# 18-1458-cv(L)

IN THE

## United States Court of Appeals

FOR THE SECOND CIRCUIT

LIFETREE TRADING PTE. LTD.,

*Plaintiff-Appellee,*

*v.*

WASHAKIE RENEWABLE ENERGY, LLC,

*Defendant-Appellant,*

*and*

ISAIAH KINGSTON, JACOB KINGSTON, RACHEL KINGSTON, WASHAKIE ENTITIES, 1-5 THE LAST FIVE NAMES BEING ENTITIES CURRENTLY UNKNOWN TO PLAINTIFF BUT BELIEVED TO HAVE ENTERED INTO A CONTRACT WITH, AND/OR PERPETRATED A FRAUD AGAINST, PLAINTIFF,

*Defendants.*

*On Appeal from the United States District Court*
*for the Southern District of New York*

## BRIEF AND SPECIAL APPENDIX FOR DEFENDANT-APPELLANT

[redacted]

[Page i of Brief omitted]

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**[Pages iv-6 of Brief omitted]**

6. This Court's review whether the District Court's decision rests on an error of law (such as application of the wrong legal principle); or a clearly erroneous factual finding or whether its decision though not necessarily the product of a legal error cannot fall within the range of permissible decisions under an abuse of discretion standard. *Wynder v. McMahon*, 360 F.3d 73, 76 (2d Cir.2004) *Clark v. All Acquisition*, LLC 886 F.3d 261, 266 (2d Cir.2018)

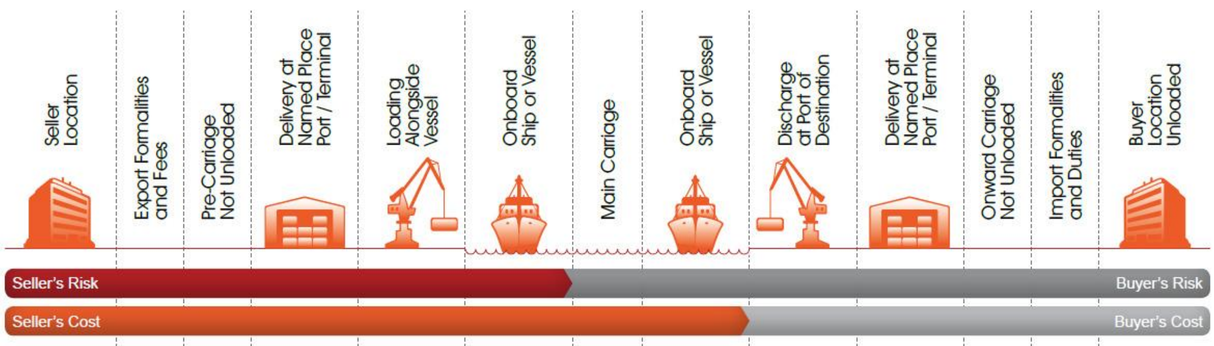
## SUMMARY OF ARGUMENT

Basic concepts of fairness and the interests of justice require the correction of the errors committed by the District Court which are the subject of this appeal.

To begin with, not only did the parties' contract designate New York as its forum and mandate its interpretation by New York's controlling law. Their primary contract also made inextricably clear that language in FOSFA 51 contrary to, or conflicting with, the express terms their written, underling contract was to be disregarded.[1] Yet, in its order denying WRE's motion for judgment as a matter of law, the District Court endorsed that the three types of damages awarded to LifeTree found their genesis in FOSFA 51". Vol. III, A787. The standard form

[1] In *M/S Bremen v. Zapata Off–Shore Co.*, 407 U.S. 13-14, 15, (1972) the Supreme Court stated there is a strong preference for upholding choice of law clauses because "agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting". See also, *Roby v. Corp. of Lloyds*, 996 F.2d 1353. 1363 (2d. Cir. 1993) [Such provisions also "eliminate uncertainty in international commerce and insure that the parties are not unexpectedly subjected to hostile forums and laws."]

