Cause No. 47316-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

BUSINESS SERVICES OF AMERICA II, INC.,

Appellant,

v.

WAFERTECH LLC,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR CLARK COUNTY
HONORABLE DAVID B. GREGERSON

BRIEF OF RESPONDENT

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I. INTRODUCTION

This latest appeal lodged by Business Services of America II, Inc. ("BSofA") is an improper attempt to re-litigate BSofA's procedural contention that BSofA is a misnomer for a long-defunct Delaware corporation. This Court squarely rejected BSofA's "misnomer" theory in its October 21, 2014 Opinion, which is not subject to further challenge. In that October 21, 2014 Opinion, this Court remanded to the trial court for the limited purpose of determining whether BSofA somehow had *independent* legal existence sufficient to continue its appeal.

During the most recent remand proceedings, the trial court fulfilled its mandate from this Court, holding a full and fair evidentiary hearing into BSofA's legal status. On February 20, 2015, the trial court correctly concluded that BSofA had no independent legal status and therefore lacked the capacity to sue or be sued. Accordingly, the only proper subject of this appeal is whether the trial court abused its discretion in so concluding. This Court should affirm the trial court's ruling and dismiss BSofA's appeal because BSofA has no legal existence and is not an aggrieved party within the meaning of RAP 3.1.

BSofA's opening brief raises a great many issues that are not properly within the scope of this limited appeal, including the propriety of the trial court's 2013 order granting summary judgment in respondent

WaferTech's favor. This Court need not reach any of those issues in order to resolve this appeal.

If this Court does decide to go beyond the scope of its October 21, 2014 remand order, this Court should affirm the trial court's grant of summary judgment to WaferTech on equitable setoff grounds. Since BSofA's predecessor obtained a $2.4 million settlement from an identically situated defendant for a claim worth no more than $1.5 million, BSofA has already been overpaid. Accordingly, this Court should affirm the dismissal of this case and resulting award of fees to WaferTech, and also award WaferTech its fees on appeal.

II. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court properly exercise its discretion in determining that BSofA does not legally exist and lacks capacity to sue or be sued?

2. Is it improper for BSofA to continue asserting that BSofA is a misnomer after that issue has already been fully litigated through final appeal?

3. Should this Court dismiss BSofA's appeal because BSofA is not an "aggrieved party" that is competent to prosecute this appeal within the meaning of RAP 3.1?

4. When a plaintiff sues two defendants for the same damages, is it proper to offset a settlement by one defendant against the liability of the other defendant under the "one satisfaction" rule?

III. RESTATEMENT OF THE CASE

The decision on appeal is the direct result of this Court's October 21, 2014 remand order, in which this Court rejected BSofA's argument that BSofA was a misnomer for another similarly-named entity. In the narrowly-crafted remand order, this Court directed the trial court to determine whether BSofA had some independent legal status that would allow BSofA to continue its appeal. Whether the trial court properly complied with this Court's October 21, 2014 remand order is the only proper subject of this appeal.

BSofA's opening brief, however, raises a number of issues that are far outside the scope of this Court's mandate. It is not necessary or proper for this Court to reach those issues to resolve this appeal. Nevertheless, in case this Court is inclined to consider issues beyond the scope of the narrow remand, WaferTech hereby submits a comprehensive restatement of the case. Many of the underlying facts in this restatement are taken from this Court's October 21, 2014 Opinion, which establishes the law of the case.

A. Original Litigation

This dispute arose over cost overrun and safety issues during the construction of WaferTech's $1.2 billion silicon wafer manufacturing plant in Camas, Washington. (CP 37) The prime contractor, Meissner + Wurst ("M+W"), hired Natkin/Scott to assist with construction of the facility's "clean room." (CP 110) On April 22, 1998, M+W terminated Natkin/Scott for repeated violations of the project's safety rules. (CP 97) Natkin/Scott then filed a mechanic's lien against WaferTech's property and commenced this lawsuit against M+W and WaferTech, seeking over $7.65 million for allegedly unpaid work. (CP 22, 37)

Natkin/Scott's sole claim against WaferTech, for foreclosure of its mechanic's lien, was based on the same claims it brought against M+W for breach of contract, wrongful termination, and *quantum meruit*. (CP 37)

In January 2001, on M+W and WaferTech's motions, Clark County Superior Court Judge James Ladley held that Natkin/Scott had waived its right to a lien against WaferTech's property for any work before February 1, 1998, but found that there were outstanding issues of fact regarding whether Natkin/Scott had also waived its breach of contract claims against M+W. (CP 373) In February 2001, Judge Ladley held that Natkin/Scott's lien claim was clearly excessive, and reduced the claim to a

maximum of $1.5 million, "the validity and amount of which is still to be determined, under RCW 60.04.081." (CP 375)

On March 19, 2001, Natkin/Scott settled with M+W for $2.4 million. October 21, 2014 Opinion at 2. As part of the settlement, M+W assigned its pass-through claims against WaferTech to Natkin/Scott. (*Id.*) The pass-through claims allowed Natkin/Scott to assert its breach of contract claims directly against WaferTech; the amount and theory of damages sought in these claims remained the same.

On May 15, 2001, Natkin/Scott amended its complaint, substituting BSofA as plaintiff. The amended complaint alleged that BSofA was a Delaware Corporation and was the assignee of Natkin/Scott's claims against WaferTech. (CP 109) This new complaint asserted the same breach of contract and *quantum meruit* claims against WaferTech that Natkin/Scott had previously brought against M+W for unpaid work on WaferTech's facility. (CP 109) On June 8, 2001, WaferTech answered, arguing that Natkin/Scott's settlement with M+W barred any further recovery. (CP 117)

On May 22, 2002, the trial court ruled that Natkin/Scott's lien waivers and claim releases barred all claims of any nature and against any defendant for work performed prior to February 1, 1998. (CP 427) This ruling meant that BSofA could potentially recover only for work that

Natkin/Scott had performed after January 31, 1998. (CP 427: "Plaintiff [BSofA's] claims are therefore limited to the recovery of job costs incurred on the WaferTech project after January 31, 1998.") Together with the trial court's February 2001 Order reducing the lien claim to a maximum of $1.5 million, this order limited BSofA's aggregate claims for unpaid work to $1.5 million under any theory of recovery and against any defendant.

