No. 325776

COURT OF APPEALS OF THE STATE
OF WASHINGTON, DIVISION III

ROIL ENERGY, LLC, a Nevada Limited Liability Company, by and through the derivative claim of ALLAN HOLMS, a married man and a Washington resident; and ALLAN HOLMS, individually, a married man and a Washington Resident,

Plaintiffs/Appellants,

v.

JOSEPH ("JAY") EDINGTON and JANE DOE EDINGTON, husband and wife and residents of Spokane County, Washington; TOLL RESERVE CONSORTIUM INC., a Nevada Corporation recently renamed as HOLMS ENERGY DEVELOPMENT CORPORATION, a Nevada Corporation; VAL AND MARI HOLMS, husband and wife, and the marital community comprised thereof, residents of the State of Montana; HOLMS ENERGY, LLC, a Nevada Limited Liability Company, and BAKKEN RESOURCES, INC., a Nevada Corporation

Defendants/Respondents.

APPEALED FROM SPOKANE COUNTY
SUPERIOR COURT CAUSE NO. 12-2-010395
THE HONORABLE LINDA G. TOMPKINS

APPELLANTS' OPENING BRIEF

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"Greed is a fat demon with a small mouth and whatever you feed it is never enough."[1]

I. INTRODUCTION

This case is about unabashed greed involving a brazen conspiracy of one brother against another brother. The unlawful conduct involves one brother depriving the other of an agreed benefit of the bargain from a joint venture consisting of the commercial development and marketing of certain oil field mineral rights in McKenzie County, North Dakota.

Prior to 2009, Defendant Val Holms inherited property in North Dakota known as the McKenzie County Mineral Interests (the "Mineral Interests"). However, Val's negligible financial resources and poor business acumen prevented him from developing or capitalizing on his inherited Mineral Interests. Accordingly, in late 2009, Val offered to share his Mineral Interests "50/50" with his half-brother[2] (hereinafter "brother") Plaintiff Allan Holms, in exchange for Allan providing funding for a development and capitalization project. Allan accepted his brother's offer and proposed to develop Val's inherited Mineral Interests through the use of an existing public company, a process known as "Reverse

[1] Janwillem Van de Wetering (Author, 1931-2008).

[2] Allan Holms and Val Holms are half-brothers, having the same father, Archie Holms. For clarity, first names will be used where appropriate. No disrespect is intended.

Merger."[3] Allan then introduced brother Val to Jay Edington, a business acquaintance of Allan's who had experience using public corporations as investment vehicles for raising capital.

By late February 2010, Edington and brothers Allan and Val had commenced a joint venture by forming a private company called Roil Energy, LLC ("Roil Energy"). As a result, on February 19, 2010, Val conveyed his Mineral Interests deeds to Roil Energy. Then, at a meeting in Butte, Montana, Val gave ***notarized*** copies of the executed deeds to his brother Allan. In turn, based upon Val's representations that the original deeds had been sent to North Dakota to be recorded, Allan provided "seed money" to Roil Energy to cover the joint venture's immediate needs (including brother Val's salary), plus another $40,000 on behalf of the joint venture to purchase shares in Edington's public "shell" company. At the time, Allan was ready, willing, and able to perform his balance of all other commitments to the joint venture.

However, in early March 2010, brother Val abruptly announced to Allan via email that he (Val) intended to abandon their joint venture and he would keep the Mineral Interests. Despite Allan's substantial

---

[3] In a "Reverse Merger," "*a private company will contribute its assets to a publicly traded company that usually has no operations [i.e., the 'shell'] ... and ends up with the majority of the stock of the shell[.]*" RP 1016. Thus, "*the private company's shareholders end up with controlling interest in the shell.*" Id.

investment of time and money, Allan nonetheless accepted as truthful and supported Val's representations that the venture would be abandoned.

The fact is, Val's representations to his brother were blatant lies. Val had no intention of keeping his Mineral Interests. Rather, in a classic act of betrayal and avarice, Val conspired with Edington to eliminate Allan from the joint venture. Indeed, by or about February 24, 2010, Val and Edington had secretly developed a "Plan B", their deception involving "*circumventing and deceiving Allan Holms into believing that Val Holms was going to keep his minerals to himself and not move forward with the reverse merger/capitalization plan.*" CP 4431. Thus, Allan was fraudulently induced to abandon his involvement in the joint venture.

Unbeknownst to Allan, brother Val had surreptitiously formed a new private company (Defendant Holms Energy, LLC ("Holms Energy")) and did in fact complete a Reverse Merger with Defendant Bakken Resources, Inc.[4] ("Bakken" or "BRI"). Bakken was a "shell" company controlled by Edington's daughter. When Allan later discovered his brother's betrayal and fraudulent misconduct, he brought individual and derivative claims on behalf of Roil Energy in Spokane Superior Court

[4] Bakken is a Nevada corporation formerly known as Multisys Language Solutions, Inc. CP 4422.

seeking damages and re-conveyance of the Mineral Deeds back to Roil Energy.

After a two-week bench trial before Judge Linda G. Tompkins, Allan individually was awarded judgment against Defendants Val Holms, Holms Energy, and Bakken for fraud, breach of fiduciary duties, oppression of minority interest, and civil conspiracy to commit those torts.[5] Plaintiff Roil Energy was awarded judgment against Val Holms, Holms Energy, and Bakken for fraud, breach of fiduciary duties, and civil conspiracy. In addition, a declaratory judgment was granted finding that the attempted dissolution of Roil Energy by Defendant Val Holms was unlawful and ineffective under Nevada law, and was an integral part of Defendants' conspiracy to defraud Plaintiff Roil Energy. The Court further declared Allan's derivative actions to be successful in part and awarded him $412,933.08 in attorney fees and costs.

However, despite granting declaratory judgment to the Plaintiffs, the Trial Court nonetheless committed reversible error in: (1) concluding that no enforceable agreement or contract for a joint venture was made by and between brothers Allan and Val Holms; (2) concluding that extrinsic evidence of Val Holms' subjective intent to conditionally deliver executed and acknowledged Mineral Deeds defeated the plain language of the

[5] Defendant Jay Edington settled with Plaintiffs prior to trial. CP 2235-38.

Deeds, thus preventing their delivery as a matter of law; (3) refusing to award damages and/or impose a constructive trust; and (4) dismissing Plaintiffs' Tortious Interference with Business Expectancy claims on summary judgment.

II. ASSIGNMENTS OF ERROR

1. The Trial Court erred in concluding that no enforceable agreement or contract for a joint venture was made by and between brothers Allan and Val Holms.

2. The Trial Court erred in concluding that extrinsic evidence of Val Holms' subjective intent to conditionally deliver executed and acknowledged Mineral Deeds defeated the plain language of the Mineral Deeds preventing delivery as a matter of law.

3. The Trial Court erred in refusing to award damages and/or impose a constructive trust.

4. It was error to dismiss Plaintiffs' Tortious Interference with Business Expectancy claims on summary judgment.

III. ISSUES

1. Whether the Trial Court erred in concluding that no enforceable agreement or contract for a joint venture was made by and between brothers Allan and Val Holms?

2. Whether the Trial Court erred in concluding that extrinsic evidence of Val Holms' subjective intent to conditionally deliver executed and acknowledged Mineral Deeds defeated the plain language of the Mineral Deeds preventing delivery as a matter of law?

3. Whether the Trial Court erred in refusing to award damages and/or a constructive trust?

4. Whether it was error to dismiss Plaintiffs' Tortious Interference with Business Expectancy claims on summary judgment?

IV. STATEMENT OF THE CASE

A. Plaintiff Allan Holms – Architect of the Reverse Merger.

In November 2009, Defendant Val Holms faced a grim and uncertain financial future. RP 1219-20. He had inherited certain mineral interests located in McKenzie County, North Dakota (the "Mineral Interests") (RP 1213-14), which he transferred into his wholly owned Nevada company, Defendant Toll Reserve Consortium, Inc. ("Toll Reserve") (now known as "Holms Energy Development Corporation"). CP 4422. Yet, Val lacked the financial resources and business acumen to capitalize on his inherited mineral rights. RP 1219-20. After he failed to qualify for a commercial loan, Val approached his brother Allan requesting a loan of $80,000 to start an auto repair shop. RP 1218-20. Allan instead encouraged Val to develop his inherited Mineral Interests by means of a Reverse Merger involving an existing public company. RP 1222. Allan then introduced Val to a business acquaintance who had experience using public corporations as investment vehicles for raising capital. RP 1223-24. That acquaintance was Jay Edington. Id.

After the initial meeting with Edington, Val "*pressed the issue*" of capitalizing his Mineral Interests through a Reverse Merger. RP 285. In

doing so Val offered to "*share 50/50 down the line*" with his brother in exchange for Allan providing funding for the venture. Id.; Exs. P-163, P-165. As Allan later explained, "*I had responsibilities I had to contribute to make this all work, and* ***he offered half his minerals to me***." CP 3967 (emphasis added).

By January 2010, the three men – brothers Allan and Val, and Edington – agreed (1) to form a private Nevada limited liability company (Roil Energy) to hold legal title to the Mineral Interests and (2) to use their equity interest in Roil Energy to acquire a majority of shares and board control of a public "shell company." Exs. P-31, P-35, P-94. Val's contribution was to be the Mineral Interests while Edington was to locate an appropriate public corporation employing his skill and experience in capitalizing companies by means of a Reverse Merger. RP 291. Allan, who was the architect of the Reverse Merger strategy and the one who brought the parties together, agreed to provide approximately $200,000 in seed capital and to raise approximately $2 million from private equity investors. CP 4423-24; RP 291-92, 1231.

In exchange for their respective promised contributions to the joint venture, brothers Allan and Val agreed to modify their 50/50 agreement and to compensate Edington for employing his "sweat equity" with a 20 percent ownership interest in the to-be formed Nevada LLC. RP 331, 632;

Exs. P-163, P-165. In doing so, the Holms brothers agreed to remain in an equal equity position with respect to one another, with each brother owning a 40 percent interest. Id.

By 1/19/2010, Val "*ha[d] put together a company profile on power point*," but was "*[s]till waiting for the laundry list*" of action items. Ex. P-52. The following day, 1/20/2010, Allan provided the "laundry list" and cautioned Val, "*[m]ost importantly, you have to come to grips with the contribution of your interest in the oil patch to a new company.*" Ex. P-54. Allan continued: "*you are forming a new corporation and you are contributing your leases and the royalty income generated from those leases. In other words, the title to the properties will transfer to the new corporation [Roil Energy].*" Id. Further, Allan assured his brother that "*[t]he success of the entity will depend on you, as its President and chief executive officer*" and that the "*most important item is you will be ... in control of your company.*" Id.

A few days later, on 1/23/2010, Val contacted Edington to arrange a meeting of the joint venturers. Ex. P-55. On 1/24/2010, Val told Edington to "*[b]e patient*" and assured him that "*if we all hang together it will be a big time winner for us all.*" Id.

B. Edington Identifies The Public "Shell Company."

On 2/1/2010, Edington identified "APD Antiquities, Inc." ("APD") as the public "shell" company targeted by their joint venture. Ex. P-67. Because APD was undercapitalized, Edington proposed that Allan, on behalf of the joint venture, "*purchase shares from some of the existing shareholders of [APD]*" and "*purchas[e] 2,500,000 shares directly from the company.*" Ex. P-120. By injecting investor capital into the "shell," Allan made it possible for the public company to eventually purchase the Mineral Interests, thereby completing the Reverse Merger. Id. Accordingly, in a series of emails dated 2/1/2010, Edington provided the Holms brothers with APD's shareholder list; a sample Stock Purchase Agreement; and a "standard asset acquisition agreement." Exs. P-71, P-72, P-74. In addition, Edington expressly confirmed that he "*spoke with Val for a few minutes and advised him that we were moving quickly[.]*" Ex. P-72.

On 2/10/2010, Allan notified Val that (1) "*[w]e will be forming the LLC*" in Nevada and – consistent with the brothers' 50/50 agreement – (2) "*[o]wnership of the LLC would be Val Holms and Allan Holms.*" Ex. P-94.