FOSFA 51 contract is an "FOB" whereas the parties' primary contract was "CIFFO" and, regarding the latter, all the costs (aside for the shared cost of "weighing, sampling and assaying" of the SME was to be shared, Vol. I, A43, but shipping of goods to Texas were to be absorbed solely by Lifetree. Put another way, aside from the "shared cost" referenced above, under the parties' CIFFO contract, Washakie was only responsible for the cost of unloading at the destination port. (see explanatory, graphic chart below) [2]




William Rooz, LifeTree's CEO ["Mr. Rooz"], testified LifeTree "never sold an FOB" it sold either CIF or CIFFO", Vol. II, A293:12-13, and in differentiating between these two shipping terms, stated CIFFO means "the supplier . . . is responsible for the cost, meaning loading the material, the insurance, the freight . . . (and) [w]hen it gets to port, the customer is responsible to offload the material",

[2] Source: http://www.aitworldwide.com/ Intercoms-CIF

Vol. II A282:4-9; adding in his testimony that "a lot of these things in (the FOSFA 51) contract **had nothing** to do with this deal at all". Vol. II, A293::20-23. [emphasis added].

LifeTree's damage expert, J. Stephen Lucas [" Mr. Lucas"] testified to his "belief" he had "expertise in calculating damages for a breach of a biodiesel contract" was based on his previous review of "hundreds" of "FOSFA contracts" over the course of "44 years". Vol. II., A387:9-10, 14-20. A summary of his conclusions, all of which were based, primarily on the terms in FOSFA 51, was published to the jury. Vol. II, A391:21-25; A392:1. This demonstrative exhibit included "Three Categories of Damages": "1. Out of Pocket (FOSFA § 29): First Shipment: $7,243.570"; "2. Lost Profit Damages (FOSFA § 29): First SME Shipment: $1,783,200, Second SME shipment: $7,649,100"; Third SME Shipment: $7,649,100"; "3. Carrying Cost Damages (FOSFA § 29): First SME Shipment: $412,500; Second SME shipment $564,000"; for a total of $25,301,470". All these amounts were based on a "Contract Total Value" of $1,015,00/mt and the "Price of SME on the Default Date: $664.47 per metric tonne". [3] Vol. III, A728-729. (Demonstrative Evidence referenced by the Ruling on WRE's Rule 59 Motion. Vol. III A711-713).

[3] According to Mr. Lucas and LifeTree, the "default date" was "**December 15, 2014**". Vol. II, A310:17-18; A398:7-12.

In counterpoint to the basis for these damage calculations, Mr. Rooz testified LifeTree incurred no "shipping costs", Vol. II, A294:8-9, in the Washakie transaction. Of equal significance. Shimon Katz, LifeTree's CFO [Mr. Katz"] testified LifeTree never took "physical possession" of any biofuel in the Washakie transaction, Vol. II, A354:8-21, and, regarding LifeTree's duties and obligations under the terms of the parties' contract, Mr. Katz admitted LifeTree had only "*sourced* [4] the first 30,000 tons {italics added}" and (thereafter) waited for the letter of credit from WRE . . ." Vol. II, 328:14-17.

The issue of Washakie's stand-by letter of credit has been, and continues to be, of major significance in this litigation. From a legal perspective, it serves as the benchmark for when the contract was materially breached and sets the date from which damages are to be measured under New York law. *Maxim Group LLC v. Life Partners Holdings, Inc*., 690 F. Supp. 2d 293 (2d Cir. 2010). Over and above this legal context, Washakie's stand-by letter of credit, as contemplated by the parties, was to serve as an integral part of how this transaction would be structured and financed. The other integral role of the transaction financing, and one which can easily be lost sight of, is that the standard letter of credit LifeTree

[4] In his follow-up question. LifeTree's counsel metamorphosed Mr. Katz statement "We **sourced** . . ." into "Q. And after LifeTree **secured** this SME was it prepared to ship the material to Washakie? {emphasis added}". "A. Yes". Vol. II, A328;19-21. In is submitted these two divergent verbs connote two entirely different types of action.

would obtain from its financial institution, BNP Paribas. Mr. Rooz described the mechanics of the financing:

> "A . . . I never got a letter of credit from WRE, so never got a letter of credit from BNP to our supplier. It was a back-to-back transaction.
>
> "Q . . .That was the way the transaction was designed, that WRE was going to provide you with a letter of credit, you were going to give it to your bank, and they were going to finance the WRE transaction. Is that correct?"
>
> "A . . . Yeah, it is called - - well, yes, generally speaking, you're correct."