B. On Appeal in 2004, this Court Affirmed the Dismissal of All But One of BSofA's Claims

BSofA appealed. On March 9, 2004, this Court affirmed the trial court's dismissal of most of BSofA's claims, including any lien claim based on work performed before January 1998. This Court expressly rejected all of BSofA's pre-February 1998 lien claims: "Here, the trial court determined that the earlier releases unambiguously released all claims without reservation. It did not err in doing so and it properly limited Natkin/Scott's lien claim to costs incurred only after January 31, 1998 . . . "$1.5 million represents the trial court's valuation of Natkin/Scott's post-January 31, 1998 lien claims." *Bus. Servs. of Am. II, Inc. v. WaferTech, LLC,* No. 28886-9-II, 2004 WL 444724 *6 (Wash. Ct. App. March 9, 2004). The Court of Appeals remanded for trial on

BSofA's assigned lien claim, as limited by the trial court and on appeal. *Id.*

After this Court's remand in 2004, the case lay fallow for more than four years before BSofA attempted to restart the case in early 2009. On WaferTech's motion, the trial court dismissed BSofA's remaining lien claim for failure to prosecute the litigation. BSofA again appealed, and the Supreme Court reversed the dismissal in 2012, remanding BSofA's $1.5 million lien foreclosure claim to the trial court. *Bus. Servs. of Am. II, Inc. v. WaferTech LLC*, 174 Wn.2d 304, 306, 274 P.3d 1025 (2012).

C. In 2013, the Trial Court Granted Summary Judgment in WaferTech's Favor on Equitable Setoff Grounds

After the second remand, BSofA filed a Third Amended Complaint, asserting a single claim to foreclose its construction lien, and again alleging that "at the time of the filing of Plaintiff's Second Amended Complaint, substituting it as plaintiff, Business Services of America II, Inc. was a Delaware Corporation." (CP 306) In its answer, WaferTech alleged that it "lacks sufficient knowledge or information to form a belief as to the truth of [BSofA's status as a Delaware Corporation], and therefore denies the same." (CP 311)

In August 2013, the trial court granted WaferTech's motion for summary judgment because any remaining lien claims were offset, in their

entirety, by a $2.4 million settlement that BSofA had received from M+W. On September 20, 2013, the trial court entered a Supplemental Judgment awarding WaferTech $430,110 in attorney fees and costs. (CP 616)

BSofA appealed, but BSofA did not post a bond or pay WaferTech's fee judgment. In pursuing collection, WaferTech discovered that no entity named "Business Services of America II" had ever been incorporated in Delaware.

After failing to obtain a satisfactory explanation from BSofA's counsel regarding BSofA's lack of existence, WaferTech moved to dismiss BSofA's appeal on the grounds that BSofA was not an "aggrieved party" within the meaning of RAP 3.1. Soon after WaferTech filed its motion to dismiss BSofA's appeal, BSofA filed a motion in the trial court under CR 60(a), seeking to change the name of the plaintiff/appellant from BSofA to " Business Service America II." (CP 637) This Court's commissioner denied WaferTech's motion to dismiss BSofA's appeal, without prejudice to WaferTech's right to raise the issue again in its merits brief. The trial court then denied BSofA's motion to change the name of the judgment debtor to Business Service America II ("BSA II") on February 7, 2014. (CP 651) On April 14, 2014, the trial court denied a renewed motion to address the alleged misnomer in BSofA's name. (CP 690)

D. In 2014, this Court Affirmed the Trial Court's Decision Denying BSofA's Motion to Change the Name of the Plaintiff to BSA II.

BSofA appealed, and this Court consolidated BSofA's appeal regarding the "misnomer" issue with BSofA's appeal of the trial court's order granting summary judgment in WaferTech's favor on equitable setoff grounds. On October 21, 2014, this Court affirmed the trial court's order denying BSofA's motion to correct the supposed "misnomer" and remanded to the trial court for the limited purpose of "determin[ing] BSofA's legal status and BSofA's ability to pursue its appeal against WaferTech." October 21, 2014 Opinion at 1-2. Because of this Court's resolution of the "misnomer" issue, this Court did not reach the merits of the trial court's equitable setoff summary judgment order. *Id.* at 2.

BSofA moved for reconsideration and twice moved to supplement the appellate record with additional documents that BSofA had not presented to this Court in connection with either of BSofA's CR 60(a) motions. BSofA claimed that these newly-presented documents supported its position that BSA II—and not BSofA—was the assignee of Natkin/Scott's claim against WaferTech. This Court denied BSofA's motion for reconsideration and denied both of BSofA's motions to supplement the record with additional documentary evidence.

November 26, 2014, Order Denying BSofA's Motion for Reconsideration and Motions to Supplement the Record.

E. On Remand, the Trial Court Determined that BSofA Had No Legal Existence

On remand in early 2015, WaferTech filed a motion and an application for an order to show cause, seeking a determination by the trial court that BSofA lacked any form of legal existence. (Supp. CP ___, Sub No. 1227, 1233)

In response, BSofA filed its own competing motion and application for a show cause order. BSofA asked the trial court to "enter findings of fact that WaferTech has known since 2002 that Business Services of America II, Inc. is a misnomer for Business Service America II, Inc." (CP 725) BSofA also filed a motion to correct the alleged misnomer, seeking (again) to correct an alleged error in WaferTech's judgment pursuant to CR 60(a) or to amend its pleading and substitute a new plaintiff for BSofA. (CP 732)

The trial court held two hearings on WaferTech's and BSofA's competing motions and show cause applications. At the first hearing, on February 19, 2015, the trial court granted WaferTech's application, ordering BSofA to appear to show cause why the trial court should not enter findings of fact determining that BSofA lacked any legal existence.

(CP 761) At that same hearing, the trial court denied BSofA's competing application for a show cause order. (CP 761)

The trial court held a show cause hearing on February 20, 2015. BSofA acknowledged that it had no evidence that BSofA had any legal existence. Tr. of Proceedings, February 20, 2015 at 6. At the conclusion of the hearing, the trial court granted WaferTech's motion, denied BSofA's motion, and entered findings of fact and conclusions of law determining that BSofA has no legal existence and lacks the capacity to sue or be sued. (CP 766) The trial court's February 20, 2015 Order is the subject of this appeal. (CP 770)

F. BSofA's Appellate Motions to Correct Alleged Misnomer

On May 12, 2015, BSofA moved this Court to correct the alleged misnomer in BSofA's name. BSofA separately moved to admit additional exhibits to the record. On June 18, 2015, this Court's commissioner denied both of BSofA's motions.

