NO. 97087-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

(COURT OF APPEALS
CASE NO. 77365-8-I)

KILO 6 OWNERS ASSOCIATION AND KILO SIX, LLC,

Petitioners,

v.

EVERETT HANGAR, LLC,

Respondent.

ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

Petitioners Kilo 6 Owners Association and Kilo Six, LLC ("Kilo Six") ask this Court to apply the equitable doctrine of judicial estoppel to promote a lie. Trial Judge Beth Andrus and the unanimous Court of Appeals both found that Kilo Six violated its duty of good faith and fair dealing by certifying that the development of vacant Lot 13 was "substantially complete," when in fact, it was not. Kilo Six does not seek review of those findings, rendering them final and conclusive. Yet Kilo Six tries to effectively reverse those findings by asking this Court to apply the *equitable* and *discretionary* doctrine of judicial estoppel to defy reality and reward Kilo Six for making its false certification and breaching the duty of good faith it owed Respondent Everett Hangar, LLC. No notion of justice supports that result.

Kilo Six's request for further review represents the latest chapter in its quest to wrest control over the parties' joint association, and, like prior chapters, is meritless. Judge Andrus and the Court of Appeals followed this Court's precedent by considering the non-exhaustive factors, exercising their discretion, and declining to apply judicial estoppel to work an obvious injustice. Division One's unpublished, unanimous decision does not warrant further attention from this Court, and the Petition for Discretionary Review should be denied.

II. COUNTERSTATEMENT OF ISSUES FOR REVIEW

Whether the Court of Appeals erred by concluding that Judge Andrus did not abuse her discretion in declining to apply the equitable doctrine of judicial estoppel to reward Kilo Six's breach of its duty of good faith, where Everett Hangar's alleged inconsistent position in prior litigation was (1) not the basis of any legal rulings in the prior matter, (2) resulted in no benefit or detriment to any party, and (3) Kilo Six itself had reversed positions on that precise issue.

III. COUNTERSTATEMENT OF THE CASE

This Petition is the latest in a long-running dispute between two neighboring leaseholders at Everett's Paine Field. Petitioner Kilo Six LLC, controlled by John Sessions, owns the leasehold over Lot 13, while a separate Sessions wholly owned entity, Historic Hangars, LLC, owns the leasehold for Lot 11. Between the two Sessions-controlled lots sits Lot 12, leased by Respondent Everett Hangar. Petitioner Kilo 6 Owners Association (the "Association") governs the three lots. In 2016, Kilo Six tried to grant itself voting rights in the Membership of the Association by certifying that the development of Lot 13—a *vacant* plot—was "substantially complete." When Everett Hangar rejected that fictional certification, Kilo Six sued Everett Hangar, seeking a judicial declaration to validate its unlawful appropriation. After a full bench trial it lost, and

now on appeal is attempting to undo the damage it brought on itself.

A. Association Governance and Voting

Sessions and his then-partner created the "Association at the time Kilo Six executed the ground lease [for all three lots] with Snohomish County." CP 57 ¶ 6. At the same time, "[t]hey also developed a set of Association Bylaws and CC&Rs" governing the Association. *Id.* The CC&Rs provide that, "[e]xcept as otherwise specifically provided … all rights and powers of the Association may be exercised by the Board without a vote of the membership." EX 546 § 4.3. Under the Bylaws, the Board is made up of three directors, each with one equal vote, all appointed by the "Declarant"—Kilo Six. EX 543 §§ 3.1, 3.2, 3.14. The directors are John Sessions, John Sessions, and Dean Weidner, the principal of Everett Hangar. EX 541 at 2. Sessions, who appointed himself twice, thus controls the Board. *Id.*

The Membership is a distinct voting body, and each Member has voting rights equal to the square footage of that owner's leasehold. EX 546 §§ 3.2, 3.3. Lot 13—held by Kilo Six—is 46% of the square footage, Everett Hangar's Lot 12 contains 34%, and Historic Hangar's Lot 11 the remaining 20%. *See* CP 60 ¶ 23. Sessions (as the sole owner of Kilo Six and Historic Hangars) thus holds 66% of the potential voting rights, whereas Everett hangar has 34%. But those voting rights have an

important caveat: A Member "shall *not* be entitled to vote on Association matters" until the "Declarant [Kilo Six] has certified to the Board that development of such Lot is substantially complete." EX 546 § 9.1 (emphasis added). Until such declaration, the Member need not pay its share of the lots' shared expenses, referred to as "Base Assessments." *Id.*