Vol. II, A306:8-16.

It is safe to say, for resolving contractual disputes, New York law is rather unforgiving. The intent of the parties, their respective liabilities and extent of their obligations thereunder, was clearly expressed by the contract when it was executed. Mr. Rooz testified the parties' contract was never was never officially amended, Vol. II, A307:3-10, and agreed to the reasonableness of the general statement ". . . one of the reasons you do a written contract and both parties sign is that the transaction is supposed to be guided by the language of the contract. Vol. II, A306:24-25; A307:1-2.

Under New York law, a material breach is a breach that "go[es] to the root of the agreement between the parties," and "is so substantial that it defeats the object of the parties in making the contract." *Felix Frank Assocs., Ltd. v. Austin Drugs, Inc.*, 111 F.3d 284, 289 (2d Cir.1997). Given this definition, every person who testified agreed WRE's failure to produce a stand-by letter of credit was a *material* breach of the parties' agreement and Mr. Rooz's testimony regarding how the parties contemplated the transaction was to be financed further bears this out.

Under New York law, damages are to be calculated at the time of the breach, *Boyce v. Soundview Tech. Group, Inc.*, 464 F.3d 376, 384 (2d Cir.2006) ("It is settled Second Circuit law that in a breach of contract case, damages are calculated at the time of the breach."). Here, the date of the material breach occurred on or about May 14, 2018. Since the April transaction, s listed in Lifetree's List of Transactions, Vol. II, A672, was **not**, according to Mr. Katz, part of "the 30,000 tons that was eventually to be shipped to WRE, Vol. II, A359:11-17, as of the date of Washakie's material breach LifeTree had suffered no damage whatsoever.

Assuming this was not the case, and LifeTree did suffer damages of $7,243.570 attributable to the "First Shipment", Washakie cannot be held legally responsible for this, or any other loss because, given the "back-to-back" financing arrangement, which called for reciprocal letters of credit, operated to obviate any such risk of loss by either party. See, *Ellerman Lines, Ltd. v. President Harding*, 288 F.2d 288, 290 (2d Cir.1961) ["the community's notions of fair compensation to an injured plaintiff do not include wounds which in a practical sense are self-inflicted."] This legal concept is even more compelling here given LifeTree's duty to mitigate and Mr. Rooz's contention LifeTree had no obligation to "reduce (its) exposure as much as possible". Vol. II, A274:8-9; See, *Wilmot v. State*, 344 N.Y.S.2d 350, 352–53, (1973).

It is equally settled under New York law that a party "may not pick and choose which provisions (of a contract) suit its purposes. . .". *God's Battalion of Prayer Pentecostal Church, Inc. v. Miele Assocs., LLP*, 6 N.Y.3d 371, 374 (2006). Upon viewing the appellate record as a whole it becomes manifest this is exactly what LifeTree has done in obtaining its damages.

## ARGUMENT

### A. THE PARTIES' CONTRACTUAL REQUIREMENT THAT WASHAKIE SECURE A "STANDBY" LETTER OF CREDITIS SUBSTANTIVELY AND MEANINGFULLY RELEVANT TO THE PROCEEDINGS AND OUTCOME BELOW SUCH THAT THIS COURT SHOULD EXERCISE ITS DISCRETION TO REVIEW THE ISSUE AT THIS STAGE AND RULE ACCORDINGLY.

If there is one point of clarity, it is that the parties' agreed that Washakie would "promptly" open "an irrevocable stand by letter of credit… covering full amount of a 30,000 MT shipment plus 5% and to be replenished immediately, if it is drawn upon or if contract is extended." The significance of this "irrevocable stand by letter of credit" cannot be overstated for another important reason as well; without it LifeTree could not obtain the standard letter of credit from its bank it intended to use to buy the first shipment of SME. Vol. II, A306:8-16.