BSofA moved to set-aside the commissioner's rulings, arguing—for the first time—that WaferTech had somehow previously "conceded" that BSofA was a misnomer for BSA II. WaferTech opposed BSofA's motion, showing that WaferTech had made no such concession. This Court denied BSofA's motion to modify the commissioner's rulings on August 18, 2015.

On September 14, 2015, WaferTech moved to strike BSofA's opening brief because BSofA's brief: (1) addressed issues outside BSofA's notice of appeal; and (2) improperly asked this Court to reconsider issues already decided in this Court's October 21, 2014 Opinion. This Court's commissioner denied WaferTech's motion without prejudice to WaferTech's right to "raise its issues about the scope of review and the record on review in its brief." October 2, 2015 Order.

IV. SUMMARY OF ARGUMENT

This Court's October 21, 2014 Opinion gave the trial court a very narrow mandate: to determine whether BSofA had any independent legal existence sufficient to allow BSofA to continue its appeal against WaferTech. The trial court did precisely as this Court directed, holding a show-cause hearing at which the trial court gave BSofA a full and fair opportunity to present evidence of its legal existence. BSofA declined to present any such evidence, effectively conceding that BSofA is a legal nullity. Consequently, on February 20, 2015, the trial court entered findings of fact and conclusions of law establishing that BSofA had no independent legal existence and lacked the capacity to sue or be sued. This Court should affirm that ruling and dismiss BSofA's appeal.

BSofA's appeal ignores this Court's October 21, 2014 ruling by continuing to assert that BSofA is a misnomer for a long defunct Delaware

corporation. This Court has already rejected BSofA's "misnomer" argument four separate times, and this Court should do so again here. The "misnomer" issue has already been litigated through final appeal, and BSofA has not shown any reason why this Court should reconsider its earlier rulings.

If this Court is somehow inclined to entertain BSofA's misnomer argument (in spite of this Court's earlier rulings to the contrary and the substantial evidence showing that BSofA is not a misnomer), then this Court should not permit BSofA to substitute the defunct shell entity BSA II as plaintiff/appellant in BSofA's place. As a void, defunct shell entity, BSA II lacks capacity under Delaware law to be substituted in place of the long-named plaintiff, BSofA.

If this Court also decides to go even further and review the trial court's 2013 summary judgment order in WaferTech's favor on equitable setoff grounds, then this Court should affirm that order. BSofA sued M+W and WaferTech for the same injury, and both defendants faced the same potential liability. BSofA extracted a $2.4 million settlement payment from M+W to settle a claim that was worth, at most, $1.5 million. Any payment from WaferTech to BSofA would be an impermissible windfall for BSofA, and the trial court correctly applied the doctrine of equitable setoff to prevent any further recovery.

This Court also should affirm the trial court's award of attorney fees to WaferTech and award fees on appeal.

V. ARGUMENT

A. The Trial Court Properly Rejected BSofA's Misnomer Argument and Correctly Ruled that BSofA Lacks Legal Existence

The trial court, in its post-remand February 20, 2015 order, denied BSofA's CR 60(a) motion to correct a misnomer and found that BSofA lacks independent legal existence. The standard of review for an order under CR 60(a) is abuse of discretion. *In re Welfare of R.S.G.,* 172 Wn. App. 230, 243, 289 P.3d 708 (Div. II, 2012) ("We review a trial court's order vacating a validly entered prior court order under CR 60 for abuse of discretion.") The trial court's findings of fact are reviewed for substantial evidence. *Mitchell v. Washington State Institute of Public Policy*, 153 Wn. App. 803, 809, 225 P.3d 280 (2009). Here, the trial court did not abuse its discretion, and the trial court's findings of fact are based on undisputed evidence.

BSofA incorrectly argues that this Court should review the trial court's post-remand rulings regarding the alleged misnomer *de novo* because the trial court's rulings were based on documentary evidence. BSofA Op. Br. at 12. But BSofA ignores the fact that this Court has already ruled that the proper standard of review for BSofA's CR 60(a)

motion is abuse of discretion. October 21, 2014 Opinion at 6, citing *Shaw v. City of Des Moines*, 109 Wn. App. 896, 900, 37 P.3d 1255 (2002); *Presidential Estates Apt. Assoc. v. Barrett*, 129 Wn.2d 320, 325-326, 917 P.2d 100 (1996). As this Court noted, "the trial court was faced with conflicting evidence as to whether BSofA or BSA II was the actual assignee [of Natkin/Scott's claims against WaferTech] and therefore which entity was the correct plaintiff." October 21, 2014 Opinion at 8. In order to evaluate whether the trial court committed error, this Court reviewed the evidence that the trial court considered in connection with BSofA's "misnomer" argument, all of which was documentary in nature. *Id.* at 8-10. Ultimately, this Court concluded that "[b]ecause of the factual uncertainty as to whether there was an error in the judgment, the trial court did not abuse its discretion in refusing to change the plaintiff's name." *Id* at 10.

Moreover, the two standard of review cases BSofA cites provide no support for BSofA's argument that this Court should review the trial court's decisions *de novo*. BSofA's two proffered cases address only the standard of review for disputes arising out of the state's Public Records Act, which expressly provides for judicial review of agency decisions and embodies a strong public policy in favor of disclosure of public records. *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) (overruled by

statute, as acknowledged in *Amren v. City of Kalama*, 131 Wn.2d 25, 929 P.2d 389 (1997); *Limstrom v. Ladenburg*, 136 Wn.2d 595, 612, 963 P.2d 869 (1998). Put simply, this is not a Public Records Act case. Consequently, nothing in either the *In re Rosier* or *Limstrom* cases changes the abuse of discretion standard of review applicable to CR 60(a) motions.

Notably, this Court has already rejected BSofA's misnomer argument on four separate occasions, beginning with this Court's October 21, 2014 Opinion. In that opinion, this Court affirmed the trial court's ruling that BSofA was not a misnomer. October 21, 2014 Opinion at 10. Nevertheless, this Court was unable to determine, from the then-existing record, whether BSofA had any independent legal existence sufficient to continue its appeal. *Id.* at 11. This Court, therefore, issued a narrowly-tailored mandate to the trial court to complete the record: "to determine BSofA's legal status and BSofA's ability to pursue its appeals against WaferTech." *Id.* at 14. BSofA unsuccessfully moved for reconsideration, arguing that this Court erred in rejecting BSofA's misnomer argument. November 26, 2014 Order Denying Motion for Reconsideration and Motions to Supplement.