B. Snohomish County Litigation

In 2014, Everett Hangar sued Kilo Six, the Association, Historic Hangars, Historic Flight Foundation (which subleased Lot 11 from Historic Hangars), and Sessions in Snohomish County Superior Court. In that suit, Everett Hangar sought to enforce two provisions of the CC&Rs: first, its right to safely and securely perform flight operations, and second, its easement over Lot 11 for ingress and egress of aircraft. *See* EX 194 at 12 ¶ 38, 16 ¶ 53. During this litigation, "the parties all agreed that Lot 13 remained undeveloped and vacant," and as a result, "Sessions contended that Kilo Six should not be required to pay what were essentially Base Assessments because of this lack of development." CP 73 ¶ 71.

After a two-week bench trial, Judge Millie Judge found in Everett Hangar's favor, holding that the CC&R's "make it clear that the ramps are to be kept clear for aircraft operations and movement," EX 194 at 19-20 ¶ 2, and that Historic Flight's activities "unreasonably interfere[d] with [Everett Hangar's] easement," *id.* at 23 ¶ 14. The court also found that

Everett Hangar's "concerns relating to safety and security are well founded," because Historic Flight's "environment is wide-open from a security standpoint," a situation which "pose[s] a clear and present security risk to Paine Field and its tenants, including, most immediately, [Everett Hangar]." *Id.* at 25-26 ¶¶ 21-22, 25. The court, however, declined to hold Sessions personally liable, because "[w]hile it is clear that Mr. Sessions is in control of all of the Defendant entities, there was no evidence that indicated he had disregarded corporate formalities." *Id.* at 28 ¶ 29. Finally, the court entered an injunction enforcing its ruling, and awarded Everett Hangar attorneys' fees. *Id.* at 30-32; EX 595; App'x A.[1]

On appeal, Division One upheld the majority of the ruling below, although it remanded for the trial court to make further findings supporting the amount of the fee award to Everett Hangar. *Everett Hangar, LLC v. Kilo 6 Owners Ass'n*, No. 73504-7-I, 195 Wn. App. 1034, 2016 WL 4188007 (Wash. Ct. App. Aug. 8, 2016) (unpublished), *review denied*, 187 Wn.2d 1007 (2017). The trial court then awarded Everett Hangar its full fees after providing the more detailed explanation Division

[1] Selected relevant documents from the Snohomish County proceeding not part of the record below are attached as appendices. This Court may take judicial notice of these documents under ER 201, as that case is a "proceeding[] engrafted, ancillary, or supplementary to" this one. *Swak v. Dep't of Labor & Indus.*, 40 Wn.2d 51, 53, 240 P.2d 560 (1952). This evidence also meets the requirements of RAP 9.11. *See Spokane Airports v. RMA, Inc.*, 149 Wn. App. 930, 936-37, 206 P.3d 364 (2009) (considering pleadings from same parties in other litigation relevant to appeal under RAP 9.11).

One requested. EX 596; EX 597. After a second appeal, Division One affirmed the fee award in full. *Everett Hangar, LLC v. Kilo 6 Owners Ass'n*, No. 76949-9-I, 2019 WL 355722, at *1 (Wash. Ct. App. Jan. 28, 2019) (unpublished). A Petition for Discretionary Review of that second affirmance is fully briefed and pending before this Court. That Petition is strictly limited to attorneys' fee issues, and has no connection to any issues regarding control over the Association.

During these appeals, the trial court found Historic Flight and Historic Hangars in contempt for acting in "clear violation of the terms of the Injunction." App'x B at 3-4; App'x C. The court imposed sanctions against Sessions' entities for seven separate violations of the injunction, and awarded Everett Hangar fees. App'x B; App'x D. Historic Flight and Historic Hangars appealed that decision and again Division One affirmed. *Everett Hangar, LLC v. Kilo 6 Owners Ass'n*, No. 77842-1-I, 6 Wn. App. 1005, 2018 WL 5802377 (Wash. Ct. App. Nov. 5, 2018) (unpublished).