The parties and proceedings indicate diametrically opposed perspectives on how to place the commercial terms "breach"; "default"; "cancellation"; and "termination" within this case's circumstantial context, because at bottom, this case deals with a transaction in the sale of goods[5] between sophisticated parties against a backdrop of some historical dealing.

A fulsome case review necessitates a brief discussion about the nature and purpose of the letter of credit ("LC") in the commercial arena. In *Nissho Iwai Europe PLC v. Korea First Bank*, 99 N.Y.2d 115 (2002), a case about a dispute over the issuer's payment of the underlying LC itself, the court explained the general nature and purpose of the letter of credit and the standby letter of credit[6]:

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[5] It is noted here that the FOSFA 51 Contract ¶ 31 references The United Nations Convention on Contracts for the International Sale of Goods of 1980 ("CISG") and expressly and appropriately states the required opt-out language that the CISG "shall not apply." The CISG applies to contracts for the sale of goods between parties of different nations which are signatories to the treaty. A contract is governed by the CISG in the absence of a choice of law provision and there is no precise written expression to opt-out of the CISG. When CISG is applicable, it preempts conflicting state law. *Valero Marketing Supply Co. v. Greeni Oy Greeni Trading Oy*, 373 F. Supp. 2d 475 (D.N.J. 2005). "When applicable, CISG preempts Article 2, Sales, of the UCC. When inapplicable, however, CISG does not displace Article 2. Both operate within their own sphere, creating horizontal bands of uniformity for the domestic and the international contract for sale of goods." *Id*. at 480 (*quoting* Richard E. Speidel, *The Revision of UCC Article 2, Sales in Light of the United Nations Convention on Contracts for the International Sale of Goods*, 16 Nw. J. Int'l L. & Bus. 165 167 (1995-1996).

[6] *Nissho* observed, 99 N.Y.2d at 120, n.1:

> Letters of credit are commercial instruments that provide a seller or lender (the beneficiary) with a guaranteed means of payment from a creditworthy third party (the issuer) in lieu of relying solely on the financial status of a buyer or borrower (the applicant). (internal citation omitted). Historically, letters of credit have been used to assure predictability and stability in mercantile transactions by diminishing a seller's risk of nonpayment and a buyer's risk of nondelivery due to insufficient funds (internal citation omitted). These "commercial" or "documentary" letters of credit are used as a substitute for money in a sales contract; the issuing bank pays the beneficiary upon certification of satisfactory performance in the underlying agreement (internal citations omitted).
>
> Letters of credit have evolved to serve an additional purpose—to provide security in the event of a default in payment owed under a separate agreement, such as a loan. (*see* 6B Hawkland UCC Series Rev. § 5–101:2, at Rev. Art. 5–7—5–8). A letter of credit serving this objective is referred to as a "standby" letter of credit because it is payable only upon proof of the applicant's nonperformance or default (*see Brenntag Intl. Chems., Inc. v. Bank of India*, 175 F.3d 245, 251 [2d Cir.1999]; Dolan, *The Law of Letters of Credit* ¶1.04, at 1–22). Stated another way, a commercial letter of credit substitutes as the primary means of payment, <u>while a standby letter of credit is used secondarily after the beneficiary fails to obtain payment from the applicant</u>

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The importance of letters of credit in international trade and financing cannot be overstated. At least five separate sets of model laws have been promulgated to govern their use: (1) article 5 of the Uniform Commercial Code, (2) the Uniform Customs and Practice for Documentary Credits (UCP 500), (3) the United Nations Convention on Independent Guarantees and Standby Letters of Credit, (4) the Uniform Rules for Demand Guarantees, and (5) the International Standby Practices 1998 (ISP98) (*see* Dolan, Analyzing Bank Drafted Standby Letter of Credit Rules, The International Standby Practice [ISP98], 45 Wayne L. Rev. 1865, 1867 [2000] ).

> (*see Federal Deposit Ins. Corp. v. Philadelphia Gear Corp.*, 476 U.S. 426, 428, 106 S.Ct. 1931, 90 L.Ed.2d 428 [1986] ). (emphasis added.)

*Nissho*, 99 N.Y. 2d at 119-20.