On Saturday, 2/13/2010, "*the responsibilities of each [party] were outlined in an action item and timeline chart prepared by Jay Edington*

and presented to Val and Allan[.]" CP 4424, Finding No. 15. Notably, pursuant to Edington's week-by-week "*Action Item and Time Line Chart*" (the "Project Time Line"), Allan was not expected to fully fund his $200,000 "seed money" commitment until 3/1/2010. Ex. P-101. The following Wednesday, 2/17/2010, Allan and Val received "*Instructions for Acquisition of APD shares*" from Edington. Ex. P-120. "*As far as the funds for the LLC,*" Edington recommended to the Holms brothers "*that [Allan] could make an initial deposit for $40-50,000 for the express purpose of covering normal expense[.]*" Id.; RP 629.

C. Val Deeds His Mineral Interests To Newly-Formed Roil Energy, LLC.

On 2/19/2010, Val Holms organized Roil Energy, LLC as a member-managed limited liability company by filing Articles of Organization with the Nevada Secretary of State. Ex. P-134. Brothers Val and Allan, along with Edington, were each designated a "manager-member" of Roil Energy. Ex. P-135. Roil Energy subsequently obtained a federal tax identification number and opened a bank account funded by Allan. Exs. P-132, P-129.

That same day, 2/19/2010, Val met with brother Allan in Butte, Montana. RP 366, 1237-38. Allan's wife, Robyn Holms, and Allan and Val's nephew, Tommy Greenfield, were also present during that meeting.

RP 1048, 963. Prior to their meeting, Val had prepared two "Mineral Deeds." RP 916-20; Ex. P-130; see **Appendix A**. It is beyond dispute that the Deeds were executed by "*Val M. Holms, President, Toll Reserve Consortium*" and properly notarized that same date. Id. Additionally, the plain language of the Deeds provides that Toll Reserve, as Grantor,

> *for and in consideration of the sum of Ten and no/100 Dollars ($10.00), cash in hand paid and other good and valuable considerations, the receipt of which is hereby acknowledged, do[es] hereby* ***grant, bargain, sell, convey, transfer, assign, and deliver*** *of the below described mineral rights unto ROIL ENERGY, LLC ... all of Grantor's right, title, and interest in the oil, gas, and other minerals lying in and under and that may be produced from [the Mineral Interests].*

Id. (emphasis added). Val gave notarized copies of the yet unrecorded Deeds to Allan, assuring him the original Deeds had been sent to the McKenzie County, North Dakota auditor for recording. RP 367-69, 1050-51.

Also at the Butte meeting, Allan and Val discussed Roil Energy's startup and payroll needs. RP 369. In direct reliance on Val's representations that the original notarized Deeds were sent to North Dakota for recording, Allan at Val's request, provided $10,000 in initial seed capital to cover Roil Energy's immediate expenses, including brother Val's salary. Id.; Exs. P-128, P-129.

In addition, Edington later recalled that "*when [Allan and Val] had the meeting in Butte ... the two of them had reached agreement*" to modify the brothers' previous 50/50 agreement such "*that it was 40 for Val, 40 for Allan and 20 for Jay.*" RP 632. Shortly after meeting with Allan in Butte, Val "*called [Edington] and made the statement something to the effect, the deal's done. It's signed. Let's get ready to go, partner.*" RP 633.

D. The Parties Commence Joint Venture Business.

On 2/22/2010, Edington revised and updated the Time Line based on progress made to date by "*designat[ing] with X*" those items which "*have been completed.*" Ex. P-137. Chief among the "completed" items – Val's obligation to "*Assign Mineral Rights to Roil and properly record and file.*" Id. at Bates No. 166-67. Nothing in the revised and updated Time Line affected in any way the parties' mutual understanding that Allan was to "*provide $200,000 as Starting Equity*" by 3/1/2010. Id.

At the same time (2/22/2010), Edington also provided "*three draft documents*" related to the Reverse Merger – (1) a "Securities Purchase Agreement"; (2) a "Written Consent of Directors" for the "shell" company; and (3) a "Material Definitive Agreement" required by the SEC. Id. By 2/23/2010, Edington had drafted a "Letter of Intent" between APD (the "shell" company) and Roil Energy concerning APD's purchase of Roil Energy's Mineral Interests (Ex. P-141), as well as an "Executive

Summary" of the public "shell" for the joint venture to provide to would-be investors (Ex. P-147). Further, on 2/28/2010, Edington provided a draft of an Operating Agreement for Roil Energy. Ex. P-171. Thus, by the end of February 2010, their joint venture was substantially performed, but things were about to take a decided turn.

E. The "Plan B" Conspiracy Concocted To Eliminate Allan.

Unbeknownst to Allan, by 2/24/2010, Val and Edington had secretly developed their "Plan B"; a deception to "*circumvent[ ] and deceiv[e] Allan Holms into believing that Val Holms was going to keep his minerals to himself and not move forward with the reverse merger/capitalization plan.*" CP 4431, Finding No. 54; Ex. P-154.

In fact, throughout late February and March 2010, Val repeatedly sent emails to Allan "ghost-written" and/or pre-approved by Edington. Id. The sole purpose of those emails was to deceive Allan into believing that Val had abandoned their joint venture. Id. The goal was to fraudulently induce Allan to abandon his involvement in it as well. Id.

On 2/24/2010, in furtherance of their conspiracy to defraud Allan, Edington re-assured Val "*the [P]lan B is feasible if we can each come up with $25,000.*" Id. Later that same day, Edington provided Val with instructions about how to "*create a new e-mail and hi[t] paste and it should be on the e-mail ready to go to Allan.*" Ex. P-155.

Indeed, the following day, 2/25/2010, Allan received a disturbing email, which at the time he believed was from his brother Val; but in reality it had been drafted by Edington:

> *I apparently overlooked a very important piece of the puzzle. I see that 2.5 million shares [of APD stock] are being purchased from the company ... and some additional shares from existing shareholders.*
>
> *I am very disappointed that this has not been brought to my attention. Is it safe to assume that Iam (sic) participating in this transaction concerning these shares? Are they being purchased for all three of the partners or is this another one of your self enrichment (sic) deals that does not figure me into the equation?*[6]

Exs. P-160, P-161.

On 2/26/2010, Allan – who at the time still had no knowledge that Val was in fact conspiring with Edington – reminded brother Val that "*[t]he deal has not changed and is as discussed with you numerous times,* ***we share everything 50/50***" with respect to each other and (2) "*[s]upposedly I receive my cost back in the future and we share those [APD] stocks 1/3; 1/3; and 1/3. They will not even be issued in my name.*" Ex. P-163 (emphasis added).

---

[6] In fact, Val knew from at least 1/7/2010, that (1) Edington intended to "*secure some options [for Allan] to purchase shares in the shell for a very nominal price*" and (2) Allan would buy the shares "*in such a way that it would inure to [Val's] financial benefit[.]*" Ex. P-35. Further, Val received frequent updates and additional detailed information regarding the APD stock transactions. Exs. P-67, P-71, P-72, P-74, P-82.

Not only was Allan "*currently putting up all of the money to buy the shares from existing people*" (Id.), but Allan was instructed "*to wire funds directly to APD today[.]*" Ex. P-164. Accordingly, Allan requested of Val that "*[i]f there is going to be a concern on your part,* ***let me know before noon when I am supposed to send the wires.***" Ex. P-163 (emphasis added).

At approximately 11:30 that same morning (2/26/2010), Val unequivocally agreed: "*Sounds good to me.*" Ex. P-165. Indeed, Val confirmed that he and brother Allan would "*share everything 50/50*" and instructed Allan to "*[g]o ahead and wire the money*" to purchase shares in the "shell" company, APD. Exs. P-163, P-165. In reliance on his brother's representations affirming the "*50/50*" deal between the brothers, Allan did in fact wire $40,000 to purchase APD shares on behalf of their joint venture. Exs. P-120, P-248.

On 3/4/2010, Val abruptly announced to brother Allan via email that he (Val) intended to abandon their joint venture and keep the Mineral Interests. This change was allegedly based on a purported position articulated by Allan that he was "*not wanting to go forward with it[.]*" Ex. P-183. Unbeknownst to Allan, Val's 3/4/2010 email had been pre-sent to Edington for review and approval before being sent to Allan. Ex. P-182.

The next morning (3/5/2010), Allan corrected Val's misstatement: "*you misinterpreted what I said yesterday.*" Ex. P-185. Further, Allan unequivocally confirmed that "*I am still fully committed to proceed with the Bakken Resources plan.*" Id. Over the next few days, Val inexplicably ignored multiple communications from Allan. Exs. P-190, P-191, P-194, P-202. Yet, Val was in frequent communication with his co-conspirator Edington during this same period. Id.

On 3/7/2010, Allan was "cc'd" on an email that Edington sent Val in which Edington purported to press Val for a decision "*as to [his] current thinking*" regarding Bakken. Ex. P-201. Six minutes later, the sinister nature of the greed-driven conspiracy to defraud Allan was brazenly confirmed by Edington in a private follow-up email to Val:

> *Ok Buddy, I opened the door for you with my previous e-mail. This was me pushing for a decision, not Allan. So tomorrow, you can write to both of us and say you are stepping back for (as listed reasons).* ***End of A Holms (sic) and we then unwind the LLC, go underground and do what is required.***

Ex. P-202 (emphasis added).

Allan, who "*had no knowledge*" that brother Val was secretly communicating with Edington to orchestrate the "*[e]nd of A Holms*" and to "*unwind the LLC, go underground and do what is required*" (RP 405),

honestly replied that he hoped Val was "*not worried I am going to try and capture your minerals because I would not do that.*" Ex. P-203.

On 3/9/2010, Val finally responded to Allan's 3/5/2010 email: "*After careful consideration of all the facts, I have decided to decline your proposal. I intend to retain my mineral rights.*" Ex. P-210. However, unbeknownst to Allan, this 3/9/2010 email was in fact also "ghost-written" by Edington. Ex. P-209.

Throughout this time period, late February and March 2010, Allan also received numerous emails directly from Edington which were a calculated part of his conspiracy with Val (1) to deceive Allan into believing that Val's alleged "misgivings" were genuine and (2) to conceal that Val was in fact plotting with Edington to fraudulently induce Allan to abandon their joint venture. Exs. P-189, P-200. By approximately 3/10/2010, the co-conspirators' fraudulent, unlawful, and fictitious misrepresentations succeeded in convincing Allan to "*support [Val's] decision to be conservative[.]*" Ex. P-214.

The next day, 3/11/2010, Edington, a non-lawyer (CP 3611; RP 708), outlined the scam strategy that was eventually implemented by the co-conspirators:

> *You[r] attorney can take the position that he recommended that you not file the assignment [the Mineral Deeds] until the operating agreement was signed and the LLC legally*

> *formed. He will then take the position that the assignment was signed [but] contingent upon [Allan] putting $200,000 into the LLC. Therefore, since there was simply a $10,000 loan to you personally and no operating agreement and no money, then there was no legal assignment of any minerals to the LLC.*

Ex. P-220. The conspirators agreed to characterize Allan's Reverse Merger capitalization plan as "*just a proposed business transaction and plan that did not materialize.*" Id.

The fact is Allan had already accepted Val's joint venture proposal; had performed by contributing over $50,000 in seed capital; and had re-confirmed that he remained ready, willing, and able to continue performing the balance of his funding commitments. RP 292-93; Exs. P-367, P-368; CP 4004. Nonetheless, despite his past performance, Allan simply accepted "*at face value*" his brother's representations that the joint venture was being abandoned, and even embraced Val's supposed change of heart: "*I support your decision to be conservative and live off your royalty income.*" RP 410; Ex. P-214.

Afterwards Allan focused on unwinding their joint venture. Because "*[t]he minerals are now owned by Roil Energy*" Allan proposed that Val "*have your attorney contact me so we can develop the paperwork to accomplish your wishes.*" Ex. P-222. Val's response however was another orchestrated, ghost-written response by Edington (Ex. P-224),

claiming that "*MY ATTORNEY AND I DO NOT SHARE THIS OPINION*" that Roil Energy owned the Mineral Interests; denying that "*[Allan] and Jay had a deal structured with me*"; and defiantly insisting that "*I WOULD DO ANYTHING I WANT WITH MY RIGHTS[.]*" Ex. P-225.

On 3/15/2010, Allan unambiguously replied, "*I don't care what you do with your minerals other than use my proprietary contacts or expertise without my involvement.*" Ex. P-227. In furtherance of their conspiracy, Val quickly forwarded his brother's email to his co-conspirator. Ex. P-228. Edington bluntly responded, "*Let me explain this to you. There is a term called circumvention.*" Id.

