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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

GEOFF TATE and SUSAN TATE, a married couple,

Plaintiffs,

v.

EDDIE JACKSON and TERESA GOLDEN-JACKSON, a married couple; SCOTT ROCKENFIELD and MISTY ROCKENFIELD, a married couple; MICHAEL WILTON and KERRIE LYNN WILTON, a married couple; TRI-RYCHE CORPORATION, a Washington corporation; QUEENSRYCHE MERCHANDISING, INC., a Washington corporation; and, MELODISC LTD., a Washington corporation,

Defendants.

NO. 12-2-21829-3 SEA

PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY JUDGMENT—BREACH OF CONTRACT

I. RELIEF REQUESTED

Plaintiffs Geoff and Susan Tate (the “Tates”) respectfully request the Court grant their Motion for Partial Summary Judgment, finding Defendants breached Mr. Tate’s employment contract when they fired him as the lead singer for Queensryche on June 5, 2012. Mr. Tate is a founding member of the band Queensryche, and has been its lead singer, brains and heart for the last 30 years. In 1994, Mr. Tate signed a valid, binding and enforceable employment contract with Tri-Ryche Corporation, Queensryche’s corporate form, under

1 which he agreed to serve as the “singer, musician, performer, [and] composer” for
2 Queensryche, and under which he can only be fired by an 80% vote of Tri-Ryche’s
3 shareholders. Mr. Tate’s employment contract has never been properly terminated or
4 modified and is still in full force and effect today. Mr. Tate owns 25% of the shares in Tri-
5 Ryche and the Defendants, collectively, own the remaining 75% of Tri-Ryche. Defendants
6 breached Mr. Tate’s employment contract by firing him without an 80% vote.
7

8 **II. STATEMENT OF FACTS**

9 Mr. Tate, along with the drummer, bassist, and guitarist, defendants Scott Rockenfield,
10 Eddie Jackson, and Michael Wilton (“Defendants”), and Chris DeGarmo, (“Mr. DeGarmo”)
11 founded the heavy metal band Queensryche more than 30 years ago. Declaration of Geoff
12 Tate (“Tate Decl.”), at ¶ 2. Under Mr. Tate’s leadership, Queensryche was very successful; it
13 repeatedly toured the world and has released over 12 albums that have sold between 25 and
14 30 million copies. *Id.* In total, the original Queensryche released 145 songs, of which Mr.
15 Tate co-wrote 117, or 81% of them. *Id.* at ¶ 3. By comparison, Mr. Rockenfield wrote one
16 song and co-wrote 32, for a total of 22%, while Mr. Jackson co-wrote 25 songs, or 17% of the
17 band’s total, and Mr. Wilton wrote one song and co-wrote 50, or 34% of the songs. *Id.* Mr.
18 Tate has co-written more songs than the three Defendants combined and because of that he
19 receives 33.66% percent of the band’s royalties, while Messrs. Rockenfield, Jackson, and
20 Wilton receive 6.60%, 4.64%, and 12.55% of the royalties, respectively. *Id.*
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24 Starting 24 years ago, the band members hired lawyers who helped them form three
25 Washington corporations to own all of Queensryche’s property, to handle the band’s
26 performances, revenue, recordings, royalties, merchandising and operations, and to draft
27 employment agreements with the band members. *Id.* at ¶ 4. In 1989 they formed the first
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1 company, Tri-Ryche Corporation (“Tri-Ryche”), and Tri-Ryche has and continues to be the
2 corporate form for the band, owning the band’s brand, its songs, its artist and publishing
3 rights, copyrights, handling its recorded performances and collecting and distributing all
4 revenue derived therefrom. *Id.* They formed the second company, Melodisc Ltd., in 1991 to
5 handle Queensryche’s touring and live performances. *Id.* And they formed the third
6 company, Queensryche Merchandising, Inc., in 1996 to handle Queensryche’s merchandising.
7 *Id.* Mr. Tate owns 25% of the shares of each of the three Queensryche companies
8 (collectively, the “Queensryche Companies”) and the Defendants, together, own the other
9 75%. *Id.* at ¶ 6.