The record below contains abundant information about the WRE's LC and its procurement. LifeTree's CFO testified he was "familiar with irrevocable letters of credit and standby letters of credit. Vol. II, A362 [Trial Tr. 164:13-14]. As to a standby LC, "…that is basically a document that says that if we do not hit the client -- the client does not pay, then we, the bank, will pay you as long as you provide us with -- and then there will be one or two or three documents that I have to provide." Vol. II, A363 [Trial Tr. 165:2-7]. On the other hand, little mention was made of "back-to-back" financial arrangement which, according to Mr. Rooz, was the way LifeTree intended this going to get done. Simply put, LifeTree would give its lender WRE's stand-by LC and, upon its receipt, would then issue a standard LC to LifeTree which LifeTree would use to guarantee payment of the first shipment of SME. If WRE paid, its standby LC would again be relied on by BNP to issue another standard LC for the second shipment. If WRE did not pay for the first shipment BNP would avail itself to WRE's stand-by LC in guaranteeing its payment. In short, under this contemplated financing arrangement LifeTree's financial risk would be minimal – which is the whole purpose of using letters of credit.

Although neither party heretofore sufficiently stressed the importance of the issue of this interplay between LifeTree's "letter of credit" and Washakie's "standby letter of credit" in the proceedings below, this Court has the discretion to consider the categorical differences between the two, and the critical role they each played in how LifeTree's bank intended to finance the transaction, raised here and send it back to the trial court for further consideration and as justice may require. *See Amalgamated Clothing and Textile Workers Union v. Wal-Mart et al.*, 54 F.3d 69, 73 (1995) (*stating* that a federal court does not routinely consider matters not raised below but can do so to prevent "manifest injustice" or when circumstances indicate "extraordinary need" to take up the issue.).

Here the interplay between the "standard" letter of credit on the one hand and the "standby" letter of credit on the other goes to the heart of LifeTree's position in these proceedings and the incongruity of its arguments.

A "standby" letter of credit presupposes payment that first comes from the buyer, with resort to the letter of credit only after buyer does not willingly pay); *BasicNet S.p.A. v. CFP Services Ltd.*, 127 App. Div. 3d 157, 165, 4 N.Y.S. 3d 27, 32 (1st Dept. 2015) (*noting* that a standby letter of credit protects the beneficiary by ensuring that an obligation is performed and if not, allows the beneficiary to demand payment under the standby letter of credit after specified events "such as the default of the other party in the underlying transaction.") (internal citations omitted). Whereas a that a "regular" commercial letter of credit guarantees payment to the seller, *Federal Deposit Ins. Corp. v. Philadelphia Gear Corp.*, 476 U.S. 426, 428 (1986).

Here, the parties negotiated for a "standby" letter of credit and made it integral part oftheir contract. Equally, LifeTree relied on receiving one in order to complete its contemplated back-to-back financial arrangement with its bank. Why, then, did LifeTree purportedly make the business decision to continue forward on the contract and thereby assume the very same financial risks which letters of credit are meant to avoid?

Even if this was not the "back-to-back" transaction described by LifeTree's CEO during trial, it reasonably follows that, even if the required standby LC been had provided, LifeTree would have still been required to look first to Washakie, itself, not the LC if nonpayment occurred. In fact, this would be the case regardless of whether there was a standby LC in place or not. Yet, since LifeTree apparently did not seek direct payment from Washakie, which would have been the commercially reasonable next step regarding the first shipment as well as a proactive course to minimize damages in the earliest phase possible.

It is not disputed the standby LC was a foundational piece to their obligations under the contract and the only engine which could move the transaction forward. LifeTree's transactional records appear to bear this out. An

April 7, 2014 "Quote" for Seller Vitol S.A. and Buyer LifeTree Trading PTE LTD (Vol. III, A582-585) for 8.500 Metric Tons for June 2014 delivery contains the following payment term: "Documentary L/C to be opened and fully operable latest May 25, 2014. Otherwise as per FOSFA Contract Clause 18 FOSFA Contract Clause 18 is the "Payment" clause. Washakie had no duty to pay unless and until LifeTree had performed its demand obligations for payment, which clause states:

> Buyer's payment in . . . for 100% of the invoice amount (plus carrying charges, if incurred) by telegraphic transfer will be due two working days after presentation of documents…. Any monies due by either party to the contract to the other in respect to final invoices and/or accounts for items on deliveries fulfilling this contract shall be settled by either party without delay . . .