C. King County Litigation

Nearly a year after the Snohomish County trial, the Association held a meeting in which Everett Hangar for the first time raised the issue that Kilo Six "was ineligible to vote on Association [Membership] matters because Kilo Six had not certified Lot 13 as substantially complete under Section 9.1 of the CC&Rs." CP 64 ¶ 37. Sessions promptly "adjourned

the meeting without further action or a vote." *Id.* Nine days later, "Sessions, as the managing member of Kilo Six, issued a letter to the Association Board members, certifying Lots 11, 12, and 13 as substantially complete under Section 9.1 of the CC&Rs." *Id.* ¶ 38.

Kilo Six then filed this suit against Everett Hangar seeking "a declaratory judgment that Lot 13 is eligible to vote on Association matters," based on its certification of substantial completion. *Id.* ¶ 40. Everett Hangar counterclaimed, asserting that the certification "violated [Kilo Six's] duty of good faith and fair dealing …. because the lot remains empty and undeveloped." *Id.* ¶ 41.

1. Kilo Six Defeated Everett Hangar's Motion for Transfer to Snohomish County.

Despite this extensive history and the fact that the property at issue is at Paine Field in Snohomish County, Kilo Six filed its suit in King County Superior Court. Everett Hangar moved to change venue to the Snohomish County court, which was already familiar with the parties and the property. Supp. CP 120-131. Kilo Six opposed that motion, arguing: "The previous trial between the parties dealt with easement and safety and security rights Everett Hangar claimed under the CC&Rs.… ***The trial had nothing to do with the parties' voting rights in the Association***, and no judge in Snohomish County has any background in this legal issue." EX

598 at 2-3 (emphasis added). In support of this argument, Kilo Six's attorney (who tried the Snohomish County case) submitted a declaration, stating: "During the [Snohomish County] summary judgment hearing and the trial, no party raised any issues regarding the terms of the Kilo [Six] Owners Association Covenants, Conditions and Restrictions ('CC&Rs') § 9.1." Supp. CP 132 ¶ 2. Kilo Six prevailed on this argument, and the court denied Everett Hangar's motion to change venue. Supp. CP 150-52.

2. Everett Hangar Prevailed at Trial and on Appeal.

The case was tried to Judge Beth Andrus of the King County Superior Court, who ruled in favor of Everett Hangar on all counts. CP 55-81. At trial, both Sessions and his counsel confirmed control over Membership voting rights was not at issue in the Snohomish trial. RP 7/18/2017 (P.M.) 68:3-21; RP 7/24/2017 (A.M.) 335:11-15, 339:2-340:8.

At the conclusion of the trial, Judge Andrus found that "development of Lot 13 is . . . not substantially complete" because "the intended improvements—an airplane hangar—have not been built." CP 66 ¶ 46. Thus, Kilo Six's decision to certify Lot 13 as substantially complete and thereby "grant voting rights to itself when it had not completed development of Lot 13 did materially and adversely affect Everett Hangar's rights under the CC&Rs," and "violate[d] its implied

duty of good faith and fair dealing to Everett Hangar." CP 79 ¶¶ 87, 89.

Judge Andrus also found it would not be appropriate to apply the doctrine of judicial estoppel to prevent Everett Hangar from defending itself against Kilo Six's claims. As she wrote, because "[n]either the trial court nor the Court of Appeals [in the Snohomish litigation] based any ruling on Kilo Six's right or lack thereof to vote on Association matters," there was thus "no evidence that Everett Hangar benefited from [any] prior inconsistent statements or that Kilo Six relied on [them] to its detriment." CP 72-73 ¶ 70. Moreover, "Kilo Six ha[d] not met its burden of establishing that it would be unjust" to allow Everett Hangar to defend itself against Kilo Six's claims because "Kilo Six and the Association have … taken inconsistent positions in the two lawsuits" as well. CP 73-74 ¶¶ 71-72 (noting Kilo Six's previous concession that "Lot 13 remained undeveloped and vacant" in support of its attempt to avoid payments).