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12 Until 1997 when he voluntarily left the band, Chris DeGarmo was a member of
13 Queensryche and owned an equal share of the Queensryche Companies. *Id.* at ¶ 6. Pursuant
14 to a Shareholder’s Agreement¹ in effect at that time, Mr. DeGarmo transferred his shares in
15 Tri-Ryche and the other Queensryche Companies back to each respective company when he
16 chose to leave Queensryche. *Id.* Consequently, Mr. Tate and each of the Defendants now
17 own 25% of the shares of each of the Queensryche Companies. *Id.* Following Mr.
18 DeGarmo’s departure, Mr. Tate became the de facto bandleader and Defendants spent
19 increasingly less time and energy in furtherance of the band’s businesses. *Id.* at ¶ 7.

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21
22 On June 6, 1994, Mr. Tate entered into an employment contract (the “Employment
23 Agreement”) with Tri-Ryche under which he gave up all his rights in the musical
24 arrangements, compositions, and lyrics he created for Queensryche in exchange for full-time
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28 ¹ The Defendants and the Tates agree that the Shareholder’s Agreement expired in 2004. See Defendants’
Motion for Partial Summary Judgment, page 4, lines 10-11 and Plaintiffs’ Response in Opposition to
Defendants’ Motion for Partial Summary Judgment, page 5, line 2. Under the now-expired Shareholders
Agreement, any shareholder who left the band such as Mr. DeGarmo, either voluntarily or involuntarily, would
be deemed to have simultaneously transferred his Tri-Ryche shares back to Tri-Ryche or the other shareholders.
See Exhibit 3 to Tate Decl.

1 employment and payment commensurate with his contributions to the band and Tri-Ryche.
2 *Id.* at ¶ 5 and Exhibit 1 to Tate Decl. At the same time, Mr. Tate executed a “Songwriters
3 Agreement”, which was incorporated into his Employment Agreement. A copy is attached as
4 Exhibit 2 to the Tate Decl. The Employment Agreement states that it “...embodies the entire
5 agreement and understanding between the parties and supersedes all prior agreements and
6 understandings related to the subject matter thereof.” Exhibit 1 to Tate Decl. The
7 Employment Agreement also states it, “*may not be modified or amended or any term of*
8 *provision hereof waived or discharged except in writing signed by the party against whom*
9 *such amendment, modification, waiver, or discharge is sought to be enforced.*” *Id.*
10 (emphasis added). The Agreement has never been properly modified and is still in full force
11 and effect today. Tate Decl. at ¶ 5. The Employment Agreement provides that Mr. Tate
12 could only be involuntarily terminated “*by the vote of the holders of eighty percent (80%) of*
13 *the shares of stock of the Corporation* (the “80% Requirement”).” *Id.* (emphasis added).
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17 After years of apathy and acquiescence to Mr. Tate’s stewardship of Queensryche,
18 Defendants entered into 2012 with the intent to take control of the band and the Queensryche
19 Companies. *See* Defendants’ Answer and Counterclaim, Docket # 91, p. 9 at ¶ 5 (“Defendant
20 Bandmates decided to start taking back control of the Queensryche corporations in 2012”).
21 Since they lacked a valid reason to terminate Mr. Tate’s Employment Agreement, Defendants
22 decided to make his life unbearable and to provoke him into a physical altercation they have
23 used as their sole justification for firing Mr. Tate.
24