Vol. III, A582-585. This above quoted requirement as a condition for payment by Washakie, referring to the LC and in the alternative to Clause 18 can lead to only one conclusion — if the LC was not forthcoming, without LifeTree's completing its condition for payment, the breach of contract was based Washakie's failure to provide the LC, not payment for acquiring goods for which LifeTree had no obligation to perform. Since no direct payment demand was made, a reasonable conclusion to be drawn is the standby LC was critical to this parties' agreement and once Washakie could not promptly obtain the requisite standby LC, it was the parties' intent and agreement that the deal itself would not move forward.

Against this detailed backdrop, the seminal import the parties gave to the standby LC cannot be understated. Recognizing the conceptual underpinning of a LC — "speed of payment" and "certainty" in the commercial process — necessarily leads to the conclusion that the contractual requirement that a standby LC be "promptly" obtained was integral to the parties' deal and that failing to do so would undermine the requisite certainty needed to fulfill the contract objective. *See e.g.*, *Crawford v. Obrecht*, 171 Md. 562, 189 A. 809, 812 (Ct. App. Md. 1937) (*reciting* facts that defendant buyer of Argentine Feed Flour could not obtain required letter of credit under contract where "[B]uyers to open promptly on signing of the contract a banker's sight irrevocable letter of credit for the value of the merchandise in favor of the sellers in Buenos Aires," and opining this did not mean that the contract was not binding until the buyer had complied with this provision. *A failure to comply was, of course, a breach of the contract by the buyer*.) (emphasis supplied). *C.T. Chemicals (U.S.A.), Inc. v. Vinmar Impex, Inc.*, 184 App. Div.2d 441, 588 N.Y.S. 2d 1 (1992) (*holding* that under UCC § 2-735 ("Letter of Credit" Term; "Confirmed Credit") and § 2-703 (Seller's Remedies in General) "[d]efendant's failure to open a proper letter of credit to pay for either installment of the shipments constituted a breach of its contract with plaintiff, entitling plaintiff to demand payment for the goods delivered and to withhold the balance of the shipment due under the contract").

As the record developed is essentially devoid of any indication that LifeTree directly pursued collection of monies due for the first shipment and for which the damages calculation included not only the commodity price itself, but also the carrying charges that Washakie disputed were also due and owing.

### B. THE OPERATIVE CONTRACT EXPRESSLY REQUIRED WRE TO FIRST "PROMPTLY" OBTAIN AN IRREVOCABLE STANDBY LETTER OF CREDIT, AND WASHAKIE'S INABILITY TO DO SO BREACHED THE OPERATIVE CONTRACT AND DAMAGES "IF ANY" SHOULD BE CALCULATED BASED UPON THE DATE OF BREACH, MAY 19, 2014, AND THEREFORE LIMITED TO THE FIRST SHIPMENT.

New York law unequivocally recognizes that a party's failure to secure "a contractually-required letter of credit" forms the basis for breach of contract and damages. *Shirai v. Blum*, 207 A.D. 605, 202 N.Y.S. 540, 543 (App. Div., 1st Dept. 1924) (*holding* that plaintiff failed to perform an essential contract term, which was not extending a letter of credit, thereby rendering the contract abandoned and relieving the defendant of any further contractual performance). In *Honeywell Intern. Inc. v. Northshore Power Systems, LLC*, 32 Misc.3d 1223(A), 936 N.Y.S.2d 59, 2011 N.Y. Slip Op. 51398(U) (Sup. Ct. N.Y. Co. 2011), the court held, in the context of a motion to dismiss, that the matter would proceed against one of two defendants because the documentary evidence presented at that stage of the litigation set forth enough factual basis that defendant failed to obtain a contractually required letter of credit that would back guaranteed payment of

**[Pages 22-40 and Appendix of Brief omitted]**