Shortly thereafter, Val closed Roil Energy's bank account and sent Allan a check for $10,000, purportedly "*in repayment of the loan made to Roil Energy, LLC.*" Ex. P-236. Although Allan knew the funds were never a "loan" to Roil Energy, he accepted and negotiated the check totally unaware of his brother's calculated and insidious conspiratorial betrayal. RP 425-26. On 3/16/2010, Val sought to dissolve Roil Energy by filing incomplete and legally insufficient dissolution documents with the Nevada Secretary of State.[7] Ex. P-336.

[7] On July 12, 2013, Roil Energy, LLC was revived. Ex. P-337.

F. Val Secretly Completes The Reverse Merger Project Without Allan.

On 3/25/2010, Edington located a substitute public "shell" company – Multisys Language Solutions, Inc. ("MLS") and derisively mocked Allan by arrogantly bragging to Val that "*God [referring to Allan] does not even know about this company and I doubt if he ever finds out about it[.]*" Ex. P-248.

In furtherance of his conspiratorial undertaking, Val then formed a new private company, Defendant Holms Energy, LLC, replacing Roil Energy as the private entity holding legal title to the Mineral Interests. CP 4432; RP 868-69. Indeed, on 6/18/2010, Val executed a new Mineral Deed in favor of Holms Energy despite the fact Val had previously conveyed the same Mineral Interests to Roil Energy, as evidenced by copies of the notarized Mineral Deeds he had presented to Allan. Ex. P-361. On 6/22/2010, Val caused the new Mineral Deed to be recorded. Id.

On 6/21/2010, Defendant BRI (then MLS) entered into an "Option to Purchase Assets Agreement" with Val's private company, Defendant Holms Energy. Ex. P-355. Pursuant to this Option, Bakken agreed to (1) pay $100,000 to Holms Energy; (2) issue 40,000,000 shares of common stock to Holms Energy; and (3) to pay Holms Energy an overriding royalty of five percent for 10 years. Id.

On 11/26/2010, Val utilized the replacement "shell" company, Defendant BRI, to complete the Reverse Merger strategy originally conceived by Allan. Exs. P-339, P-362. He did so by acquiring the Mineral Interests from Holms Energy. Id.

G. Val's Betrayal Caused Allan Damages Exceeding $5.8 Million.

In early 2011, Allan discovered that brother Val had in fact capitalized the Mineral Interests. RP 438. Allan learned this from an unexpected telephone call from his son. Id. Thereafter, on 3/14/2012, Allan commenced the present lawsuit. CP 1-36.

By the time of trial, in November 2013, Defendant Holms Energy had received two years' royalties and cash payments from BRI in the approximate amount of $1,291,081, with Allan's 40 percent interest valued at approximately $516,432. Exs. P-338, P-341. Additionally, in November 2013, eight years remained on Holms Energy's royalty agreement. Ex. P-355. Allan's 40 percent share of these remaining royalty payments totaled approximately $1,369,177. Exs. P-355, P-375. Accordingly, Allan was fraudulently deprived of approximately $1,886,000 in royalty payments alone!

Additionally, Holms Energy also received 40,000,000 shares of Bakken stock. Ex. P-355. The stock was valued at $0.25 per share at the time the Reverse Merger transaction closed. RP 755-56. Thus, in addition

to the $1,886,000 in lost royalty income, Allan was fraudulently deprived of his share of the BRI stock issued to Holms Energy – 16 million shares (40 percent of 40,000,000), valued at $4,000,000 at the time of closing. RP 330-31; Ex. P-338. As such, Allan's total, readily calculable damages exceeded $5.8 million.

V. ARGUMENT

A. Val Holms Entered Into An Enforceable Contract For Joint Venture With Brother Allan.

The essential elements of a joint venture are: (1) a contract, (2) a common purpose, (3) a community of interest, and (4) an equal right to a voice accompanied by an equal right of control. Refrigeration Engineering Co. v. McKay, 4 Wn. App. 963, 973 (1971).

1. Val's Express Contract For Joint Venture.

"*The existence of a contract ... is a legal question that is subject to de novo review.*" Lamar Outdoor Adver. v. Harwood, 162 Wn. App. 385, 395 (2011). "*The interpretation of a writing is a question of law.*" Shaw v. Hous. Auth. of City of Walla Walla, 75 Wn. App. 755, 759 (1994).

"*The relation [of joint venture], as a legal concept cognizable by the courts, must have its origin in contract.*" Carboneau v. Peterson, 1 Wn.2d 347, 358 (1939) (quotations omitted). "*A contract requires offer, acceptance, and consideration.*" Veith v. Xterra Wetsuits, L.L.C., 144 Wn. App. 362, 366 (2008). "*For a contract to exist there must be mutual*

assent to its essential terms." Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC, 139 Wn. App. 743, 765 (2007). "*To form an express contract, the parties must express their intentions and the terms of their agreement, either orally or in writing, at the time they enter into the contract.*" Concerned Citizens of Hosp. Dist. No. 304 v. Bd. of Comm'rs of Pub. Hosp. Dist. No. 304, 78 Wn. App. 333, 341 (1995) (citations omitted).

Washington follows the objective manifestation test for contracts, which "*lays stress on the **outward** manifestation of assent made by each party to the other.*" City of Everett v. Sumstad's Estate, 95 Wn.2d 853, 855 (1981) (emphasis added). "*A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties.*" Id. (citation omitted). "*The inquiry, then, is into the **outward manifestations of intent** by a party to enter into a contract.*" Id. (emphasis added). Therefore, as a matter of law "*the unexpressed, subjective intentions of the parties are irrelevant.*" Weiss v. Lonnquist, 153 Wn. App. 502, 511 (2009).

Here, the Trial Court committed reversible error as a matter of fact and law by concluding (1) that "*no enforceable agreement or contract was made by and between Allan Holms and Val Holms*" and (2) that "*[n]o enforceable contract for joint venture was established between Allan and Val Holms.*" CP 4434-35, Conclusions No. 10 and 13. In doing so, the

Trial Court simply ignored that Val expressly confirmed in writing that his 50/50 deal with Allan "*[s]ounds good to me*." Ex. P-165. Val continued:

> *Go ahead and wire the money*[8] *and I will see you either late Saturday or Sunday. I wouldn't worry about getting your money back because it is a dead ringer to produce. If you are concerned, I have a couple of investors that would be more than happy to get in on the deal in any way they can. All I know is time is slipping by and it seems that you have been so wrapped up in your other deals that you do not have the time to concentrate on the project at hand, and I don't want to lose it because we are dragging our feet too long.*

The plain language of Val and Allan's 2/26/2010 email exchange "*express[ed] their intentions and the terms of their agreement[.]*" Concerned Citizens, 78 Wn. App. at 341. Moreover, Val's 2/26/2010 writing as a matter of law "*manifest[ed] an intention to agree in regard to the matter in question*" – that brothers Allan and Val "*share everything 50/50*" (Ex. P-163). Sumstad's Estate, 95 Wn.2d at 855. Because "*reasonable persons would conclude that [Val] manifested an objective intent*" to be bound to the 50/50 deal, therefore as a matter of law "*that*

[8] Id. In reliance on Val's objective manifestation of assent to their 50/50 deal, Allan did in fact wire approximately $40,000 to purchase APD shares on behalf of their joint venture. Exs. P-120, P-248; CP 4426, Finding No. 26. Yet, the Trial Court inexplicably and inconsistently found, without factual or evidentiary support, that "*[o]f the $200,000.00 in seed money that Allan Holms said he would provide, only provided $10,000.00 to open a corporate bank account.*" CP 4424, Finding No. 16.

agreement is established." Id. at 856. Accordingly, it was error to conclude there was "*no enforceable agreement or contract[.]*"[9] CP 4434.

2. Alternatively, There Was An Implied Contract For Joint Venture.

"*Where no express agreement exists, whether the parties have entered into a joint venture is a question of fact.*" Goeres v. Ortquist, 34 Wn. App. 19, 22 (1983). Findings of fact are reviewed for substantial evidence. Hoglund v. Meeks, 139 Wn. App. 854, 871 (2007) (citations omitted). "*Substantial evidence is evidence sufficient to convince a fair-minded, rational person of the truth of the finding.*" Id.

Joint ventures "*arise by express or implied contract.*" Adams v. Johnston, 71 Wn. App. 599, 611 (1993) amended on denial of reconsideration, 869 P.2d 416 (1994). "*[A] contract may be implied in fact with its existence depending on some act or conduct of the party sought to be charged.*" Hoglund, 139 Wn. App. at 870. A contract implied in fact "*does not describe a legal relationship which differs from an express contract: only the mode of proof is different.*" Eaton v. Engelcke Mfg., Inc., 37 Wn. App. 677, 680 (1984).

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[9] The Trial Court likewise erred in concluding "*[s]ince no enforceable contract had been entered into between Allan Holms and Val Holms regarding the joint venture and/or reverse merger, Val Holms had the right to withdraw from the negotiations, and further had the right to develop his mineral interests by means of another transaction.*" CP 4436, Conclusion No. 18.

"*A joint adventure is in the nature of a partnership.*" Barrington v. Murry, 35 Wn.2d 744, 752 (1950). "*It is well settled, however, that written articles of agreement are not necessary to constitute a partnership, but that a partnership may exist under a verbal agreement.*" Nicholson v. Kilbury, 83 Wash. 196, 202 (1915) (citation omitted). "*Where, from all the competent evidence, it appears that the parties have entered into a business relation combining their property, labor, skill, and experience, or some of these elements on the one side and some on the other, for the purpose of joint profits, a partnership will be deemed established.*" Id.

Here, the Trial Court erred in ignoring overwhelming and undisputed evidence of Val's "*outward manifestations of intent ... to enter into a contract.*" Sumstad's Estate, supra at 855. Indeed, Val requested a "laundry list" and "*put together a company profile.*" Ex. P-52. On 2/19/2010, Val (1) organized the private company (Roil Energy) intended by the parties to hold legal title to the Mineral Interests (Ex. P-134); (2) executed and delivered Mineral Deeds to Roil Energy, thereby transferring his Mineral Interests to Roil Energy (Ex. P-130); (3) had the Deeds notarized (Id.); (4) provided copies of the acknowledged Deeds to brother Allan (RP 369, 965-66, 1051, 1239; CP 4425, 4427); (5) requested and received from Allan $10,000 of seed capital to cover Roil Energy's immediate expenses, including his (Val's) own salary (RP 369, 633, 688-

89, 1051); and (6) falsely assured Allan that the originals had been sent to North Dakota to be recorded (RP 369, 1050-51; CP 4425).

In addition, on 2/22/2010, Val opened Roil Energy's bank account, deposited Allan's $10,000 "seed" money, and immediately paid himself $6,000. CP 4428. Most pointedly, on 2/26/2010, Val in writing instructed Allan to "*[g]o ahead and wire the money*" to purchase shares in the "shell" company, APD. Exs. P-163, P-165.

The fact is, the overwhelming preponderance of "*competent evidence*" confirms that Val Holms and brother Allan "*entered into a business relation combining their property, labor, skill, and experience, or some of these elements on the one side and some on the other, for the purpose of joint profits[.]*" Nicholson, 83 Wash. at 202 (emphasis added). Under these circumstances, "*a partnership will be deemed established*" as a matter of law. Id. Yet, the Trial Court inexplicably and erroneously refused to "*impute an intention corresponding to the reasonable meaning of [Val's] words and acts.*" Sumstad's Estate, supra 855. Therefore, the Trial Court's failure to engage in "*[t]he [proper] inquiry ... into the outward manifestations of intent by [Val] to enter into a contract*" constituted reversible error. Id.

3. The Trial Court Erroneously Misapplied Well-Established Principles Of Partnership Law.

Questions of law and conclusions of law are reviewed de novo. Newport Yacht Basin Ass'n of Condominium Owners v. Supreme Northwest, Inc., 168 Wn. App. 56, 64 (2012). Findings of fact are reviewed for substantial evidence. Hoglund, supra at 871 (citations omitted). Where a Trial Court's determination constitutes legal reasoning, this Court "*treat[s] it as a conclusion of law, which we review de novo.*" Casterline v. Roberts, 168 Wn. App. 376, 383 (2012).

"*[P]artnership law generally applies to joint ventures[.]*" Pietz v. Indermuehle, 89 Wn. App. 503, 510 (1998). "*Property acquired by a partnership is property of the partnership and not of the partners individually.*" RCW 25.05.060. "*Property is presumed to be partnership property if purchased with partnership assets, even if not acquired in the name of the partnership[.]*" RCW 25.05.065(3).