Even in the face of this Court's October 21, 2015 Opinion, BSofA continued to press its "misnomer" argument on remand. (CP 725, 732)

The trial court properly rejected BSofA's continuing effort to re-litigate this issue on the grounds that BSofA's "misnomer" argument was outside the scope of the mandate from this Court. February 19, 2015 Transcript of Proceedings at p. 15:13-17 (Judge Gregerson: "[T]he Court of Appeals' mandate specifically wants this Court to address what, if any, is the status of the named plaintiff in this proceeding and that will be the limited inquiry of the Court [at the show-cause hearing]." Accordingly, the trial court ordered BSofA to appear at a show-cause hearing to present evidence of BSofA's legal existence. (CP 761)

At the show cause hearing, BSofA refused to present any evidence. BSofA's counsel stated "I don't have any evidence that [BSofA] exists." February 20, 2015 Transcript of Proceedings at p. 6:8-10. At the conclusion of the show-cause hearing, the trial court fulfilled its mandate from this Court by entering findings of fact and conclusions of law establishing that BSofA had no legal existence and lacked the capacity to sue or be sued. (CP 766)

B. BSofA's Continued Attempt to Re-Litigate the Misnomer Issue Violates the Law of the Case Doctrine

BSofA's opening brief effectively asks this Court to reconsider and vacate its October 21, 2014 Opinion by ruling that BSofA is a misnomer for BSA II. BSofA's argument violates the law of the case doctrine by

attempting to reopen issues that have already been litigated through final appeal. *See, e.g., Humphrey Industries, Ltd. v. Clay Street Associates, Inc.*, 176 Wn.2d 662, 671, 295 P.3d 231 (2013) (on remand, it is error for a trial court to revisit issues that have already been decided by the appellate court.) [1]

Although BSofA may argue that this Court should revisit its October 21, 2014 Opinion and subsequent orders under RAP 2.5(c)(2), there is no cause for this Court to do so. The Washington Supreme Court has consistently ruled that "an appellate court may reconsider only those decisions that were clearly erroneous and that would work a manifest injustice to one party if the clearly erroneous decision were not set aside." *State v. Worl*, 129 Wn.2d 416, 425, 918 P.2d 905 (1996) (holding that the law of the case doctrine barred the Court of Appeals from reconsidering an earlier ruling); *see also Folsom v. City of Spokane*, 111 Wn.2d 256, 265, 759 P.2d 1196 (1988) (appellate court can only reconsider its prior ruling if the prior ruling is clearly erroneous).

Here, BSofA has invited this Court to reconsider its October 21, 2014 Opinion on multiple occasions, but this Court has consistently declined to do so. Before filing its opening brief in this appeal, BSofA filed two separate motions in an attempt to persuade this Court to adopt

[1] BSofA did not petition the Washington Supreme Court for Review.

BSofA's misnomer theory. In BSofA's first motion, filed on May 14, 2015, BSofA asked this Court to correct the alleged misnomer in BSofA's name under RAP 7.3. This Court's commissioner denied BSofA's motion on June 18, 2015. Then, on July 6, 2015, BSofA moved to modify the commissioner's ruling, arguing—for the first time—that WaferTech had somehow "conceded" at oral argument that BSofA "was a misnomer that could be corrected." On August 18, 2015, this Court denied BSofA's motion. All told, this Court has squarely rejected BSofA's misnomer theory on four separate occasions. *See* October 21, 2014 Opinion; November 26, 2014 Order Denying Motion for Reconsideration; June 18, 2015 Order; and August 18, 2015 Order. There has been no change in the evidence or in the state of the law that would justify reconsideration of this Court's October 21, 2014 Opinion. This Court's rejection of BSofA's misnomer argument is now law of the case and should not be subject to further review.

C. As this Court has Previously Ruled, BSofA is not a Misnomer

If, in spite of all its earlier rulings, this Court is inclined to revisit its October 21, 2014 Opinion, this Court should nonetheless reject BSofA's misnomer argument. In affirming the trial court's order denying BSofA's CR 60(a) motion, this Court acknowledged the existence of significant evidence showing that BSofA is <u>not</u> a misnomer. First, as this

Court noted, BSofA's second and third amended complaints alleged that BSofA (not BSA II) was the assignee of Natkin/Scott's claim against WaferTech. October 21, 2014 Opinion at 8.

Second, as this Court recognized, BSofA identified itself as BSofA in myriad pleadings and other filings since 2001. *Id.* at 9. This was not a one-time spelling error; BSofA held itself out as plaintiff in hundreds of pleadings over more than a decade of litigation. Third, a surety paid "earlier judgments for over $800,000 in attorney fees against BSofA." *Id.* Finally, Joseph Guglielmo signed an acknowledgement, in his capacity as president of BSofA, that BSofA was the assignee of Natkin/Scott's claim against WaferTech. *Id.*

This Court concluded that this evidence made it uncertain whether there was an error in the judgment (*i.e.,* whether BSofA was merely a misnomer for BSA II). *Id.* at 9-10. Based on this factual uncertainty, this Court determined that the trial court did not abuse its discretion in rejecting BSofA's misnomer argument. *Id.* at 10.

BSofA's opening brief again argues that WaferTech somehow conceded at oral argument that BSofA is a misnomer. BSofA Op. Br. at 9. Not so. WaferTech's position now and at oral argument has been consistent: that BSofA failed to meet its burden of proving the existence of a misnomer pursuant to CR 60(a). Transcript of Oral Argument, at

24:10-16 ("But what I'm asking you to do is affirm the trial court's refusal to allow the substitution under CR 60(a) and that—the plaintiff has the burden of that, the moving party, and they didn't carry their burden in the trial court."); 26:10-13 ("But again, the threshold issue for this court is whether the trial court CR 60(a) ruling was correct and should be affirmed under the abuse of discretion standard.")

WaferTech took the same position in its responding brief to BSofA's appeal of the trial court's denial of BSofA's CR 60(a) motion. Respondent's Brief, Cause No. 46138-II, pp. 7-12. In short, WaferTech has never conceded that BSofA is a misnomer. BSofA had the burden of proof on that issue. The trial court previously concluded that BSofA failed to meet its burden, and this Court affirmed. October 21, 2014 Opinion at 1.

BSofA also improperly asks this Court to consider "new" documentary evidence that BSofA never presented to the trial court in support of BSofA's CR 60(a) motions until after this Court issued its October 21, 2014 Opinion. BSofA Op. Br. at 5. Even if this Court were inclined to consider new evidence at this late stage, BSofA's proffered documents are so riddled with inconsistencies and internal contradictions that they are meaningless for purposes of establishing the identity of Natkin/Scott's assignee.