25 Defendants put their plan into action on April 14, 2012, when Queensryche was
26 performing a show in Sao Paulo, Brazil. Shortly before going on stage, Defendants called a
27 band meeting at which they told Mr. Tate they had fired his wife, Susan, who was
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1 Queensryche’s manager, his daughter Miranda who handled, among other things, the
2 Queensryche merchandising, and his son-in-law, Chris Zukas, who was a guitar technician for
3 the band. Tate Decl. at ¶ 8. After the band took to the stage to get ready for the show, Mr.
4 Rockenfield taunted Mr. Tate by saying, “I fired your wife, I fired your daughter and your
5 son-in-law, and you’re next.” *Id.* Mr. Tate reacted angrily to the provocation and got
6 physical with Mr. Rockenfield and Mr. Wilton. *Id.* Despite this, the band went on to play the
7 show in Sao Paulo and to two more shows the following month. *Id.*

9 Not to be deterred, on June 5, 2012, Defendants, acting as the shareholders and
10 executive committee² of Tri-Ryche, passed the following corporate resolution:

11 1....***Unanimous Decision to expel Geoff Tate from the Band*** with all ramifications
12 that creates under the controlling agreements, including loss of any director or office
13 position within any of the Queensryche corporations, and ***triggering mandatory***
14 ***transfer and repurchase of any stock.***

15 1...Consider Geoff Tate ***expelled from the band*** as par the above stated details.

16 A copy of the corporate resolutions is attached Exhibit 4 to the Tate Decl. (emphasis added).

17 Since June 5, 2012, Mr. Tate has not been employed by Tri-Ryche or the band and has
18 received no compensation from the Queensryche Companies (other than historical royalty
19 payments) for any of the activities he formerly engaged in as the lead singer for the original
20 Queensryche. *Id.* at ¶ 11. Before being fired, Mr. Tate derived a significant portion of his
21 income from his employment with Tri-Ryche and the other Queensryche Companies as lead
22 singer of the band. *Id.*

23 This Court has already opined that the physical altercation in Brazil has no bearing on
24 the outcome of this case, stating:
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² Since that meeting, the Defendants have been running the Queensryche Companies via an “executive committee” that excludes Mr. Tate. *Id.*

1 But it is also the case that people fight. And people have lawsuits. There was
2 discussion of being like brothers. Well, brothers sue each other, and brothers have
3 lawsuits, but they also resolve matters.

4 ***

5 The-- *the issue of the fight*--again, *I don't think that's dispositive*.

6
7 Quoting the Transcript from the July 13, 2012 hearing on the Tates' Motion for a Preliminary
8 Injunction, at Page 4, lines 3-8, a copy of which is attached as Exhibit 1 to the Declaration of
9 Joshua Brower (emphasis added) ("Brower Decl.").

10
11 **III. STATEMENT OF ISSUES**

12 1. Whether the Court should grant the Tates' motion for partial summary judgment
13 for breach of contract because the Employment Agreement is a valid, enforceable and binding
14 contract that requires an 80% vote to fire Mr. Tate and the Defendants breached that contract
15 by firing Mr. Tate while holding only 75% of votes in Tri-Ryche?

16
17 **IV. EVIDENCE RELIED UPON**

18 The Tates rely upon the declarations of Geoff Tate and Joshua Brower, the exhibits
19 attached to those declarations, and the documents on file with the Court in this matter.

20
21 **V. AUTHORITIES AND ARGUMENT**

22 **A. Summary Judgment Standard**

23 "Summary judgment is appropriate only if the pleadings, affidavits, depositions, and
24 admissions on file demonstrate the absence of any genuine issue of material fact and the
25 moving party is entitled to judgment as a matter of law." *Sheehan v. Central Puget Sound*
26 *Reg'l Transit Auth.*, 155 Wn.2d 790, 797, 123 P.3d 88 (2005). Once the moving party
27 demonstrates entitlement to summary judgment, the opposing party must go beyond the
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1 pleadings and designate specific facts to show that there is a genuine issue for trial. *White v.*
2 *State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). The opposing party “may not rely on speculation
3 or argumentative assertions that unresolved factual issues remain.” *Id.* “[B]are assertions
4 that a genuine material issue exist will not defeat a summary judgment motion in the absence
5 of actual evidence.” *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000).
6 If the opposing party fails to establish the existence of a factual dispute essential to its case,
7 summary judgment should be granted. *Hines v. Data Line Sys., Inc.*, 114 Wn.2d 127, 148,
8 787 P.2d 8 (1990). There are no genuine issues of material fact regarding the Employment
9 Agreement and Defendants’ breach and thus the Tates are entitled to summary judgment as a
10 matter of law.
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12
13 **B. Defendants Breached Mr. Tate’s Employment Agreement.**