In a unanimous, unpublished opinion, Division One of the Court of Appeals affirmed the trial court in full. *Kilo 6 Owners Ass'n v. Everett Hangar LLC*, No. 77365-8-I, 2019 WL 451376 (Wash. Ct. App. Feb. 5, 2019) (unpublished). Presiding Chief Judge Leach (joined by Chief Judge Applewick and Judge Dwyer) concluded that judicial estoppel "does not bar Everett Hangar's challenge to Kilo Six's voting" and "[t]he trial court did not err in finding that lot 13 is not 'substantially complete' based on

the ordinary and usual meaning of the phrase and the parties' intended use of lot 13." *Id*. at *9. The Court of Appeals based its judicial estoppel decision on two independently sufficient reasons. First, it concluded that "[b]ecause the earlier lawsuit was unrelated to Kilo Six's voting rights and the trial court in this lawsuit reviewed de novo whether Kilo Six had the right to vote lot 13's percentage interest, substantial evidence supports [the trial court's] finding that Everett Hangar's inconsistent position did not create the perception that either the Snohomish County Superior Court or the trial court was misled." *Id.* at *3. Second, the Court of Appeals also determined that, "[s]imilar to the trial court, we conclude that because both parties have taken inconsistent positions, not applying judicial estoppel to bar Everett Hangar's claims would not provide either party an unfair advantage or cause either party an unfair detriment." *Id.* at *4.

IV. ARGUMENT

Nothing about this case warrants Supreme Court review. First, the Court of Appeals' decision follows Supreme Court and Court of Appeals precedent in a straightforward application of the equitable doctrine of judicial estoppel. RAP 13.4(b)(1)-(2). Second, Division One's unpublished opinion, relying on the specific facts of these parties' unique years-long saga to determine that a trial court did not abuse its discretion, does not come close to invoking "substantial public interest" warranting

Supreme Court review. RAP 13.4(b)(4). Finally, while the Court of Appeals relied on the two factors summarized above to reach the conclusions in its unpublished opinion, other factors properly considered under the equitable doctrine confirms that Judge Andrus did not abuse her discretion in declining to apply judicial estoppel here.

A. Neither *Arkison* Nor *Cunningham* Commands a Different Result.

Kilo Six's primary ground for further appellate review is its claim that the Court of Appeals' decision conflicts with the precedents of this Court and the Court of Appeals. Pet. at 10-15 (citing *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538-39, 160 P.3d 13 (2007) and *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 231, 108 P.3d 147 (2005)). The opposite is true: Both the Superior Court and the Court of Appeals applied the very cases cited by Kilo Six, and reached a conclusion well within the mainstream application of this flexible doctrine.

Kilo Six's argument to the contrary rests on a fundamental misapplication of judicial estoppel. It suggests that the court erred by considering whether a prior inconsistent statement was "material" to the outcome of the first litigation. *See* Pet. 12-13 (arguing that "acquiescence of the findings alone is grounds for equitable estoppel"). Thus, Petitioners posit, "judicial estoppel should have been applied." *Id.* at 15.

This argument misses perhaps the most basic fact about the doctrine: It is an "equitable doctrine" to be flexibly applied and the traditional factors "are not an exhaustive formula and additional considerations may guide a court's decision." *Arkison*, 160 Wn.2d at 538-39 (citation and internal quotation marks omitted). Judicial estoppel "is a rule of procedure based on manifest justice and on a consideration of orderliness, regularity and expedition in litigation." *Seattle-First Nat'l Bank v. Marshall*, 31 Wn. App. 339, 343, 641 P.2d 1194 (1982) (citation and internal quotation marks omitted). Whether Kilo Six is correct that it could show some of the factors necessary to invoke the doctrine is immaterial to the question at hand: Whether, on balance, the circumstances taken as a whole merit the application of judicial estoppel. Rather than the automatic application Kilo Six demands, Washington courts have consistently recognized that "judicial estoppel, an equitable doctrine, is not to be applied inflexibly." *Miller v. Campbell*, 137 Wn. App. 762, 771, 155 P.3d 154 (2007), *aff'd in relevant part*, 164 Wn.2d 529, 539-45, 192 P.3d 352 (2008); *see also Ashmore v. Estate of Duff*, 165 Wn.2d 948, 951, 205 P.3d 111 (2009), as amended (June 4, 2009) (recognizing "core factors" alongside other equitable considerations).