For example, the first page of Ex. 899, which purports to be an opinion letter from Natkin/Scott's attorneys regarding the sale of Natkin/Scott's litigation claims, identifies the buyer as "Business Service America, Inc." Joseph Guglielmo signed this letter on April 21, 1999 in his capacity as President and Chief Executive Officer of Scott Company of California, one of the two participants in the Natkin/Scott Joint Venture.

Page 5 of Ex. 899, which is a letter from Scott Co. to Wells Fargo regarding the sale, identifies the buyer slightly differently, as "Business Services America, Inc."

The sale and servicing agreement, beginning on page 6 of Ex. 899, identifies the buyer of Natkin/Scott's litigations claims as "Business Service America II, Inc., a *Georgia* corporation, whose address is 27012 Gardner Drive, Alpharetta, Georgia 30004." (Emphasis added). No such entity has ever been registered in Georgia. A person named Charles V. Litt, who identified himself as "President" of Business Service America II, signed the sale and servicing agreement on behalf of Business Service America II, which is dated July 23, 1999. If this "Business Service America II" is the same entity as the plaintiff in this case (allegedly a Delaware corporation), then Mr. Litt's signature as "President" contradicts the sworn testimony in the Guglielmo declaration that Mr. Guglielmo was president of BSA II from 1999-2006. *See* CP 708, 545. In his declaration,

Mr. Guglielmo attempts to explain this apparent discrepancy by stating that he "replaced Charles Litt as president sometime after July 23, 1999." Mr. Guglielmo offers no other details regarding the timing or reason of his succession to BSA II's presidency.

Page 16 of Ex. 899, which is an agreement between the joint venture participants of Natkin/Scott, defines the buyer as "Business Service America, Inc." But on page 17, which is an assignment agreement, and on page 18, which is a promissory note, the buyer is described as "Business Service America II, Inc., a Delaware Corporation" (again, with Mr. Litt as president).

All told, Ex. 899 describes the buyer of Natkin/Scott's claim at least four different ways. Rather than adding clarity to the question of BSofA's identity, Ex. 899 just muddies the water further. This Court recognized as much when it denied BSofA's motion for reconsideration of the October 21, 2014 Opinion, and also denied BSofA's post-remand appellate motions, all of which rely extensively on Ex. 899.

D. The Trial Court Properly Rejected BSofA's Attempt to Amend Its Complaint After This Court's October 21, 2014 Opinion

After this Court issued its October 21, 2014 Opinion, BSofA sought to amend its complaint and substitute the void entity BSA II as Plaintiff. (CP 725, 732) The trial court properly rejected BSofA's motion

because the relief BSofA requested was outside the scope of the trial court's narrowly-tailored mandate, which was limited to determining BSofA's legal status and ability to continue its appeal. (CP 766) In addition, BSofA's attempt to substitute BSA II as plaintiff under CR 15 was premised on BSofA's "misnomer" argument, which the trial court and this Court have both repeatedly rejected.

When a party moves to amend its complaint "after an adverse granting of summary judgment, the normal course of proceedings is disrupted and the trial court should consider whether the motion could have been timely made earlier in the litigation." *Doyle v. Planned Parenthood of Seattle – King County, Inc.*, 31 Wn. App. 126, 130-131, 639 P.2d 240 (Div. I, 1982) (holding that trial court did not err in denying a post-summary judgment motion to amend complaint.)

Permitting BSofA to amend its complaint now, after the trial court has already entered summary judgment in WaferTech's favor and entered an order dismissing BSofA's complaint with prejudice, would be hugely disruptive to the litigation and prejudicial to WaferTech. If, as BSofA claims, it is merely a misnomer for BSA II, then BSofA should have notified the trial court of the misnomer and sought to correct its supposed error long ago. Instead, BSofA filed hundreds of pleadings and documents under the name BSofA over more than a decade of litigation

and only asserted that the name was a misnomer when WaferTech attempted to collect on its $430,110 judgment after BSofA refused to post a supersedeas bond.

E. The Void Entity BSA II Lacks Capacity to Substitute for BSofA

Even if this Court were somehow inclined to permit BSofA to amend its complaint to substitute a new plaintiff, BSofA's proposed replacement, BSA II, is a void Delaware corporation that lacks capacity to substitute for BSofA or to otherwise pursue this appeal.

BSA II was organized under the laws of the state of Delaware, but was dissolved in 2006. BSofA Opening Brief at 23. A void Delaware corporation lacks "any standing to appeal and be heard." *Transpolymer Indus., Inc. v. Chapel Main Corp.*, 582 A.2d 936 (Del. 1990). Because a Delaware court would not permit BSA II to substitute for BSofA to pursue this appeal against WaferTech, under Delaware law, this Court should not permit BSA II to substitute for BSofA here. Courts universally recognize that, for corporate entities, capacity to sue or be sued is determined by the law under which the corporation was organized. *See, e.g.*, Fed. R. Civ. Pro. 17(b) (for a corporation, capacity determined "by the law under which it was organized); *see also Chandler v. Miller* 168 Wash. 563, 569,

13 P.2d 22 (1932) (deferring to Minnesota law to determine receiver of defunct Minnesota corporation's capacity to sue in Washington).

Delaware law permits void corporations to take certain actions, but the powers of such entities are sharply limited. Del. C. Tit. 8 § 278 ("Section 278"). Void corporations may wind up their affairs, which can include proceedings begun by or against the corporation within three years of dissolution. *Id.* However, nothing in the statute allows a void corporation to substitute as plaintiff or appellant in an existing case after the expiration of the three-year runoff period. *See id.* As a void corporation that is long-past Section 278's three-year runoff period, BSA II does not have the capacity to substitute for BSofA as plaintiff or appellant.

F. This Court Should Dismiss BSofA's Appeal Under RAP 3.1 Because BSofA Does Not Legally Exist

Only an aggrieved party whose "proprietary, pecuniary, or personal rights are substantially affected" can seek review. RAP 3.1; *Breda v. B.P.O. Elks Lake City*, 120 Wn. App. 351, 353, 90 P.3d 1079 (2004). BSofA does not—and cannot—have any "proprietary, pecuniary, or personal rights" at stake in this case because BSofA has no legal existence.