14 To prevail on summary judgment, the Tates must show that: (1) Mr. Tate had a valid
15 and enforceable contract with Tri-Ryche; (2) Defendants breached that contract; and (3) their
16 breach caused Mr. Tate harm. *See St. John Med. Ctr. v. Dep’t of Soc. & Health Servs.*, 110
17 Wn.App. 51, 64, 38 P.3d 383 (2002).
18

19 **1. Mr. Tate’s Employment Agreement is a Valid and Enforceable Contract.**

20 “Employment contracts are governed by the same rules as other contracts.” *Kloss v.*
21 *Honeywell, Inc.*, 77 Wn.App. 294, 298, 890 P.2d 480 (1995). The essential elements of a
22 contract are “the subject matter of the contract, the parties, the promise, the terms and
23 conditions, and...consideration.” *DePhillips v. Zolt Const. Co., Inc.*, 136 Wn.2d 26, 31, 959
24 P.2d 1104 (1998). Here, the Employment Agreement meets all requirements of a valid and
25 enforceable unilateral contract because it is in writing, evidences the essential terms of the
26 parties’ agreement, was signed by both parties, and is supported by consideration. *See Tate*
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1 Decl., Exhibit 1; *see also Flower v. T.R.A. Indus., Inc.*, 127 Wn.App. 13, 27, 111 P.3d 1192
2 (2005)(“A unilateral contract consists of a promise on the part of the offeror and the
3 performance of the requisite terms by the offeree.”). Mr. Tate’s 1994 Employment
4 Agreement provides, in part:

5 1. Retention of Services.
6

7 The Employee [Mr. Tate] will serve as a singer, musician, performer, composer
8 and in such other creative artistic capacity as may be reasonably requested by [Tri-
9 Ryche] and *will devote his full time and attention during normal business hours
10 to the business of the Corporation and use his best efforts to promote the
11 interests of the Corporation.*

12 Tate Decl., Exhibit 1, page 1 (emphasis added). In addition to being required to devote his
13 full time and attention to Queensryche, under his Songwriters Agreement, Mr. Tate:

14 ...hereby sells, assigns, transfer and sets over to [Tri-Ryche], its successors and
15 assigns, [Mr. Tate’s] *Musical Compositions (lyrics, music and title) and each and
16 every arrangement thereof, together with the world-wide copyrights thereof*, and the
17 right to secure copyright therein for the entire world....

18 Tate Decl., Exhibit 2 (emphasis added). Mr. Tate lived up this his end of the bargain by being
19 the singer, face and brains of Queensryche for nearly 30 years. *See* Tate Decl. at ¶ 7. Under
20 Mr. Tate’s leadership, Queensryche was extremely successful, touring the world and releasing
21 12 albums that sold approximately 25 to 30 million copies. *Id.* at ¶ 2. Mr. Tate also took his
22 songwriting responsibilities seriously: The original Queensryche with Mr. Tate at its helm
23 released 145 songs of which Mr. Tate co-wrote 117, or 81% of them. *Id.* at ¶ 3. Mr. Tate has
24 co-written more songs than the three Defendants combined and because of that he receives
25 33.66% percent of the band’s royalties while Messrs. Rockenfield, Jackson, and Wilton
26 receive 6.60%, 4.64%, and 12.55% of the royalties, respectively. *Id.*

27 In exchange for his service and devotion to Queensryche, Tri-Ryche and the
28 Defendants made a number of promises to Mr. Tate in his Employment Agreement, including:

1 2. Compensation of Employee.

