudiation occurred, but considering the agreement’s terms, it would have had to occur after the harvest shares became effective in February of 2010.<sup>4</sup> Consequently, Karm’s claim, filed in September of 2011, CP 1, is timely.

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position below about the effective date of FLCC harvest shares. CP 28 (“Because the BS/AI groundfish fishery is still managed by NMFS on a derby-style basis ... the [FLCC] could not be effective until every eligible harvester participated – even one non-member LLP license holder eligible for the subsector could defeat a voluntary rationalization of the fishery by continuing to harvest ‘derby-style.’ Accordingly, it wasn’t until February 1, 2010 that the BS/AI longline catcher processor subsector was able to agree on and execute a membership agreement for its 100% subsector-participated cooperative, the [FLCC]”) (citations omitted); RP 6 (“It’s also important to note that that 2009 was the first year that the agency made a sector specific allocation to the group that was basically comprised of Freezer Longline Conservation Co-op. So it wouldn’t have made any difference anyway prior to that point [what the effective date of the FLCC’s Membership Agreement was] because that was the first year they could operate under that agreement.”).

<sup>4</sup> Alternatively, Blue Ace’s alleged “unwritten promise [to pay] may give rise to an estoppel to prevent the use of the statute of limitations if reasonably relied upon.” *Peterson v. Groves*, 111 Wn. App. 306, 311, 44 P.3d 894 (2002) (Div. 1) (citation omitted).

D. If this Court reverses and remands, the trial court's award of attorneys' fees to Blue Ace should be set aside because Karm may ultimately become the "substantially prevailing party."

Blue Ace insists the trial court's award of attorneys' fees to Blue Ace should be upheld "regardless of the outcome of this appeal," Resp. Brief, p. 30, but that argument is inconsistent with the standard for awarding attorneys' fees under a "substantially prevailing party" clause. Whether a party "substantially prevails" depends on "the extent of the relief afforded the parties." *Marassi v. Lau*, 71 Wn. App. 912, 916, 859 P.2d 605 (1993) (Div. 1) (citations omitted). Although Karm pleaded two claims below – for breach of an oral contract and for unjust enrichment – they were pleaded in the alternative. CP 4. Accordingly, Karm was only ever going to secure "relief" based on one or the other of the two claims. Karm is not challenging the dismissal of its oral contract claim, but it still may prevail on its alternative claim for unjust enrichment and could ultimately obtain a greater recovery under that claim. Depending on the value of the FLCC harvest shares issued to Blue Ace, any judgment in Karm's favor requiring disgorgement could result in significant relief to Karm supporting its status as the "substantially prevailing party."

Dated this 7<sup>th</sup> day of December, 2012.

Respectfully submitted,

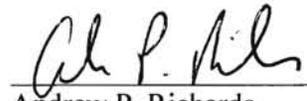


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Certificate of Service

I certify that I arranged for a copy of the foregoing "Reply Brief of Appellants" to be delivered via legal messenger to counsel for respondents, Mr. R. Shawn Griggs of Holmes Weddle & Barcott, P.C., at 999 Third Avenue, Suite 2600, Seattle, Washington 98104, on December 7, 2012.



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