Here, the Trial Court erred as a matter of fact and law in concluding (1) "*Allan Holms would retain beneficial ownership and control of all shares purchased [in APD]*"; and that (2) "*[f]ollowing Allan Holms' purchase of shares contemplated by the Shareholder Nominee Transaction, Allan Holms would own nearly 1,356,654 shares of APD*

common stock" or "*approximately 55% of APD's common stock.*"[10] CP 4426, Findings No. 26, 31, and 32 (emphasis added).

In fact, Edington proposed that Allan, **on behalf of the joint venture**, purchase shares of APD as a means of injecting investor capital into the "shell." Ex. P-120. Moreover, Val knew by early January 2010 (1) that Edington intended to "*secure some options [for Allan] to purchase in the shell*"; (2) that Allan's purchase of the APD shares "*would inure to [Val's] financial benefit*"; and (3) that "*Val cannot be an investor in this round[.]*" Exs. P-35, P-67.

Accordingly, in part performance of his contractual obligation to provide approximately $200,000 in seed capital to the joint venture, Allan did, in fact, purchase approximately $40,000 in APD stock on behalf of the joint venture. RP 291-92, 1231; CP 4423-24; Ex. P-120, P-248. Indeed, on 2/26/2010, Allan expressly confirmed to Val (1) that "*[s]upposedly I receive my cost back in the future*[11] *and* ***we share those***

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[10] Because Findings No. 26, 31, and 32 contain "*interpretation[s] of the legal significance of, the evidentiary facts*" (Moulden & Sons, Inc. v. Osaka Landscaping & Nursery, Inc., 21 Wn. App. 194, 197-98 n.5 (1978)), these "Findings" are conclusions of law subject to de novo review (Casterline, 168 Wn. App. at 381). In addition, Findings No. 19-25, 27-28, and 52-53 (CP 4425-26, 4431) are conclusions of law insofar as they state and/or imply that ownership of the APD shares at issue would vest in Allan as his individual property.

[11] "*The fact that the funds advanced by [Allan] were to be returned to him before the proceeds of the business could be divided does not in any way detract from the force of the contract of partnership.*" Constanti v. Barovic, 199 Wash. 117, 127 (1939).

stocks 1/3; 1/3; and 1/3"; and (2) that the APD shares "*will not even be issued in my name.*" Ex. P-163 (emphasis added). Edington later corroborated Allan's 2/26/2010 representation to Val: "*I do remember the third, a third, a third scenario.*" RP 659.

Because the APD stock was "*purchased with partnership assets,*" the APD stock as a matter of law "*is presumed to be partnership property[.]*" RCW 25.05.065(3). Thus, the APD stock at issue belonged to the joint venture, **not** to Allan Holms, as the Trial Court erroneously concluded.[12] RCW 25.05.065(3).

In addition, it was error to find the partners' respective ownership interests in Roil Energy "*would have likely been based upon each members' ownership (by themselves or through nominees) in the shares of APD, the target public shell corporation.*" CP 4430, Finding No. 48. In fact, the partners' ownership position in APD was to be based upon their equity interest in Roil Energy (i.e., 40/40/20). RP 809.

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[12] The Trial Court's misapplication of partnership law undermines its findings that "*Val Holms came to the belief that his brother, Allan Holms, intended to gain control of Val Holms' McKenzie County Mineral Interests*" and that "*Val would not have control of Roil Energy, LLC or APD, since Allan Holms would control 3.8 million shares of APD[.]*" CP 4431, Findings No. 52 and 53. Even if Val subjectively believed that his brother "*would retain beneficial ownership and control*" of the APD stock that Allan purchased on behalf of the joint venture, "*[a] mistake of law ... is not a ground for avoidance of a contract.*" Schwieger v. Harry W. Robbins & Co., 48 Wn.2d 22, 24 (1955).

Because it relied on its unsustainable findings and erroneous conclusions regarding the APD stock purchase transaction, the Trial Court committed reversible error in concluding: (1) "*neither common purpose, community of interest nor equal right of control was established*"; (2) "*[w]hen Val Holms learned he would not hold majority right of control, all collaborative activity with Allan ceased*"; and (3) "*[n]o enforceable contract for joint venture was established between Allan and Val Holms.*" CP 4434-35, Conclusions No. 11, 12, 13.

B. <u>The Mineral Deeds Were Delivered To Roil Energy.</u>

Despite its unequivocal findings of Defendants' fraud, breach of fiduciary duty, oppression of minority interest, and civil conspiracy to commit these torts against the Plaintiffs, the Trial Court committed reversible error in concluding "*(1) the mineral deeds do not satisfy the Statute of Frauds; and (2) there was no enforceable agreement between Roil Energy, LLC and Toll Reserve upon the essential terms of any such transfer of mineral interests.*"[13] CP 4435.

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[13] In addition, the Trial Court dismissed with prejudice "*Plaintiffs' causes of action for declaratory judgment declaring that neither Holms Energy, LLC nor Bakken Resources, Inc. can be or are bonafide (sic) purchasers for value without notice of Roil Energy, LLC's claim to title of the McKenzie County Mineral Interests[.]*" CP 5295.

However, the Trial Court evaluated Plaintiffs' declaratory claims "*that specifically applied to bona fide purchasers for value without notice ... in the overarching larger analysis of declaratory judgment[.]*" RP 1570. Thus, because the Trial Court relied on its erroneous conclusion that Val's secret, subjective intent defeated the plain language of

Where "*[t]he provisions of the deed in question are plain and unambiguous*," construction of the deed is a question of law. Coleman v. Layman, 41 Wn.2d 753, 756 (1953). Questions regarding "*the intention of the grantor and grantee at the time of the execution of the deed with reference to its delivery*" are reviewed de novo. Anderson v. Ruberg, 20 Wn.2d 103, 104 (1944). Here, undisputedly (1) Val Holms executed two Mineral Deeds in favor of Roil Energy; (2) Val had the Deeds notarized; (3) Val provided copies of the acknowledged Deeds to Allan on 2/19/2010; and (4) Val falsely assured Allan that the originals had been sent away to be recorded. Accordingly, it was reversible error, as a matter of fact and law, to conclude there was no deed delivery.

1. Plain Language Of The Notarized Deeds Confirms Delivery.

"*Real property conveyances ... must be accomplished by deed.*" Bale v. Allison, 173 Wn. App. 435, 445 (2013); RCW 64.04.010. "*Every deed shall be in writing, signed by the party bound thereby, and acknowledged[.]*" RCW 64.04.020. "*To effectively pass title, a deed must be delivered by the grantor to the grantee.*" Juel v. Doll, 51 Wn.2d 435, 436 (1957). "*There may be an effective delivery of a deed without actual*

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the Deeds and prevented delivery as a matter of law, the Trial Court erred in refusing to declare that neither Holms Energy nor Bakken can be or are bona fide purchasers for value without notice of Roil Energy's claim to the Mineral Interests. CP 5295.

manual delivery and change of possession, but whether there has been a valid delivery under the circumstances depends upon the intentions of the grantor." Anderson, 20 Wn.2d at 103. Indeed, "*[d]elivery in all cases is a question of intent[.]*" Id. "*Washington law requires that the intent of the parties be determined from the unambiguous language of the document itself.*" Newport Yacht, 168 Wn. App. 56, 69 (2012).

Here, the plain language of the Deeds as to delivery is unambiguous:

> *Val M. Holms, President, Toll Reserve Consortium, ... for and in consideration of the sum of Ten and no/100 Dollars ($10.00), cash in hand paid and other good and valuable considerations, the receipt of which is hereby acknowledged, do[es] hereby grant, bargain, sell, convey, transfer, assign, and deliver ... all of Grantor's right, title, and interest in the oil, gas, and other minerals lying in and under and that may be produced from [the Mineral Interests].*

Ex. P-130; see **Appendix A**.

Yet, despite the plain language of the Deeds, the Trial Court inexplicably concluded, without factual or legal support:

> *Any agreement by Toll Reserve Consortium, Inc. to transfer the mineral interests to Roil Energy, LLC would have been an oral agreement unenforceable under the Statute of Frauds (RCW 64.04.010).*
>
> ...
>
> *The mineral deeds themselves contain no language setting forth the terms upon which the transfer of the mineral*

> *interests were to be made, the consideration to be received by Toll Reserve in exchange for any such transfer, and whether there were any conditions to the transfer. The fact that two mineral deeds were prepared in anticipation of reaching agreement, and copies given to Allan Holms, is insufficient to establish the terms upon which Val Holms would agree to have his mineral interests transferred to Roil Energy, LLC, and therefore: (1) the mineral deeds do not satisfy the Statute of Frauds; and (2) there was no enforceable agreement between Roil Energy, LLC and Toll Reserve upon the essential terms of any such transfer of mineral interests.*

CP 4435.

The Court's Conclusion is patently irreconcilable with the plain language of the notarized Deeds, which confirms that Val Holms in fact transferred his mineral interests to Roil Energy "*for and in consideration of the sum of Ten and no/100 Dollars ($10.00), cash in hand paid and other good and valuable considerations, the receipt of which is hereby acknowledged.*" Ex. P-130; see **Appendix A**.

2. The Trial Court Erroneously Relied On Extrinsic Evidence Contradicting The Plain Language Of The Notarized Mineral Deeds.

Evidentiary rulings are reviewed for abuse of discretion. Hizey v. Carpenter, 119 Wn.2d 251 (1992). A trial court abuses its discretion when the ruling is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26 (1971).

Here, the Trial Court's admission and reliance on extrinsic evidence contradicting the unambiguous plain language of the notarized Mineral Deeds constitutes reversible abuse of discretion. Id.; see also In re Marriage of Littlefield, 133 Wn.2d 39, 47 (1997) (A court's decision "*is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.*")

Although extrinsic evidence may be relevant in determining the grantor's intent, "*a deed must be ambiguous before extrinsic evidence is properly considered.*" Newport Yacht, supra at 70. However, even where a court finds ambiguity in a deed, extrinsic evidence is admissible **only** "*where the evidence gives meaning to words used in the contract.*" Hollis v. Garwall, Inc., 137 Wn.2d 683, 695 (1999). Thus, as a matter of law, extrinsic evidence is inadmissible and cannot be used to "*show an intention independent of the instrument*" or to "*vary, contradict or modify the written word.*" Id.

In Newport Yacht, the trial court "*improperly relied on extrinsic evidence to contradict the written words of the quitclaim deed.*" Supra at 71. Accordingly, that court reversed, explaining that "*the language of the deed at issue unambiguously documents the intent of the grantors to convey fee title[.]*" Id. at 61. Thus, "*the trial court erred by resorting to*

extrinsic evidence in order to derive a finding of intent that contradicts the written words of the deed." Id.

Here, as in Newport Yacht, the Trial Court committed reversible error by relying on extrinsic evidence of Val Holms' secret, subjective intent to "*transfer title to Roil Energy only upon receipt of the $200,000.00 seed money and the performance of other commitments from Allan Holms.*" CP 4427. Washington law is clear on this issue: "*a deed must be ambiguous before extrinsic evidence is properly considered.*" Newport Yacht, supra at 70. Because extrinsic evidence that "*show[s] an intention independent of the instrument*" cannot be used to contradict the written word of the Deeds, the above evidence was inadmissible as a matter of law and the Trial Court committed reversible error in relying upon it. Id.; Hollis, 137 Wn.2d at 695.

"*[I]t generally takes more than the grantor's self-serving statements to overcome the presumption of delivery.*" 4 Tiffany Real Prop. § 1034 (3d ed.). Here, in addition to blatantly contradicting the unequivocal plain language of the written Mineral Deeds, Val's self-serving, after-the-fact testimony is the only "evidence" that even remotely suggests the conveyance of the Mineral Interests was in any way contingent upon Allan providing $200,000 to Val at the 2/19/2010

meeting in Butte. RP 1238-39. Val's revisionist history was directly contradicted by brother Allan's trial testimony:

> *Q.* *Did he bring you the originals?*
>
> *A.* *I asked him – I looked at [the Mineral Deeds] and I said, this looks like a copy, and he said, yes. I said, where is the original? And he said, well, I sent them to North Dakota for filing.*

RP 369.

In addition, Robyn Holms' unrebutted trial testimony confirmed that (1) Val represented to Allan that "*he had mailed the originals to North Dakota for filing*" and (2) Allan and Val discussed "*the amount of money that was needed for the initial payment, ...and they agreed on $10,000 was enough for the first injection.*" RP 1050-51.