As this Court recognized in its October 21, 2014 Opinion, an entity with no legal existence cannot sue or be sued. October 21, 2014 Opinion at 11, citing *Roth v. Drainage Imp. Dist. No. 5 of Clark County*, 64 Wn.2d 586, 590, 392 P.2d 1012 (1964) (lacking separate legal existence, a drainage district that was not a municipal or quasi-municipal corporation had no capacity to sue or be sued.) Here, the trial court's judgment in WaferTech's favor could not "substantially affect a legally protected interest" of BSofA, because BSofA is a nullity with no legally protected interests. *See Polygon Northwest Co. v. American Nat. Fire Ins. Co.*, 143 Wn. App. 753, 768, 189 P.3d 777 (2008).

G. BSofA's Opening Brief Addresses Issues that are not Properly the Subject of this Appeal

BSofA's opening brief seeks reversal of the trial court's August 2013 order granting summary judgment in WaferTech's favor on equitable setoff grounds. *See* BSofA Opening Brief, at 2, 3, 11, 12-17. BSofA also seeks reversal of the trial court's related orders entering final judgment in WaferTech's favor and awarding WaferTech prevailing-party fees of $430,110. *Id.* at 17-19, 26-27. None of these orders are properly the subject of this appeal, which is limited to the narrow scope of this Court's October 21, 2014 remand order.

BSofA has already unsuccessfully petitioned this Court to broaden the scope of issues applicable to this appeal. After filing its notice of appeal of the trial court's February 20, 2015 order, BSofA moved to consolidate this appeal with Appeal No. 45325-8-II (concerning the trial court's summary judgment order) and Appeal No. 46138-2-II (concerning the trial court's rejection of BSofA's "misnomer" argument). This Court denied BSofA's motion to consolidate the appeals, holding that this Court no longer had jurisdiction over the earlier appeals because this Court had already issued its mandate to the trial court. April 28, 2015 Order Denying Motion to Consolidate Appeals.

BSofA's opening brief ignores the fact that this Court already has denied BSofA's motion to consolidate appeals. Instead, BSofA unjustifiably seeks review of issues that are far outside this Court's most recent remand order. As set forth in this Court's October 21, 2014 Opinion, the proper focus of this appeal is limited to the trial court's determination of BSofA's legal existence and BSofA's ability to continue its appeal against WaferTech.

H. The Trial Court Properly Applied the Doctrine of Equitable Setoff to Prevent BSofA from Receiving a Double Recovery

If this Court discards its earlier rulings and somehow determines that BSofA has legal existence sufficient to pursue this appeal, this Court

should nonetheless affirm the trial court's order granting summary judgment to WaferTech on equitable setoff grounds. The trial court properly granted equitable setoff to prevent BSofA from recovering twice for the same injury. "[I]t is a basic principle of damages . . . that there shall be no double recovery for the same injury." *Pub. Employees Mut. Ins. Co. v. Kelly*, 60 Wn. App. 610, 618, 805 P.2d 822 (1991).

When a plaintiff sues two defendants for the same injury and then settles with one of the defendants, the non-settling defendant is entitled to a setoff of the settlement amount. *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn. App. 697, 702, 9 P.3d 898 (2000). Here, BSofA is seeking a double recovery because BSofA has already recovered a $2.4 million payment from M+W for a claim that this Court long ago ruled is worth a maximum of $1.5 million. 120 Wn. App. at n.8 ("1.5 million represents the trial court's valuation of [BSofA's] post-January 31, 1998 lien claims.")

I. Equitable Setoff Is Reviewed For Abuse Of Discretion

This Court reviews a trial court's grant of setoff for abuse of discretion. *See Scott's Excavating Vancouver, LLC v. Winlock Properties, LLC*, 176 Wn. App. 335, 348, 308 P.3d 791 (2013) (affirming, on abuse of discretion standard, trial court's decision not to grant an offset in a lien priority dispute); *Harmony at Madrona Park Owners Ass'n v. Madison*

Harmony Development, Inc., 143 Wn. App. 345, 359, 177 P.3d 755 (2008) (affirming, on abuse of discretion standard, trial court's decision not to grant setoff in a construction defect dispute because there was no evidence that plaintiff would recover twice for the same injury). BSofA argues that this Court should review the trial court's grant of equitable setoff *de novo*, but BSofA merely relies on boilerplate cases about the standard of review for summary judgment, while completely ignoring the controlling cases that establish that trial courts' decisions regarding equitable setoff are reviewed for abuse of discretion. *See, e.g., Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn. App. 697, 9 P.3d 898 (2000).

J. This Court Should Follow *Eagle Point* And Affirm The Offset To WaferTech To Prevent BSofA From Obtaining A Double Recovery

In *Eagle Point*, the plaintiff homeowner's association asserted claims against both the builder and the developer of a condominium complex. 102 Wn. App. at 700. After the homeowner's association settled with the builder for $65,000, it continued to pursue its claims against the developer. At trial, the association proved damages of $77,441. The trial court offset the association's judgment by $55,000, calculated by reducing the $65,000 settlement by $10,000 to account for a claim of the unit owners who had joined the lawsuit asserting a $10,000 claim against the builder. *Id.* at 703.

This Court held that the trial court did not abuse its discretion in granting the offset, because "the trial court was within its discretion to conclude that an offset was necessary as a matter of equity to ensure that the plaintiffs did not recover damages from both [the developer] and [the builder] for the same defects." *Id.* at 703. "In setting off the [builder's] settlement, the trial court's equitable purpose was to assure that the [homeowner's association] did not recover from both [the builder] and [the developer] for the same damage." *Id.* at 702.

At all times, all of BSofA's claims in this case sought recovery for the same alleged injury—BSofA's purportedly unpaid work on the WaferTech construction project. Like the plaintiff in *Eagle Point*, BSofA sued two defendants for the same injury, so BSofA should be bound by the trial court's discretionary determination of the appropriate offset.

In arguing against an offset, BSofA relies on two cases, both of which involved insurance disputes over environmental cleanup costs at industrial sites. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*,142 Wn.2d 654, 15 P.3d 115 (2000) and *Puget Sound Energy, Inc. v. Alba General Ins. Co.*, 149 Wn.2d 135, 68 P.3d 1061 (2003) (BSA Br. at 13). In both *Weyerhaeuser* and *Puget Sound Energy*, the defendant insurers faced damage claims that did not perfectly overlap – a crucial distinction between those insurance cases and this one. In both *Weyerhaeuser* and

Puget Sound Energy, some insurers were liable to pay for cleanup at certain sites, or for certain policy years, but not others. Here, in contrast, WaferTech and M+W faced *identical* damage claims from BSofA's predecessor Natkin/Scott.