2 (a) Publishing Compensation. The Employee shall be entitled to one
3 hundred percent (100%) of the net income realized by the Corporation
4 from the commercial exploitation of any musical composition actually
5 written and/or composed by the Employee and recorded by the musical
6 group “Queensryche” (the “Band”), as more fully set forth in the
7 Songwriter Agreement attached hereto as Exhibit A and conterminous
8 herewith (the “Songwriter Agreement”).

9 ***

10 6. Involuntary Termination of the Employee.

11 ***The Employee’s engagement hereunder may be terminated by the vote of
12 the holders of eighty percent (80%) of the shares of the stock of the
13 Corporation.***

14 ***

15 8. Miscellaneous

16 ...This agreement embodies the entire agreement and understanding
17 between the parties and supersedes all prior agreements and
18 understandings relating to the subject matter hereof. ***This agreement may
19 not be modified or amended or any term or provision hereof waived or
20 discharged except in a writing signed by the party against whom such
21 amendment, modification, waiver or discharge is sought to be enforced.***

22 Tate Decl., Exhibit 1 (emphasis added). Mr. Tate’s Employment Agreement, along with the
23 integrated Songwriters Agreement, embody and contain the entire agreement between the
24 parties, are supported by 19 years of consideration from Mr. Tate, and, to date, have never
25 been properly modified or terminated. Tate Decl. at ¶ 5. The Employment Agreement is a
26 valid, binding and enforceable contract. *DePhillips*, 136 Wn.2d at 31.

27 **2. Defendants Breached the Employment Agreement by Firing Mr. Tate.**

28 The Employment Agreement provides that Tri-Ryche can only fire Mr. Tate by an
affirmative vote of 80% of the Tri-Ryche shareholders. Tate Decl. at Exhibit 1, paragraph 8.
Mr. Tate owns 25% of the Tri-Ryche shares and the Defendants own the remaining 75%.
Tate Decl. at ¶ 5. Despite this, on June 5, 2012, the Defendants, acting on behalf of Tri-
Ryche, voted to fire Mr. Tate and force him to transfer his stock to them:

1 1....*Unanimous Decision to expel Geoff Tate from the Band* with all ramifications
2 that creates under the controlling agreements, including loss of any director or office
3 position within any of the Queensryche corporations, and *triggering mandatory*
4 *transfer and repurchase of any stock*.

5 *Id.* at ¶ 10 and Exhibit 4 (emphasis added). Defendants’ vote breached Mr. Tate’s
6 Employment Agreement because it violates the 80% Requirement. Moreover, in Washington,
7 it is axiomatic that majority shareholders in a corporation cannot simply “vote” to “expel” a
8 minority shareholder and “trigger a mandatory transfer and repurchase of any stock.” *See*
9 *generally, the Washington Business Corporations Act, Title 23B RCW* (The WBCA does not
10 provide for forced expulsion of a minority shareholder). In fact, Courts consider such harsh
11 and overreaching treatment by the majority shareholders of a minority shareholder to be
12 indicia of shareholder oppression by violating a minority shareholder’s reasonable expectation
13 of continued employment, such as Mr. Tate’s reasonable expectation of continued
14 employment with Tri-Ryche and the Queensryche Companies. *See Scott v. Trans-Sys., Inc.*,
15 148 Wn.2d 701, 711, 64 P.3d 1 (2003).³

16 3. The Defendants’ Breach Caused Harm to Mr. Tate.