Likewise, Val's revisionist testimony that he expected to receive $200,000 from Allan on 2/19/2010, cannot be reconciled with the Time Line evidence prepared by Edington on 2/13/2010, which called for "*Allan [to] provide $200,000 as Starting Equity*" by 3/1/2010. Ex. P-101. More pointedly, Edington's 2/22/2010 revision to the project Time Line confirms that (1) Val's conveyance of the Mineral Rights "*[had] been completed*" and (2) 3/1/2010 remained the deadline for Allan to fully fund his financial commitment to the joint venture. Ex. P-137. This 3/1/2010 date of course was well after Val had told Allan on 2/19/2010 that he had

already sent the notarized deeds to North Dakota to be recorded – something we know now never occurred. RP 369, 1050-51; CP 4425.

Further, the Trial Court erred in concluding that Val "*did not record the mineral deeds conveying the McKenzie County Mineral Interests to Roil Energy, LLC*" because "*Val Holms never received from Allan the $200,000.00 seed money to be deposited into Roil Energy, LLC[.]*"[14] CP 4427. In so doing, the Trial Court erred in ignoring overwhelming evidence that Val and Edington had already initiated their "Plan B" conspiracy by 2/24/2010. Exs. P-150, P-154. By the time Allan was expected to fully fund his $200,000 commitment on 3/1/2010, it was an orchestrated, foregone conclusion by conspirators Val and Edington that there was never going to be a joint venture with Allan.

Any after-the-fact contrived claim that there was an alleged deficiency in Allan's promised 3/1/2010 performance was caused and specifically orchestrated by Val's prior unlawful and fraudulent conduct, which as a matter of fact and law excused any further requirements for Allan to perform. Wolk v. Bonthius, 13 Wn.2d 217, 219 (1942) ("*One of the parties to a contract cannot avail himself of nonperformance where the nonperformance is occasioned by his acts. That is, a party may not*

[14] Despite the Trial Court's emphasis on Val's failure to record the deeds, it is black-letter law that "*[u]nrecorded conveyances of realty, however, are valid as between the parties.*" Chelan Cnty. v. Wilson, 49 Wn. App. 628, 632 (1987).

benefit by his wrongful acts."). Here, the conspirators had already decided that there would be no further involvement by Allan and orchestrated the scenario to make that happen well before 3/1/2010.

3. Washington Does Not Recognize "Conditional Delivery."

Even if the Trial Court here had not erred in construing Washington law regarding extrinsic evidence and thus relying on Val Holms' inadmissible testimony regarding his secret, subjective intent, Washington does not recognize "conditional delivery":

> *If the grantor do[es] not intend that his deed shall take effect until some condition is performed or the happening of some future event, he should either keep it himself, or leave it with some third person as an escrow, to be delivered at the proper time. If he deliver it as his deed to the grantee, it will operate immediately, without any reference to the performance of the condition[.]*

Richmond v. Morford, 4 Wash. 337, 342-43 (1892) (citations and quotations omitted).

In Richmond, the court explained that delivery of deeds "*is one of the cases in which the law fails to give effect to the honest intention of the parties, for the reason that they have not adopted the proper legal means of accomplishing their object.*" Id. Where the grantor delivers a deed intending it "*to take effect upon the performance by [the grantee] of certain conditions,*" courts are required to ignore the grantor's subjective

intentions because "*the instrument at once, in law, became operative, and passed the title to [the grantee] absolutely, without regard to any agreement that may have existed between the parties.*" Id. The Trial Court erred in concluding otherwise, completely ignoring that the executed deeds had been duly notarized.

4. Application of N. Dakota Law Confirms Delivery Occurred.

Because the Mineral Interests are located in McKenzie County, North Dakota, the Trial Court was required to construe the Mineral Deeds according to North Dakota law. See NDCC 47-04-01. However, North Dakota law regarding "delivery of a deed" is consistent with properly-applied Washington law:

> *A grant takes effect so as to vest the interest intended to be transferred only upon its delivery by the grantor and is presumed to have been delivered at its date.*

NDCC 47-09-06.

This presumption cannot be defeated unless the evidence is "*clear and convincing.*" Adams v. Little Missouri Minerals Ass'n, 143 N.W.2d 659, 676 (N.D. 1966). In fact, the North Dakota Supreme Court has unequivocally held that "*[i]n the absence of evidence to overthrow the presumption of delivery as of the date of the deed,* ***the deed speaks for itself and determines the time of delivery***." Id. (emphasis added). The

presumption "*is not overcome because of failure to record.*"[15] Cox v. McLean, 66 N.D. 696, 268 N.W. 686, 688 (1936).

As in Washington, "*[a] grant cannot be delivered to the grantee conditionally.*" NDCC 47-09-07. Delivery "*is necessarily absolute and the instrument takes effect thereupon, discharged of any condition on which the delivery was made.*" Id. Moreover, "*a grantor, having effectually conveyed the title to another, cannot thereafter impair such conveyance by her* ***subsequent*** *acts or declarations.*" O'Brien v. O'Brien, 19 N.D. 713, 125 N.W. 307, 309 (1910) (emphasis added).

Moreover, North Dakota's parole evidence rule "*is not an evidentiary or interpretive rule, but rather one of substantive law.*" Gajewski v. Bratcher, 221 N.W.2d 614, 626 (N.D. 1974). North Dakota recognizes that "*in proper circumstances, parol testimony may be admissible* ***to explain an ambiguous contract or instrument.***" Hook v. Crary, 142 N.W.2d 140, 146 (N.D. 1966) (emphasis added). As in Washington, "*[t]he parol evidence rule, however, has never been relaxed to a point which will permit the introduction of testimony of the undisclosed intentions of a party or his conclusions as to the meaning of the language of an instrument.*" Id. Further, "*[s]tatements of a grantor*

[15] In North Dakota, as in Washington, "*[a]n unrecorded instrument is valid as between the parties thereto and those who have notice thereof.*" NDCC 47-19-46.

made after the delivery of a deed are admissible in a suit to enforce title thereunder ***when such statements support the deed [b]ut not when they are against it.***" Gajewski, supra at 627 (citation omitted) (emphasis added).

In Gajewski, the trial court erroneously admitted and relied on parole evidence regarding the grantors' secret, subjective intent. Id. Accordingly, the North Dakota Supreme Court reversed, holding that certain oral testimony was "*incompetent and inadmissible*":

> *(1) to vary, contradict and impeach the quitclaim deed they executed and delivered to the plaintiffs herein; (2) to prove that said deed was to be returned to them upon the repayment of said loan; and (3) to strike down and to nullify the grant contained in said deed which is conclusive against them, as grantors and their privies.*

Id. Further, under North Dakota law appellate courts have "*the explicit duty, to disregard and to exclude from [their] consideration in the rendition of [their] decision all of the oral or intrinsic evidence, admitted without objection, in violation of the parol evidence rule.*" Id. at 631.

As discussed above, the notarized Mineral Deeds are clear on their face. Ex. P-130; see **Appendix A**. Val's after-the-fact testimony regarding his secret, subjective intent cannot be reconciled with the plain language of the deeds which Val executed and had notarized. Therefore, the Trial Court committed reversible error under both North Dakota and

Washington law in considering and relying on "*evidence that was received in violation of the parol evidence rule*" to invalidate the notarized and executed conveyances. Gajewski, supra at 630; Newport Yacht, supra.

C. The Trial Court's Failure To Award Damages Is Error.

Here, the Trial Court erroneously and inexplicably concluded as a matter of law there was an "*absence of ascertainable damages.*" CP 4437. "*The standard of review for a trial court's findings of fact and conclusions of law is a two-step process. First, we must determine if the trial court's findings of fact were supported by substantial evidence in the record. If so, we must next decide whether those findings of fact support the trial court's conclusions of law.*" Landmark Dev., Inc. v. City of Roy, 138 Wn.2d 561, 573 (1999). Conclusions of law are reviewed de novo. Newport Yacht, supra 63-64.

1. The Trial Court Ignored Evidence Of Allan Holms' "Benefit Of The Bargain" Damages.

Damages for fraud or misrepresentation are generally measured by the "benefit of the bargain." Salter v. Heiser, 39 Wn.2d 826, 832 (1951). However, where a plaintiff "*seeks to recover damages not inherent in the 'benefit of the bargain' rule, he will be awarded damages for* ***all losses*** *proximately caused by defendant's fraud.*" Id. (emphasis added); Turner v. Enders, 15 Wn. App. 875, 880 (1976). Damages for oppression of minority interest/breach of fiduciary duty include all damages proximately

caused by defendants' tortious conduct. Interlake Porsche & Audi v. Bucholz, 45 Wn. App. 502, 508 (1987).

Once the fact of damage is established, uncertainty as to the exact amount of damage does not prevent recovery. "*[U]ncertainty as to the **fact of damage** is fatal; nevertheless, uncertainty as to **the amount** or **quantum** is not to be regarded similarly, as fatal to a litigant's right to recover damages.*" Wenzler & Ward Plumbing & Heating Co. v. Sellen, 53 Wn.2d 96, 99 (1958) (emphasis supplied). A party who commits a tortious or fraudulent act cannot "*escape his liability in damages therefore simply by reason of difficulty in the ascertainment of the damage to the plaintiff.*" Id. Instead, "*the wrongdoer shall bear the risk of the uncertainty which his own wrong has created[.]*" Id. (citation omitted). "*[W]here proof of actual damage to the plaintiff is available, uncertainty as to the exact amount thereof **cannot deny** to the plaintiff a right to recover any compensation at all.*" Id. at 100 (emphasis added).

Here, the Trial Court correctly concluded that Plaintiffs produced "*sufficient evidence of a direct lost suffered by Allan Holms*" as a result of Defendants' "*fraud, breach of fiduciary duty and civil conspiracy.*" CP 4438; RP 1569. However, the Trial Court then inexcusably refused to award clearly calculable damages on Plaintiffs' successful claims, based

on a purported "*absence of ascertainable damages.*" CP 4437. The Trial Court's conclusion constituted reversible error, factually and legally.

Indeed, the Trial Court without reason or justification simply ignored (1) that Val Holms confirmed his 50/50 deal with Allan when Val instructed his brother to "*[g]o ahead and wire the money*" to purchase shares in the "shell" company, APD and (2) that Allan and Val then reduced their respective ownership position in the joint venture to 40 percent in order to award Edington a 20 percent ownership. RP 330-31, 632; Exs. P-163, P-165.

Likewise, the Trial Court erroneously concluded that "benefit of the bargain" damages "*are not fairly computable from the financial status of the new entities, Holms Energy, LLC and BRI*" because "*any income of BRI/Holms Energy, LLC is based on a completely different corporate structure than that developed with Allan Holms as a joint venturer.*" CP 4437-38. Yet, expert William Ross testified that Val and Edington's "Plan B" employed "*[e]xactly the same format*" as the Reverse Merger capitalization plan originally proposed by Allan Holms. RP 1021. Co-conspirator Edington also confirmed that their "Plan B" Reverse Merger was only "*a little different than the strategy with APD.*" RP 751.

The fact is, when the co-conspirator's "Plan B" Reverse Merger closed, Defendant Holms Energy (the replacement company for Roil

Energy) received (1) 40,000,000 shares of the public "shell company"; (2) $100,000 in cash; and (3) a 10-year, five percent overriding royalty. Exs. P-339, P-355. By cutting Allan out of the project, Defendants fraudulently deprived Allan of 16 million shares of Bakken (40 percent of 40,000,000) valued at $4 million, plus cash and royalty payments in the amount of approximately $1,886,000. RP 755-56, 773; Exs. P-338, P-375. Thus, the damage to Allan was both certain and calculable. Accordingly, based on the "original plan," Defendants' fraudulent conspiracy triggered "benefit of the bargain" damages to Allan in excess of $5.8 million. RP 285, 331, 755-56, 1067; Exs. P-163, P-165, P-338, P-355, P-375.

"*[W]hen it is clearly apparent that the plaintiff has sustained actual damages from the defendant's wrong, a liberal rule is applied with respect to determining the amount of that damage.*" Wenzler & Ward, 53 Wn.2d at 100. Here, the Trial Court's refusal to award Allan's clearly ascertainable "benefit of the bargain" damages constituted reversible error.