In *Weyerhaeuser*, the plaintiff settled with several insurers to offset environmental cleanup costs on a number of sites. *Weyerhaeuser*, 142 Wn.2d at 671. A non-settling insurer sought a setoff for funds received from other insurers. *Id.* The Supreme Court affirmed the trial court's denial of a setoff to the non-settling insurer. *Puget Sound Energy* also involved a dispute over insurance coverage for environmental cleanup costs at various sites. *Puget Sound Energy*, 149 Wn.2d at 137. Some insurers settled, but others did not. *Id.* The non-settling insurers sought a setoff for the settlement payments the plaintiff received from the other insurers. *Id.* The Washington Supreme Court held that Puget Sound Energy was not required to "show how it has, or will, allocate the proceeds it received from the settling insurers," and that the non-settling insurers "have not made an affirmative showing that [Puget Sound Energy] has been made whole." Puget Sound Energy "established that the settlement proceeds at issue were secured by releasing risks broader than those at issue in this case." *Id.* at 142. As a result, the non-settling insurers were not entitled to a setoff, in part because the settlement

proceeds were "at least in part for the present and future cost associated with" the sites at issue.

Neither *Weyerhaeuser* or *Puget Sound Energy* governs or is applicable to the instant case because the non-settling insurers in those cases faced different risks—and different damage claims—from the insurers that decided to settle. *Weyerhaeuser*, 142 Wn.2d at 673 (the settling insurers "paid Weyerhaeuser for a release from an unquantifiable basket of risks and considerations"); *Puget Sound Energy*, 149 Wn.2d. at FN4 ("the amount paid was at least in part for the present and future costs associated with the Commencement Bay, Mercer Street Headquarters, and Georgetown warehouse sites, none of which is at issue in this action.") Here, M+W's settlement payment to BSofA was for the *exact same damages* and the *exact same legal claims* that BSofA now attempts to assert against WaferTech.

BSofA argues that the claim M+W settled (recovery for work throughout the project) was broader than the claim BSofA asserts against WaferTech (recovery for work after January 31, 1998). BSofA Op. Br. at 13. BSofA is incorrect. The plaintiff sued *both* M+W and WaferTech for *all* of the allegedly unpaid costs throughout the project. *Compare* CP 37 (Amended Complaint) with CP 109 (Second Amended Complaint). M+W and WaferTech faced the *exact same* potential liability. Even *after* M+W

settled, BSofA continued to pursue WaferTech for *all* the allegedly unpaid costs across the entire project (CP 109), which this Court subsequently ruled was limited to work after January 31, 1998. *Bus. Servs. of Am. II, Inc. v. WaferTech, LLC,* No. 28886-9-II, 2004 WL 444724 *6 (Wash. Ct. App. March 9, 2004).

K. The Trial Court Properly Granted Final Judgment in WaferTech's Favor

BSofA argues that the trial court should not have entered final judgment in WaferTech's favor because the value of BSofA's lien might exceed the $2.4 million setoff from the M+W settlement. BSofA Op. Br. at 17. Not so. The trial court long ago limited BSofA's lien claim pursuant to RCW 60.04.081 to a maximum of $1.5 million. (CP 375) The trial court's order ruled that $1.5 million was BSofA's *maximum possible* recovery against WaferTech, and that BSofA still had the burden of proving the "validity and amount" of its lien claim up to the $1.5 million cap. *Id.*

The trial court converted its RCW 60.04.081 ruling to a final judgment (at BSofA's request) to enable BSofA to appeal the ruling. But BSofA ultimately did not appeal the trial court's reduction of BSofA's lien, and this Court confirmed that BSofA's maximum possible recovery for its lien claim is $1.5 million. *Bus. Servs. of Am. II, Inc.*, 120 Wn. App.

at 1042 ("the trial court also found that [BSofA] had waived and released some of its construction lien claims and it limited [BSofA's] remaining claims to $1.5 million" and "$1.5 million represents the trial court's valuation of [BSofA's] post-January 31, 1998 lien claims.") It is far too late for BSofA to now appeal the trial court's reduction of BSofA's lien. (RAP 5.2(a).)

Williams v. Athletic Field, Inc., 155 Wn. App. 434, 228 P.3d 1297 (2010) does not support BSofA's position. The *Williams* case involved a dispute between a property owner and a contractor over an oral contract to conduct site preparation work for the construction of a warehouse. *Id.* at 437. The contractor filed a lien to recover for allegedly unpaid work and the property owner moved for an order declaring the lien invalid under RCW 60.04.081 because the lien was not signed under penalty of perjury by an officer or attorney of the claimant. The Court of Appeals reversed the trial court's order granting the property owner's motion, holding that the lien was invalid for failure to comply with the requirements of RCW 60.04.081(2), but not necessarily frivolous. *Id.* at 445 ("[a]lthough all frivolous liens are invalid, not all invalid liens are frivolous.").

Williams does *not* stand for the proposition that "RCW 60.04.081 is not intended to be an adjudication when there is a dispute regarding the amount of the lien." BSofA Op. Br. at 17. The *Williams* court stated that

"[a] proceeding to determine the validity or frivolity of a lien claim is not a substitute for a trial on the merits of the *underlying* claim." *Williams*, 155 Wn. App. at 446 (*emphasis added*). In the *Williams* case, the underlying claim was a breach of contract action. But BSofA does not have an underlying claim against WaferTech; lien foreclosure is its *only* claim, and that claim is limited to $1.5 million.

Moreover, BSofA's argument is contradicted by the plain text of the statute itself. RCW 60.04.081, on its face, clearly contemplates that disputes regarding the amount of liens can be adjudicated in summary proceedings when the amount of lien claim is clearly excessive. That is exactly what the trial court did when it reduced BSofA's lien claim to $1.5 million.

L. The Trial Court Properly Exercised Its Discretion In Awarding Fees to WaferTech

"To reverse an attorney fee award, [this Court] must find the trial court exercised its discretion on untenable grounds or for untenable reasons." *Miller v. Kenny*, 180 Wn. App. 772, 820, 325 P.3d 2728 (2014). BSofA does not dispute WaferTech's entitlement to attorney fees under the lien statute or the reasonableness of counsel's hourly rates. BSofA's objection is limited to its contention that the trial court included compensation for hours spent on unproductive tasks and excessive hours

for various tasks. BSofA Op. Br. at 26-27. BSofA's objection is without merit.