17 As a result of the Defendants’ breach of the Employment Agreement, Mr. Tate has
18 suffered damage because he is no longer employed by Tri-Ryche as Queensryche’s lead
19 singer. Mr. Tate gave nearly 30 years of his life to Queensryche and was employed by Tri-
20 Ryche for 18 years. Tate Decl. at ¶ 1. He signed his Employment Agreement and, via his
21 Songwriter’s agreement, signed over his right and title in the 117 songs he wrote or co-wrote
22 in exchange for continued employment as the lead singer of Queensryche. *Id.* at ¶ 3 and
23 Exhibits 1 and 2. By firing Mr. Tate, the Defendants are reaping the benefit of Mr. Tate’s 30-
24 years’ worth of work in building the Queensryche brand and music while simultaneously
25 depriving Mr. Tate of his contractually bargained-for employment with Tri-Ryche and the
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28 ³ “‘Reasonable expectations’ are those spoken and unspoken understandings on which the founders of a venture
rely when commencing the venture. Application of the reasonable expectations test is most appropriate in
situations where the complaining shareholder was one of the original participants in the venture—one who would
have committed capital and resources.” *Citations omitted.*

1 band. Due to Defendants' breach, Mr. Tate no longer derives a significant part of his income
2 from being the lead singer of Queensryche through his employment with Tri-Ryche. *Id.* at ¶
3 11. While the Tates are asking the Court to determine, as a matter of law, that Defendants
4 breached the Employment Agreement, they are reserving their damages claim arising from
5 this breach for trial, where they will ask the Court to impose appropriate remedies, including
6 monetary and/or specific performance.
7

8 **C. Defendants Have No Defense.**

9 The Tates anticipate the Defendants will claim their action was justified because of the
10 physical altercation in Brazil; because the Employment Agreement was somehow changed by
11 Mr. DeGarmo's departure from Queensryche; or because of a mutual mistake. Such
12 arguments are meritless.
13

14 **1. Defendants Cannot Use Their Provocation of Mr. Tate to Justify Their**
15 **Breach of His Employment Agreement.**

16 Throughout this entire case, Defendants have repeatedly claimed the altercation in
17 Brazil justified their firing of Mr. Tate. In fact, they labeled an entire section in their failed
18 Motion for Summary Judgment "*DUE TO THE ASSAULT, GEOFF TATE'S FIRING WAS*
19 *JUSTIFIED.*" See Defendants' Motion for Partial Summary Judgment, page 6, line 4
20 (emphasis in original). There are at least two fatal flaws with this assertion.
21

22 First, Defendants provoked Mr. Tate into a physical confrontation and thus they
23 cannot use a situation they manufactured to justify breaching a valid employment contract.
24 Minutes before going on stage to play a show in Sao Paulo, Brazil, Defendants told Mr. Tate
25 they had fired his wife Susan, Queensryche's manager, his daughter Miranda, Queensryche's
26 merchandising person, and his son-in-law Chris, a guitar technician. Tate Decl. at ¶ 8.
27 Then, when they were on stage getting ready to play, Mr. Rockenfield taunted Mr. Tate by
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1 saying, “I fired your wife, I fired your daughter and your son-in-law, and you’re next.” *Id.* at
2 ¶ 9. Defendants’ reactions to the incident belie their attempt to make a mountain out of a
3 molehill: They played the show in Brazil minutes after the incident, and then went on to play
4 two more shows during the following month. And this Court has already opined that the
5 “fight” does not justify the Defendants’ actions, stating:

7 But it is also the case that people fight. And people have lawsuits. There was
8 discussion of being like brothers. Well, brothers sue each other, and brothers have
9 lawsuits, but they also resolve matters.

10 The-- *the issue of the fight*--again, *I don't think that's dispositive.*

11 Brower Decl., Exhibit 1, Page 4, lines 3-8 (emphasis added).

12 Second, Defendants may claim Mr. Tate’s actions somehow *breached* his
13 Employment Agreement. This argument also fails because a corporate officer such as Mr.
14 Rockenfield cannot induce a breach to obtain an economic advantage for himself and the
15 other shareholders as has accrued by eliminating Mr. Tate’s share of Queensryche’s revenue
16 since June 5, 2012. *See Deep Water Brewing, LLC v. Fairway Resources Ltd.*, 152 Wn.App.
17 229, 264, 215 P.3d 990 (2009)(Corporate officer not free to induce a contract breach merely
18 to obtain economic advantage).