2. Alternatively, The Trial Court Ignored Clearly Calculable Evidence Of Allan Holms' "Facilitation Value" Damages.

Based on its findings that Allan was the architect who had originally conceived the Reverse Merger capitalization plan (CP 4423-24), the Trial Court correctly concluded that "*[m]ore probably than not, but for the contact with Jay Edington facilitated by Allan, Val would not have*

capitalized his minerals through a merger with a public shell provided by Edington." CP 4530. Accordingly, the Trial Court "*invited [the parties] to further brief and argue what, if any,* ***facilitation value*** *was lost to Allan by the fraudulent actions of Jay Edington and Val to exclude him.*" CP 4438 (emphasis added).

However, the Trial Court then inexplicably failed to award clearly calculable "**facilitation value**" damages, erroneously concluding "*the contributions and shares of earnings are not sufficiently comparable between Allan Holmes (sic) and Jay Edington to form a fair basis for damages.*" CP 4530. Thus, even if this Court were somehow persuaded to affirm the Trial Court's refusal to award "benefit of the bargain" damages, this Court can and should find that the Trial Court committed reversible error in refusing to award damages based on Allan's lost "facilitation value."

"*[A] plaintiff will not be required to prove an exact amount of damages, and recovery will not be denied because damages are difficult to ascertain[.]*" Mutual of Enumclaw Ins. Co. v. Gregg Roofing, Inc., 178 Wn. App. 702, 715 (2013) (citation omitted). Where the defendant's own wrongdoing has prevented a more precise computation of damages, the court "*may make a just and reasonable estimate of the damage based on relevant data[.]*" Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264

(1946). "*Evidence of damage is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture.*" Gregg Roofing, 178 Wn. App. at 716 (quotations and citations omitted).

Here, the unrebutted testimony of expert William Ross provided a "reasonable basis" for calculating Allan's "facilitation value" damages:

> *Q. [B]ased on what happened, do you have an opinion as to whether Allan Holms brought any value to this enterprise?*
>
> *A. Oh, definitely.*
>
> *Q. And what was that and why was it?*
>
> *A. Well, after examining the information and the flow of events, I don't think this company [Bakken] would be where it is today. I don't think you would have the revenues that you have today, if you'd have any at all. The ['shell'] company created the opportunity to raise money. If I recall correctly, there were about $2.8 million raised after the shell transaction, maybe a little bit before. There were a number of transactions that came from the shell that match with what my opinion states here. The company was able to advance itself through the issuance of stock to a consultant. They used all of the benefits of a shell, which is the concept that Allan brought to the table and came with Jay Edington as well.*

RP 1029-30; Ex. P-353.

However, despite the significant and undisputed value of Allan's Reverse Merger capitalization strategy, "*Allan lost the opportunity to participate in the project*" as a result of brother Val and Edington's fraudulent and unlawful "Plan B" conspiracy. CP 4436. Accordingly,

Allan's lost "facilitation value" was reasonably measured by the amount that Val eventually paid to Edington for his "facilitation" of "Plan B" – approximately 7.9 million shares of BRI stock, or approximately 20 percent of the 40,000,000 shares issued to Holms Energy, valued at the time of closing at $0.25 per share for a cash equivalent of $1,975,000. Ex. P-320; RP 330-31. Further, Edington himself testified that a "facilitation fee" of 20 percent would be "*adequate compensation.*" RP 601.

Allan's trial testimony established that he had more than 20 years' experience as a "business facilitator" who, as "*part of the M and A work, mergers and acquisitions*," had "*invest[ed] in various companies*" and "*put transactions together for people.*" RP 247-48. It is clear given his skill, knowledge, experience, and training that he had earned at a minimum a "facilitation fee" based upon his contributions to this venture. The Trial Court erred in refusing to acknowledge and award damages based upon the evidence presented.

This evidence of damages "*afford[ed] a reasonable basis for estimating loss and [did] not subject the trier of fact to mere speculation or conjecture.*" Gregg Roofing, supra at 716. Thus, the Trial Court's refusal to award "facilitation value" damages constituted reversible error.

3. It Was Error To Refuse Disposition Of A Constructive Trust.

The Trial Court also erroneously concluded that "*computation of any equitable amount to allocate in trust for the benefit of Allan Holms is impossible.*" CP 4437-38. Whether a constructive trust exists is a conclusion of law reviewable de novo. In re Marriage of Lutz, 74 Wn. App. 356, 372 (1994). "*Equity will raise a constructive trust ... where one through actual fraud ... gains something for himself which in equity and good conscience he should not be permitted to hold.*" Scymanski v. Dufault, 80 Wn.2d 77, 88-89 (1971) (citations omitted). "*The principal objective in imposing a constructive trust is to prevent unjust enrichment.*" Thor v. McDearmid, 63 Wn. App. 193, 207 (1991). "*A person has been unjustly enriched when he has profited or enriched himself at the expense of another contrary to equity.*" Dragt v. Dragt/DeTray, LLC, 139 Wn. App. 560, 576 (2007). A person who is unjustly enriched "*is liable in restitution to the other.*" Id.

In Scymanski, the court held that a constructive trust "*is the appropriate remedy*" where the defendant "*has intentionally interfered with another's business relationship and as a result of such interference has acquired the property that was the subject of that relationship.*" 80

Wn.2d at 89. Accordingly, the Trial Court here erred in refusing to impose a constructive trust. Id.

Despite overwhelming evidence of Val's fraudulent and deceptive intentional misconduct, the Trial Court committed reversible error when it rejected Plaintiffs' constructive trust/unjust enrichment claim based on the same flawed logic it applied to Plaintiffs' fraud damages:

> *Constructive trust is an equitable remedy and is only available if there is no adequate remedy at law available to Plaintiffs. As noted above, such adequate remedy is not available since any income of BRI/Holms Energy, LLC is based on a completely different corporate structure than that developed with Allan Holms as a joint venture. For that reason, computation of any equitable amount to allocate in trust for the benefit of Allan Holms is impossible.*

CP 4437-38.

The fact is, the Trial Court made no attempt to ascertain Allan's damages despite the fact it expressly concluded that "*[m]ore probably than not, but for the contact with Jay Edington facilitated by Allan, Val would not have capitalized his minerals through a merger with a public shell provided by Edington.*" CP 4530. Expert William Ross' unrebutted testimony established the inherent and substantial value of Allan's Reverse Merger capitalization strategy. RP 1029-30; Ex. P-353.

As a consequence of "*capitaliz[ing] his minerals through a merger with a public shell provided by Edington,*" Val Holms ultimately obtained

majority ownership in a public company valued in excess of $14,000,000, plus substantial annual lease royalties. The Court concluded that "*Val might never have capitalized his minerals*" at all but for the contact with Jay Edington facilitated by Allan. CP 4530. Thus, Val's entire ensuing windfall which he has been permitted to retain, constitutes unjust enrichment at the expense of his brother's contributions. Baker v. Leonard, 120 Wn.2d 538, 548 (1993). In refusing to impose a constructive trust, the Trial Court committed reversible error.

D. The Trial Court Erred In Dismissing Plaintiffs' Tortious Interference Claims.

"*The standard of review on appeal of a summary judgment order is de novo, with the reviewing court performing the same inquiry as the trial court.*" Ski Acres, Inc. v. Kittitas Cnty., 118 Wn.2d 852, 854 (1992).

Here, the Trial Court committed reversible error in dismissing Plaintiffs' tortious interference claims based on its mistaken conclusion that Defendants were entitled to "judgment as a matter of law." RP 46; CP 2187-92.

1. Val Holms Tortiously Interfered With Plaintiffs' Expectancies.

Tortious Interference "*requires five elements: (1) the existence of a valid contractual relationship or business expectancy; (2) that defendants had knowledge of that relationship; (3) an intentional interference*

inducing or causing a breach or termination of the relationship or expectancy; (4) that defendants interfered for an improper purpose or used improper means; and (5) resultant damage." Roger Crane & Assoc., Inc. v. Felice, 74 Wn. App. 769, 777-78 (1994). Recovery for tortious interference "*requires that the interferor be an intermeddling third party; a party to a contract cannot be held liable in tort for interference with that contract.*" Houser v. City of Redmond, 91 Wn.2d 36, 39 (1978).

In Houser, the plaintiff sued his former employer for interference with his employment contract on the theory that his former co-workers "*constitute[d] the requisite third parties for a valid interference claim.*" Id. at 39-40. However, "*[i]f the employees were within the scope of their employment, the interference claim falls for lack of a third party[.]*" Id. at 40. Yet, if the employees acted outside the scope of their employment, the employer "*bears no responsibility for their private actions.*" Id. "*Because [Houser] brought only an interference claim, and named only [the employer] as a defendant, the Court of Appeals correctly concluded that he has not stated an actionable claim in this lawsuit.*" Id. When read closely, Houser simply confirms that a principal is not legally responsible for its agents' ultra vires misconduct. However, nothing in Houser supports the Trial Court's erroneous conclusion here that "*there wasn't a*

possibility as a matter of law" for Val to tortiously interfere with brother Allan and/or Roil Energy's separate business expectancies. RP 46.

Indeed, the Houser court expressly recognized that if "*the actions of the employees were not within the scope of employment, then* ***they are third parties*** *potentially liable in their individual capacities.*" Id. (emphasis added). Although the Houser court analyzed agent interference liability in an employment context, that same reasoning applies with equal force where corporate officers or LLC manager-members induce a breach of the entity's business expectancy for their own personal gain.

It is well-established that a defendant's "*status as a corporate officer [does] not shield him as a matter of law from liability for tortiously interfering with [the entity's] contractual relations[.]*" Olympic Fish Products, Inc. v. Lloyd, 93 Wn.2d 596, 599 (1980). Instead, courts treat the issue "*as a matter of privilege or justification to be raised as an affirmative defense by the defendant.*" Deep Water Brewing, LLC v. Fairway Resources, Ltd., 152 Wn. App. 229, 263 (2009). However, the privilege "*is not absolute[.]*" Id. at 262. "*To avoid personal liability, the corporate officer must have acted in good faith[.]*" Id. at 263. The good faith test "*prevents corporate officers from pursuing purely personal goals with no intent to benefit the corporation.*" Olympic, 93 Wn.2d at 600.

In Olympic, a corporate officer induced his corporation to breach its contract. Id. at 598-99. The court unanimously rejected argument that "*because a corporation acts only through its agents, he cannot be personally liable for inducing*" the breach. Id. Indeed, "*[w]here a corporate officer induces a breach of contract solely for his personal gain, he should not be allowed to avail himself of the protection of the corporation.*" Id. at 600-01. Because "*[a] trial is necessary to resolve the issue of good faith,*" summary judgment was improper, warranting reversal. Id. at 602-03.

Here, the Trial Court itself acknowledged "*there are questions of material fact on tortious interference[.]*" RP 45. Yet, it then incongruently and erroneously concluded "*there wasn't a possibility as a matter of law for [Val Holms] to interfere with the business expectancies*" of Roil Energy or Allan Holms. RP 46. These irreconcilable conclusions constitute reversible error.

2. Defendants Interfered With Roil Energy's Expectancies.

Because Roil Energy was organized in Nevada, its "*organization and internal affairs and the liability of its members and managers*" must be governed by Nevada law. RCW 25.15.310(1)(a). Under Nevada law, "*[a] limited-liability company is an entity distinct from its managers and*

members." NRS 86.201(3). A Nevada LLC may sue, be sued, complain, and defend in its own name. NRS 86.281. A Nevada LLC "*is considered legally organized pursuant to this chapter [NRS 86.]*" NRS 86.201(1). Accordingly, from the time Roil Energy came into existence on 2/19/2010 (Ex. P-134), the company possessed business expectancies regarding the development and marketing of the McKenzie County Mineral Interests that were as a matter of law independent of those possessed by its members. Id.

In Olympic, the court remanded the case for trial because "*the question remains whether [the defendant] was acting solely for his own benefit rather than in the best interests of Yankee*." Olympic, supra at 602. Here, however, Roil Energy unequivocally established at trial that Val committed fraud, breached his fiduciary duties, and engaged in a civil conspiracy. CP 5262-67. Likewise, Allan established that the attempted dissolution of Roil Energy by brother Val was unlawful and ineffective under Nevada law and was an integral part of Val's conspiracy to defraud Roil. Id. These Trial Court findings establish that Val clearly acted in bad faith. Therefore, as a matter of law Val Holms was a "*third part[y] potentially liable in his individual capacit[y]*" for his intentional interference with Roil Energy's expectancies. See Houser, supra at 40. To rule otherwise constituted reversible error by the Trial Court.