The trial court reviewed detailed billing entries from WaferTech's counsel. (CP 611) Both parties submitted briefing on WaferTech's fee petition and the trial court entertained oral argument before entering its fee award. *Id.* The trial court did not rubber-stamp WaferTech's fee application; rather, the trial court entered findings of fact and conclusions of law adjusting the lodestar calculation downward to compensate for the "possibility that there may have been some duplication of effort among the attorneys representing WaferTech." *Id.* The record adequately demonstrates the basis for the trial court's conclusion that WaferTech's detailed billing records were more persuasive than BSofA's unsupported estimate of the number of hours WaferTech's counsel should have spent.

BSofA points to only two instances of allegedly unproductive work: (1) work performed prior to April 2012 in connection with WaferTech's Motion to Dismiss and subsequent appeal; and (2) WaferTech's Motion to Appoint a Referee. BSofA Op. Br. at 26-27. Neither task was unproductive. With regard to its Motion to Dismiss, WaferTech prevailed at the trial court and obtained dismissal of BSofA's claim. This Court and the Supreme Court ultimately reversed and remanded, but the Supreme Court explicitly stated that "neither party is

awarded attorney fees until further proceedings reveal which party is the prevailing party under RCW 60.04.181(3)." *Bus. Servs. of Am. II, Inc. v. WaferTech LLC*, 159 Wn. App. 591, 262, 245 P.3d 257 (2011).

BSofA fails to cite any Washington authority for the proposition that WaferTech's fee award should be reduced merely because WaferTech did not ultimately prevail on every motion that it filed. Indeed, Washington law is directly to the contrary; a party that obtains "substantial relief should not have his attorneys' fee reduced because the district court did not adopt each contention raised." *Martinez v. City of Tacoma*, 81 Wn. App. 228, 243, 228, 914 P.2d 86 (1996).

BSofA's argument with regard to WaferTech's motion to appoint a referee in 2012 makes even less sense. WaferTech filed that motion at the request of Judge Woolard, who believed that Judge Ladley—the original trial court judge in this case, who had retired from the bench—was best positioned to decide WaferTech's motion for summary judgment because of his deep experience and institutional knowledge of this case. Judge Woolard, in fact, appointed Judge Ladley to serve as referee, but BSofA thwarted Judge Woolard's decision by refusing to pay its share of Judge Ladley's customary fee. (CP 562)

BSofA's argument regarding the reasonableness of the hours expended by WaferTech is similarly without merit. BSofA's lien

foreclosure claim raised novel and complicated issues of law and fact. As described in WaferTech's fee petition, the post-remand litigation has involved much more than just a simple summary judgment motion.

WaferTech's fee petition included detailed time entries describing the work performed and the time expended on each aspect of this case since 2009. *See Bowers v. Transamerica*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983) (This documentation need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed and the category of attorney who performed the work (*i.e.*, senior partner, associate, etc.)) A lodestar award can be adjusted for the quality of work performed, but this is an "*extremely limited* basis for adjustment, because in virtually every case the quality of work will be reflected in the reasonable hourly rate" (*emphasis added*). *See also Id.* at 599 ("A quality adjustment is appropriate only when the representation is unusually good or bad, taking into account the level of skill normally expected of an attorney commanding the hourly rate used to compute the lodestar.") Here, BSofA has not shown any basis for departing from the lodestar calculation.

BSofA also objects to the trial court's award of $300 in fees in connection with BSofA's motion to add exhibits to the record. The trial court's $300 sanction was appropriate because BSofA served incorrect

motion papers on WaferTech, forcing WaferTech to prepare a response to a motion that BSofA did not intend to pursue. The trial court correctly ruled that WaferTech should not be forced to bear the costs of BSofA's unilateral mistake.

M. This Court Should Award WaferTech Prevailing Party Attorney Fees On Appeal Pursuant To RCW 60.04.081(3)

WaferTech is entitled to its fees and costs on appeal. *See* RAP 18.1(b); RCW 60.04.081(3) ("The court may allow the prevailing party . . . as part of the costs of the action, . . . attorneys' fees and necessary expenses incurred by the attorney in the . . . court of appeals"). This Court should either award fees pursuant to RAP 18.1 or direct the trial court to determine the reasonable fees incurred on appeal upon return of the mandate. *See Hedlund v. Vitale*, 110 Wn. App.183, 189 n.6, 39 P.3d 358 (2002).

BSofA, by contrast, is not entitled to recover fees even if this Court reverses the trial court's decision. RCW 60.04.081(3) provides for an award of fees to the "prevailing party *in the action.*" Only if this Court remanded the case for trial, and BSA ultimately prevailed, would BSofA then be entitled to recover fees for this appeal.

VI. CONCLUSION

The scope of this Court's review on appeal should be sharply limited by the scope of this Court's October 21, 2014 Opinion, which

directed the trial court to determine BSofA's legal status and its ability to pursue this appeal against WaferTech. On remand, the trial court gave BSofA a full and fair chance to present evidence of BSofA's independent legal status, but BSofA refused to do so. Instead BSofA continued to assert that it was a misnomer for another entity—an argument that BSofA had already lost through final appeal.

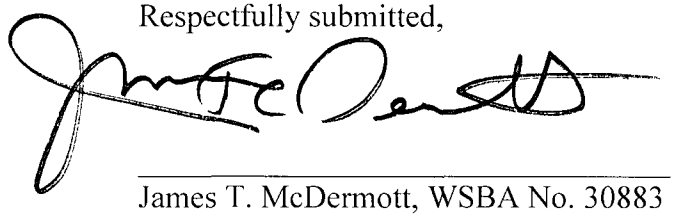
This Court should affirm the trial court's February 20, 2015 order holding that BSofA lacks legal existence. Accordingly, this Court should dismiss BSofA's appeal pursuant to RAP 3.1.

If this Court reaches the trial court's August 2013 summary judgment order, then this Court should affirm the trial court's application of the equitable setoff doctrine. BSofA has already been paid $2.4 million for a claim that is worth a maximum of $1.5 million. Any further payment would constitute an impermissible double recovery. This Court should

also affirm WaferTech's earlier award of fees and award WaferTech fees on appeal.

DATED this 23rd day of October, 2015.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on October 23, 2015, a copy of the foregoing document has been served by email, by agreement of counsel, on:

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