20 **2. Defendants Cannot Unilaterally Reduce the 80% Requirement.**

21 The Tates also anticipate that Defendants will argue the 80% Requirement in Mr.
22 Tate’s Employment Agreement was somehow “amended” and reduced to a 75% requirement
23 after Mr. DeGarmo left the band in 1997. In 1994, when Mr. Tate signed his Employment
24 Agreement, there were five band members/shareholders, each of whom owned 20% of Tri-
25 Ryche. Because of that, it took the vote of four shareholders (80%) to fire an employee and
26 force a resale of his stock. The Tates anticipate the Defendants will claim that after Mr.
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1 DeGarmo left, the parties “intended” to reduce the 80% Requirement to a 75% requirement to
2 be consistent with the prior arrangement. The Court should reject any such argument for a
3 number of reasons.

4 First, it flies in the face of Washington law regarding the *construction* and
5 *interpretation* of written contracts. In Washington, “[i]t is the duty of the court to declare the
6 meaning of what is written, and not what was intended to be written.” *Berg v. Hudesman*, 115
7 Wn.2d 657, 669, 801 P.2d 222 (1990) (quoting *J.W. Seavey Hop Corp. v. Pollock*, 20 Wn.2d
8 337, 349, 147 P.2d 310 (1944)). In interpreting a contract, the court should give the words in
9 the contract their ordinary meaning. *City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584,
10 590, 259 P.3d 1017 (2012). In certain circumstances, extrinsic evidence may be admissible to
11 assist the court discerning the meaning of certain words or phrases, but such evidence cannot
12 change the plain meaning of the writing. *Berg*, 115 Wn.2d at 667-68 (quoting Restatement
13 (Second) of Contracts § 212 and § 212 cmt. b (1981)). As the Washington Supreme Court
14 explained in *Hearst Commc’ns, Inc. v. Seattle Times, Co.*:

15 Since *Berg*, we have explained that surrounding circumstances and other extrinsic
16 evidence are to be used “to determine the meaning of *specific words and terms used*”
17 and not to “show an intention independent of the instrument” or to “vary, contradict or
18 modify the written word.”

19 *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005)
20 (quoting *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695-96, 974 P.2d 836 (1999)(emphasis in
21 original)).

22 Here, the Court’s entire inquiry should start and finish with the plain language in the
23 Mr. Tate’s Employment Agreement because this case is readily distinguishable from seminal
24 contract interpretation cases such as *Berg* where the court had to resort to extrinsic evidence
25 to interpret the meaning of words in the document at issue. In *Berg*, the parties were fighting
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1 over the *meaning* of the term “gross rentals”, which was not defined in the subject lease and
2 is a term of art. *Berg*, 115 Wn.2d at 672. To resolve this dispute, the Court looked to the
3 parties’ historic behavior under which the landlord accepted the tenant’s accountings and rent
4 payments for at least four years before challenging the calculation and deductions for “gross
5 rent.” *Id.* at 677. As the *Berg* Court stated in determining the meaning of “gross rent”: “It is
6 well established that subsequent acts and conduct of the parties to a contract are admissible to
7 assist in ascertaining their intent.” *Id.* at 677-678 (*citations omitted*). Here, the words at issue
8 (i.e., the 80% Requirement) are plain, simple, and are not “undefined” terms of art. For
9 nearly 20 years there has been no dispute regarding the *meaning* of the words in the
10 Employment Agreement. Any extrinsic evidence introduced now to establish a different
11 interpretation would contradict the plain meaning of the 80% Requirement and cannot be used
12 to change what was written. *Hearst Commc'ns, Inc.* 154 Wn.2d at 503.
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15 Even is extrinsic evidence is necessary and admissible, the parties’ 18-year history
16 confirms this interpretation. Since 1994, the Defendants, as shareholders in Tri-Ryche and
17 the other Queensryche Companies, have received and obtained the benefit of Mr. Tate’s work
18 as lead singer and primary songwriter for Queensryche. They never questioned his
19 employment until 2012, when they decided “to take control” of the Queensryche Companies
20 and provoked the incident in Brazil to justify firing Mr. Tate. If the Defendants “intended” to
21 change the 80% Requirement to 75% after Mr. DeGarmo left the band, the time to do that was
22 1997, not 15 years later in June 2012.
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25 And last, Mr. Tate’s Employment Agreement contains express amendment and
26 modification provisions, none of which apply here. That contract requires Mr. Tate agree to
27 any amendment or modification, which has never happened. Any attempt to modify or amend
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1 the 80% Requirement without Mr. Tate’s written acceptance violates the plain meaning of
2 these provisions in the Agreement.