3. Defendants Interfered With Allan Holms' Expectancies.

At all relevant times, Val Holms was a managing member of Roil Energy. Exs. P-134, P-135. As such, Val owed fiduciary duties to the entity and to its members. JPMorgan Chase Bank, N.A. v. KB Home, 632 F. Supp. 2d 1013, 1024-26 (D. Nev. 2009); NRS 86.286(5)-(7). However, Val defrauded Roil Energy, breached his fiduciary duties, and engaged in a civil conspiracy with respect to Roil. CP 5262-67. In addition, each of the three member managers of Roil Energy – Edington and brothers Val and Allan – formed separate and distinct contracts with Roil Energy at the time of formation. NRS 86.351 ("*The interest of each member of a limited-liability company is personal property.*"). Under Nevada law, each member of Roil Energy had separate and distinct duties to the company, as well as separate and independent business and statutory expectations to distributions of profit. NRS 86.321; 86.341; 86.391.

Here, Val intentionally interfered with Allan's legitimate business expectancies arising from Allan's membership interest in Roil Energy. CP 5262-67. Specifically, Val attempted to unlawfully dissolve Roil Energy, fraudulently induced Allan into walking away from their Reverse Merger joint venture, and purported to reconvey Mineral Interests previously deeded to Roil Energy. Id.; Exs. P-336, P-361.

Yet, despite the evidence presented, the Trial Court inexplicably dismissed Allan's intentional interference claims against Val based on the same flawed reasoning the Trial Court applied to Roil Energy's interference claims. RP 46-47, 49. Because the Trial Court ignored evidence pertinent to the economic relationship of the parties and erroneously refused to acknowledge Allan's separate and distinct contractual relationship with Roil Energy, this Court must reverse the Trial Court and remand for further proceedings.

4. The Trial Court Erroneously Misapplied Washington Law Regarding The Scope Of Defendants' Tortious Interference Liability.

In their briefing and arguments before the Trial Court, Defendants strenuously and erroneously argued that Defendant Val Holms as a matter of law could not interfere with Roil Energy's expectancies or with Allan Holms' expectancies, purportedly because "*they are all parties to the overall business relationship, and you cannot have any tortious interference among them.*" RP 9-10. Defendants presented, and the Trial Court relied on BellSouth Mobility, Inc. v. Cellulink, Inc., 814 So.2d 203 (Ala. 2001) as support for the novel legal theory that a member of an LLC cannot as a matter of law interfere with the expectancies of another company member or of the company itself. Id.

In BellSouth, the Alabama Supreme Court explained that "*the absence of the defendant's involvement in the business relationship is an element of the plaintiff's tortious-interference claim.*" Id. (emphasis added). Because "*BellSouth was anything but a stranger to the relationship between Cellulink and Wal-Mart,*" the plaintiffs' interference claim would not lie. Id. at 214 (emphasis added). However, the Alabama court held an artificially constricted view that only parties who lack any interest in the underlying contract or expectancy can as a matter of law interfere with the contract. However, this narrow, novel view of the tort of intentional interference has never been adopted in Washington. Indeed, Washington does not inquire into the overall business "relationship" of the litigants at all, but instead focus on the specific and distinct expectancies of the parties. Houser, supra; Olympic Fish, supra.

The Trial Court here erroneously adopted an unprecedented Alabama case – BellSouth – to apply a unique view of tortious interference, erroneously concluding that "*there wasn't a possibility as a matter of law*" for Val to interfere with Allan and Roil Energy's independent expectancies. RP 46. In so ruling, the Trial Court embraced the notion that because Val had an economic interest in the contractual relationship, he could interfere without risk of facing either tort or contract

liability. That is not even remotely the law in Washington. Houser, supra; Olympic Fish supra.

In so holding, the Trial Court erroneously shielded Val Holms from liability based on his economic interest in Roil Energy, thereby "*creat[ing] an undesirable lacuna in the law between the respective domains of tort and contract.*" United Nat. Maint., Inc. v. San Diego Convention Ctr., Inc., 766 F.3d 1002, 1007 (9th Cir. 2014). "*This result is particularly perverse as it is those parties with some type of economic interest in a contract whom would have the greatest incentive to interfere with it.*" Id. Because the Trial Court relied on a single Alabama case (BellSouth) in an attempt to craft new law in Washington inconsistent with binding precedent, the Trial Court's summary judgment must be reversed.

VI. RAP 18.1 MOTION FOR ATTORNEY FEES AND COSTS

Both Nevada and Washington law authorize an award of reasonable expenses, including reasonable attorney's fees "*[i]f a derivative action is successful, in whole or in part[.]*" NRS 86.489; RCW 25.15.385. Accordingly, Plaintiffs respectfully request an award of reasonable attorney fees and costs incurred on appeal. RAP 18.1.

VII. CONCLUSION

Based upon the foregoing, Appellants Allan Holms and Roil Energy respectfully request that (1) the Trial Court's errors in concluding that no enforceable agreement or contract for a joint venture was made by and between brothers Allan and Val Holms and in relying upon extrinsic evidence to defeat the plain language of the Mineral Deeds be reversed and remanded for entry of an Amended Judgment; (2) the Trial Court's errors in refusing to award damages and/or impose a constructive trust be reversed and remanded for additional proceedings on the issue of damages; and/or (3) alternatively, in the event this Court finds insufficient proof of damages, the Trial Court's error in dismissing Plaintiffs' Tortious Interference claims on summary judgment be reversed and remanded for trial; and (4) reasonable costs and attorney fees be awarded on appeal.

DATED this 22 day of April, 2015.

DUNN BLACK & ROBERTS, P.S.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22 day of April, 2015, I caused to be served a true and correct copy of the foregoing document to the following:

☒ HAND DELIVERY ☐ U.S. MAIL ☐ OVERNIGHT MAIL ☐ FAX TRANSMISSION ☐ EMAIL	Carl Oreskovich Etter, McMahon, Lamberson, Clary & Oreskovich 618 W. Riverside, Ste. 210 Spokane, WA 99201
☐ HAND DELIVERY ☒ U.S. MAIL ☐ OVERNIGHT MAIL ☐ FAX TRANSMISSION ☒ EMAIL	Wesley Paul Paul Law Group 41 Madison Avenue, 25th Floor New York, NY 10010
☒ HAND DELIVERY ☐ U.S. MAIL ☐ OVERNIGHT MAIL ☐ FAX TRANSMISSION ☐ EMAIL	Robert F. Greer Frank J. Gebhardt Feltman, Gebhardt, Greer & Zeimantz, P.S. 14th Floor Paulsen Center 421 W. Riverside Spokane, WA 99201

PHIL G. CHILDRESS

MINERAL DEED

KNOW ALL MEN BY THESE PRESENTS, that VAL M. HOLMS, PRESIDENT, TOLL RESERVE CONSORTIUM, 8883 WEST FLAMINGO ROAD, SUITE 102, LAS VEGAS, NEVADA, 89147, a Nevada Corporation, hereinafter called "GRANTOR," whether one or more, for and in consideration of the sum of Ten and no/100 Dollars ($10.00), cash in hand paid and other good and valuable considerations, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell, convey, transfer, assign, and deliver of the below described mineral rights unto ROIL ENERGY; LLC, 470 HOLMS GULCH ROAD, HELENA, MONTANA 59601, a Nevada Corporation, hereinafter called "GRANTEE," whether one or more, all of Grantor's right, title, and interest in the oil, gas, and other minerals lying in and under and that may be produced from the following described tracts of land, located in McKenzie County, State of North Dakota, towit:

TOWNSHIP 151 NORTH, RANGE 100 WEST
Section 5: Lots 3(40.06), 4(40.02), S1/2NW1/4, SW1/4NE1/4, W1/2SE1/4

together with the right to ingress and egress at all times for the purpose of mining, drilling, exploring, operating, and developing said lands for oil, gas, and other minerals and storing, handling, transporting, and marketing the same therefrom with the right to remove from said land all of Grantee's property and improvements.

This sale is made subject to any rights now existing to any lessee or assigns under any valid and subsisting mineral lease of record heretofore executed; it being understood and agreed that said Grantee shall have, receive, and enjoy the herein granted undivided interest in and to all bonuses, rents, royalties, and other benefits which may accrue under the terms of said lease insofar as it covers the above-described land from and after the date hereof, precisely as if the Grantee herein had been at the date of the making of said lease the owner of a similar undivided interest in and to the lands described and Grantee one of the lessor therein.

Grantor agrees to execute such further assurance as may be requisite for the full and complete enjoyment of the rights herein granted and likewise agrees that Grantees herein shall have the right at any time to redeem for said Grantor by payment any mortgage, taxes, or other liens on the above-described land, upon default in payment by Grantor, and be subrogated to the rights of the holder thereof.

TO HAVE AND TO HOLD, the above-described property and easement with all and singular the rights, privileges, and appurtenances thereto or in any wise belonging to said Grantee herein, their heirs, successors, personal representatives, successors, and assigns forever and does hereby agree to defend all and singular the said property unto the said Grantee herein, their heirs, successors, personal representatives, and assigns against every person whomsoever claiming or to claim the same or any part thereof.

Cause No.: 12-2-01039-5
ROIL ENERGY vs. VAL HOLMS
Plaintiff's Exhibit No.: 130
Disposition:

APPENDIX A

WITNESS our hands this 19 day of February, 2010.

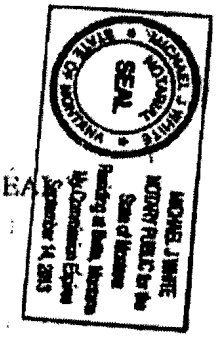
President

Val M. Holms

STATE OF MONTANA)
: ss.
County of Lewis and Clark)

On this 19 day of February, 2010, before me, the undersigned, a Notary Public for the State of Montana, personally appeared VAL M. HOLMS known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.



(SEAL)

Notary Public for the State of Montana

Michael J White
Print name
Residing at Helena, Montana
Commission expires 09/14 2013

MINERAL DEED

KNOW ALL MEN BY THESE PRESENTS, that VAL M. HOLMS, PRESIDENT, TOLL RESERVE CONSORTIUM, 8883 WEST FLAMINGO ROAD, SUITE 102, LAS VEGAS, NEVADA, 89147, a Nevada Corporation, herein called "GRANTOR," whether one or more, for and in consideration of the sum of Ten and no/100 Dollars ($10.00), cash in hand paid and other good and valuable considerations, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell, convey, transfer, assign, and deliver of the below described mineral rights unto ROIL ENERGY, LLC, 470 HOLMS GULCH ROAD, HELENA, MONTANA, 59601, a Nevada Corporation, hereinafter called "GRANTEE," whether one or more, all of Grantor's right, title, and interest in the oil, gas, and other minerals lying in and under and that may be produced from the following described tracts of land, located in McKenzie County, State of North Dakota, towit:

TOWNSHIP 151 NORTH, RANGE 100 WEST
Section 6: Lots 2, 3; SW1/4 NE1/4, SE1/4, NW1/4, NW1/4 SE1/4, SE1/4, SE1/4

TOWNSHIP 152 NORTH, RANGE 100 WEST
Section 5: SW1/4 SW1/4
Section 6: S1/2 SE1/4, SE1/4 SW1/4, Lot 14
Section 7: Lots 1,2,3,4; E1/2SW1/4, E1/2, E1/2NW1/4
Section 8: SE 1/4 SE 1/4, SW1/4,W1/2NW1/4, SE 1/4 NW1/4, SW1/4SE1/4
Section 9: Lots 1,2,3,4; SW 1/4NW1/4, NE 1/4SW1/4, SW1/4SE 1/4, S1/2SW1/4, NW1/4SW1/4,SE1/4 SE1/4
Section 10: Lots 2, 3,4; S 1/2 SW1/4
Section 15: NE 1/4N W1/4
Section 17: NE 1/4, E1/2 NW1/4, NW1/4 NW1/4, N1/2SW1/4 NW1/4, SE 1/4, E1/2- SW1/4,S1/2 SW1/4 NW1/4, W1/2 SW1/4
Section 18: N1/2NE1/4,NE1/4NW1/4, Lot 1
Section 20: All
Section 21: All
Section 22: W /2 W1/2, SE1/4 SW1/4, NE1/4 SE1/4, S1/2, SE1/4, NE1/4 SW1/4 NW1/4 SE1/4, E1/2NW1/4
Section 23: W1/2SW1/4
Section 29: NE1/4, N1/2NW1/4
Section 30: Lots 3,4; E1/2SW1/4, W1/2SE 1/4
Section 31: Lots 1,2,3,4; E1/2W1/2, E1/2
Section 32: SE 1/4NW1/4, W1/2W1/2, NE 1/4SW 1/4

TOWNSHIP 152 NORTH, RANGE 101 WEST
Section 1: SE 1/4SE 1/4
Section 12: SE1/4NE1/4, E1/2SE1/4, NE1/4NE1/4
Section 13: N1/2NE1/4, NW1/4
Section 24: SW1/4

Section 25:	NW 1/4NE 1/4, S1/2NE 1/4, N1/2NW 1/4, SE1/4NW1/4, NE 1/4SW 1/4, N1/2SE1/4, SE1/4SE1/4
Section 26:	SE 1/4
Section 35:	NE 1/4NE 1/4, S1/2NE 1/4, SE 1/4NW 1/4

together with the right to ingress and egress at all times for the purpose of mining, drilling, exploring, operating, and developing said lands for oil, gas, and other minerals and storing, handling, transporting, and marketing the same therefrom with the right to remove from said land all of Grantee's property and improvements.

This sale is made subject to any rights now existing to any lessee or assigns under any valid and subsisting mineral lease of record heretofore executed; it being understood and agreed that said Grantee shall have, receive, and enjoy the herein granted undivided interest in and to all bonuses, rents, royalties, and other benefits which may accrue under the terms of said lease insofar as it covers the above-described land from and after the date hereof, precisely as if the Grantee herein had been at the date of the making of said lease the owner of a similar undivided interest in and to the lands described and Grantee one of the lessor therein.

Grantor agrees to execute such further assurance as may be requisite for the full and completed enjoyment of the rights herein granted and likewise agrees that Grantee herein shall have the right at any time to redeem for said Grantor by payment any mortgage, taxes, or other liens on the above-described land, upon default in payment by Grantor, and be subrogated to the rights of the holder thereof.

TO HAVE AND TO HOLD, the above-described property and easement with all and singular the rights, privileges, and appurtenances thereto or in any wise belonging to said Grantee herein, their heirs, successors, personal representatives, successors, and assigns forever and does hereby agree to defend all and singular the said property unto the said Grantee herein, their heirs, successors, personal representatives, and assigns against every person whomsoever claiming or to claim the same or any part thereof.

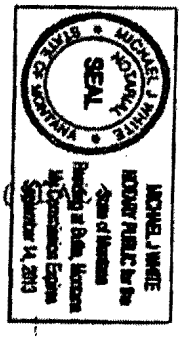
WITNESS our hands this 17th day of February, 2010.

Val M. Holms

STATE OF MONTANA)
: ss.
County of Lewis and Clark)

On this 19 day of February, 2010, before me, the undersigned, a Notary Public for the State of Montana, personally appeared VAL M. HOLMS known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.



Notary Public for the State of Montana

Michael J White
Print name
Residing at Helena, Montana
Commission expires 09/14 2013

RCW 25.05.060
Partnership property.

Property acquired by a partnership is property of the partnership and not of the partners individually.

[1998 c 103 § 203.]

Appendix B

RCW 25.05.065(3)
When property is partnership property.

(3) Property is presumed to be partnership property if purchased with partnership assets, even if not acquired in the name of the partnership or of one or more partners with an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership.

[1998 c 103 § 204.]

Appendix C

RCW 64.04.010
Conveyances and encumbrances to be by deed.

Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed: PROVIDED, That when real estate, or any interest therein, is held in trust, the terms and conditions of which trust are of record, and the instrument creating such trust authorizes the issuance of certificates or written evidence of any interest in said real estate under said trust, and authorizes the transfer of such certificates or evidence of interest by assignment by the holder thereof by a simple writing or by endorsement on the back of such certificate or evidence of interest or delivery thereof to the vendee, such transfer shall be valid, and all such assignments or transfers hereby authorized and heretofore made in accordance with the provisions of this section are hereby declared to be legal and valid.

[1929 c 33 § 1; RRS § 10550. Prior: 1888 p 50 § 1; 1886 p 177 § 1; Code 1881 § 2311; 1877 p 312 § 1; 1873 p 465 § 1; 1863 p 430 § 1; 1860 p 299 § 1; 1854 p 402 § 1.]

Appendix D

RCW 64.04.020
Requisites of a deed.

Every deed shall be in writing, signed by the party bound thereby, and acknowledged by the party before some person authorized by *this act to take acknowledgments of deeds.

[1929 c 33 § 2; RRS § 10551. Prior: 1915 c 172 § 1; 1888 p 50 § 2; 1886 p 177 § 2; Code 1881 § 2312; 1854 p 402 § 2.]

Appendix E

NDCC 47-04-01. Jurisdiction - State laws.

Real property within this state is governed by the law of this state.

APPENDIX F

NDCC 47-09-06. Delivery of written transfer - Requirement - Presumption from execution.

A grant takes effect so as to vest the interest intended to be transferred only upon its delivery by the grantor and is presumed to have been delivered at its date.

APPENDIX G

NDCC 47-19-46. Unrecorded instrument valid between parties - Knowledge of instruments out of chain of title.

An unrecorded instrument is valid as between the parties thereto and those who have notice thereof. Knowledge of the record of an instrument out of the chain of title does not constitute such notice, provided, however, that the record of a mortgage, deed, or other conveyance prior to the recording of a deed or other conveyance vesting title of record in the mortgagor or grantor shall not be considered out of the chain of title after the recording of a deed or other conveyance vesting title in the mortgagor or grantor in such first recorded mortgage, deed, or other conveyance.

APPENDIX H

NDCC 47-09-07. Delivery must be absolute - Conditional delivery ineffective, becomes absolute.

A grant cannot be delivered to the grantee conditionally. Delivery to the grantee or to the grantee's agent as such is necessarily absolute and the instrument takes effect thereupon, discharged of any condition on which the delivery was made.

APPENDIX I

RCW 25.15.310(1)(a)
Law governing.

(1) Subject to the Constitution of the state of Washington:

(a) The laws of the state, territory, possession, or other jurisdiction or country under which a foreign limited liability company is organized govern its organization and internal affairs and the liability of its members and managers; and

[1995 c 337 § 21; 1994 c 211 § 901.]

APPENDIX J

NRS 86.201(3). Commencement of organizational existence.

3. A limited-liability company is an entity distinct from its managers and members.

APPENDIX K

NRS 86.281. General powers.

A limited-liability company organized and existing pursuant to this chapter may exercise the powers and privileges granted by this chapter and may:

1. Sue and be sued, complain and defend, in its name;

2. Purchase, take, receive, lease or otherwise acquire, own, hold, improve, use and otherwise deal in and with real or personal property, or an interest in it, wherever situated;

3. Sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any part of its property and assets;

4. Lend money to and otherwise assist its members;

5. Purchase, take, receive, subscribe for or otherwise acquire, own, hold, vote, use, employ, sell, mortgage, lend, pledge or otherwise dispose of, and otherwise use and deal in and with shares, member's interests or other interests in or obligations of domestic or foreign limited-liability companies, domestic or foreign corporations, joint ventures or similar associations, general or limited partnerships or natural persons, or direct or indirect obligations of the United States or of any government, state, territory, governmental district or municipality or of any instrumentality of it;

6. Make contracts and guarantees and incur liabilities, borrow money at such rates of interest as the company may determine, issue its notes, bonds and other obligations and secure any of its obligations by mortgage or pledge of all or any part of its property, franchises and income;

7. Lend, invest and reinvest its money and take and hold real property and personal property for the payment of money so loaned or invested;

8. Conduct its business, carry on its operations and have and exercise the powers granted by this chapter in any state, territory, district or possession of the United States, or in any foreign country;

9. Appoint managers and agents, define their duties and fix their compensation;

10. Cease its activities and surrender its articles of organization;

11. Exercise all powers necessary or convenient to effect any of the purposes for which the company is organized; and

12. Hold a license issued pursuant to the provisions of chapter 463 of NRS.

(Added to NRS by 1991, 1297; A 1993, 2011; 1997, 718; 2001, 1390, 3199)

APPENDIX L

NRS 86.201(1). Commencement of organizational existence.

1. A limited-liability company is considered legally organized pursuant to this chapter:

(a) At the time of the filing of the articles of organization with the Secretary of State, upon a later date and time as specified in the articles, which date must not be more than 90 days after the date on which the articles are filed or, if the articles specify a later effective date but do not specify an effective time, at 12:01 a.m. in the Pacific time zone on the specified later date, whichever is applicable; and

(b) Upon paying the required filing fees to the Secretary of State.

APPENDIX M

NRS 86.286(5)-(7). Operating agreement.

5. If, and to the extent that, a member or manager or other person has duties to a limited-liability company, to another member or manager, or to another person that is a party to or is otherwise bound by the operating agreement, such duties may be expanded, restricted or eliminated by provisions in the operating agreement, except that an operating agreement may not eliminate the implied contractual covenant of good faith and fair dealing.

6. Unless otherwise provided in an operating agreement, a member, manager or other person is not liable for breach of duties, if any, to a limited-liability company, to any of the members or managers or to another person that is a party to or otherwise bound by the operating agreement for conduct undertaken in the member's, manager's or other person's good faith reliance on the provisions of the operating agreement.

7. An operating agreement may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties, if any, of a member, manager or other person to a limited-liability company, to any of the members or managers, or to another person that is a party to or is otherwise bound by the operating agreement. An operating agreement may not limit or eliminate liability for any conduct that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.

APPENDIX N

NRS 86.351. Nature and transfer of member's interest; rights of transferee; substituted members.

1. The interest of each member of a limited-liability company is personal property. The articles of organization or operating agreement may prohibit or regulate the transfer of a member's interest. Unless otherwise provided in the articles or operating agreement, a transferee of a member's interest has no right to participate in the management of the business and affairs of the company or to become a member unless a majority in interest of the other members approve the transfer. If so approved, the transferee becomes a substituted member. The transferee is only entitled to receive the share of profits or other compensation by way of income, and the return of contributions, to which the transferor would otherwise be entitled.

2. A substituted member has all the rights and powers and is subject to all the restrictions and liabilities of the transferor, except that the substitution of the transferee does not release the transferor from any liability to the company.

APPENDIX O

NRS 86.321. Contributions to capital: Form.

The contributions to capital of a member to a limited-liability company may be in cash, property or services rendered, or a promissory note or other binding obligation to contribute cash or property or to perform services.

APPENDIX P

NRS 86.341. Distribution of profits.

A limited-liability company may, from time to time, divide the profits of its business and distribute them to its members, and any transferee as his or her interest may appear, upon the basis stipulated in the operating agreement. If the operating agreement does not otherwise provide, profits and losses must be allocated proportionately to the value, as shown in the records of the company, of the contributions made by each member and not returned.

APPENDIX Q

NRS 86.391. Liability of member to company.

1. A member is liable to a limited-liability company:

(a) For a difference between the member's contributions to capital as actually made and as stated in the articles of organization or operating agreement as having been made; and

(b) For any unpaid contribution to capital which the member agreed in the articles of organization or operating agreement to make in the future at the time and on the conditions stated in the articles of organization or operating agreement.

2. A member holds as trustee for the company specific property stated in the articles of organization or operating agreement as contributed by the member, but which was not so contributed.

3. The liabilities of a member as set out in this section can be waived or compromised only by the consent of all of the members, but a waiver or compromise does not affect the right of a creditor of the company to enforce the liabilities if the creditor extended credit or the creditor's claim arose before the effective date of an amendment of the articles of organization or operating agreement effecting the waiver or compromise.

APPENDIX R

NRS 86.489. Expenses.

If a derivative action is successful, in whole or in part, or if anything is received by the plaintiff as a result of a judgment, compromise or settlement of an action or claim, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, and shall direct the plaintiff to remit to the limited-liability company the remainder of those proceeds received by the plaintiff.

APPENDIX S

RCW 25.15.385
Expenses.

If a derivative action is successful, in whole or in part, as a result of a judgment, compromise, or settlement of any such action, the court may award the plaintiff reasonable expenses, including reasonable attorneys' fees, from any recovery in any such action or from a limited liability company.

[1994 c 211 § 1004.]

APPENDIX T