3 **3. The 80% Requirement is not a Mistake.**

4 Defendants may argue that they made a mistake by not *changing* the 80%
5 Requirement after Mr. DeGarmo’s departure. “A party may seek reformation of a contract if
6 (1) the parties made a mutual mistake; or (2) one of them made a mistake and the other
7 engaged in inequitable conduct.” *Denaxas v. Sandstone Court of Bellevue, L.L.C.*, 148 Wn.2d
8 654, 669, 63 P.3d 125 (2003). A mistake is a belief held at the time the parties entered into
9 the contract that is not in accord with the facts at that time. *Id.* at 668. *See e.g. Simonson v.*
10 *Fendell*, 101 Wn.2d 88, 675 P.2d 1218 (1984) (holding the contract for the purchase of a
11 business should be rescinded where the financial statement the parties used to value the
12 business erroneously omitted a fact that showed the business was insolvent). A mistake does
13 not include an erroneous belief regarding future events. Restatement (Second) of Contracts §
14 151 cmt a (1981). A party engages in inequitable conduct if it conceals a material fact from
15 the other party. *Washington Mut. Sav. Bank v. Hedreen*, 125 Wn.2d 521, 526, 886 P.2d 1121
16 (1994).

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20 Defendants’ 15-year failure to request an amendment or modification of Mr. Tate’s
21 Employment Agreement is not a mistake justifying contract reformation. First, any “mistake”
22 is unilateral, not mutual. Second, the “mistake” did not occur in 1994 when the contract was
23 made but only in 1997 when Mr. DeGarmo left the band. Third, Defendants’ belief that they
24 could fire Mr. Tate on a 75% vote is an erroneous belief that applied to a future event
25 occurring after entering the contract and thus does not qualify as a “mistake.” And, last, even
26 assuming, *arguendo*, that their belief is a “mistake”, Mr. Tate has not engaged in inequitable
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1 behavior and has not hidden his employment from Defendants and thus this doctrine is
2 inapposite to the current situation.

3 **VI. CONCLUSION**

4 For the reasons articulated forth above, Geoff and Susan Tate respectfully request the
5 Court enter an Order granting partial summary judgment against the Defendants on the claim
6 for breach of contract, reserving the issue of damages for trial.
7

8 DATED this 21st day of October, 2013.

9 VERIS LAW GROUP PLLC

10 By /s/ Joshua C. Allen Brower

11 Joshua C. Allen Brower, WSBA No. 25092

12 Benjamin J. Stone, WSBA No. 33436

13 Denver R. Gant, WSBA No. 38552

14 Attorneys for Geoff and Susan Tate
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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on this date I caused the foregoing document to be served on the following persons via the methods indicated:

Thomas T. Osinski, Jr., Esq.
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- Overnight Delivery via Fed Ex
- First Class Mail via USPS
- Hand-Delivered via ABC Legal Messenger
- Facsimile
- E-mail / King County E-Service

Dated at Seattle, Washington, this 21st day of October, 2013.

s/ Alison Sepavich
Alison Sepavich, Paralegal

4850-4506-3958, v. 4