A recent decision shows that it is Kilo Six's position—not the decision of the Court of Appeals—which conflicts with Washington law.

In *Haslett v. Planck*, 140 Wn. App. 660, 666-67, 166 P.3d 866 (2007), a litigant conceded its bankruptcy schedules included statements inconsistent with its current positions in litigation, but argued that its later attempts to amend those schedules mitigated that inconsistency. The trial court held the litigant was judicially estopped, believing the case law prevented it from evaluating all aspects of the two suits. *Id.* Division One reversed: "We conclude the trial court abused its discretion, as it erroneously believed it could not consider this [other] relevant factor." *Id.* at 667. That erroneous constraint on consideration of all applicable information is precisely what Kilo Six asks the Court to do here.

No case cited by Kilo Six counsels any other result. It first asserts that *Arkison* supports reversal. Pet. at 10-12. But in *Arkison*, as noted above, this Court identified "three core factors [that] guide a trial court's determination" of whether to apply judicial estoppel, and explicitly instructed courts to use their judgment in determining what other information may be important: "***additional considerations*** may guide a court's decision." 160 Wn.2d at 538-39 (emphasis added) (citation & internal quotation marks omitted). Thus, far from conflicting with *Arkison*, the trial court and Court of Appeals—which both applied the core factors alongside other relevant considerations—did what this Court instructed lower courts to do. Kilo Six also asserts that the Court of

Appeals' decision conflicts with *Cunningham*, 126 Wn. App. at 231. But the very statement quoted by Kilo Six disproves that claim, recognizing that meeting the core factors merely "***permits*** the application of judicial estoppel." *Id.* (quoted at Pet. at 15) (emphasis added). Nothing suggests that their satisfaction ***requires*** its application. In fact, Division One recently rejected the same argument Kilo Six makes: "*Cunningham* does not support the proposition that a court necessarily abuses its discretion by weighing the equities and declining to apply judicial estoppel . . . ." *Chonah v. Coastal Villages Pollock, LLC*, 5 Wn. App. 139, 153, 425 P.3d 895 (2018), *review denied*, 192 Wn.2d 1012 (2019).

In sum, *Arkison*, *Cunningham*, and a host of other Washington authority establish that the factors they lay out are a necessary—but not sufficient—precondition for applying judicial estoppel. *See Taylor v. Bell*, 185 Wn. App. 270, 282, 340 P.3d 951 (2014) (collecting cases). The Court of Appeals recognized this and appropriately considered the "core factors" alongside the other relevant considerations. Its finding that Judge Andrus did not abuse her discretion by doing the same is a straightforward application of the very cases cited in the Petition, and should not be disturbed. Review is not warranted under RAP 13.4(b)(1) or (2).

B. The Decision Is Not of Substantial Public Interest.

In the alternative, Kilo Six asserts that judicial estoppel "protects

the integrity of the judicial process and is a matter of substantial public interest." Pet. at 10 (citation & internal quotation marks omitted); *see also id.* at 15-16. But it makes no argument as to why ***this case*** meets that test. Kilo Six appears to believe that any case applying a legal doctrine must be of substantial public importance. That is not the law. Instead, Kilo Six must show that the particular opinion it seeks reviewed merits examination by the Supreme Court. It has not.

This Court has made clear the limited circumstances that satisfy the public interest prong of Rule 13.4(b). For example, where a decision of the Court of Appeals "has the potential to affect a number of proceedings in the lower courts [it] may warrant review as an issue of substantial public interest if review will avoid unnecessary litigation and confusion on a common issue." *In re Flippo*, 185 Wn.2d 1032, 1032, 380 P.3d 413 (2016) (review proper where "numerous now-pending" suits are based on appellate decision). Similarly, in *State v. Watson*, 155 Wn.2d 574, 122 P.3d 903 (2005), this Court granted review because the publication of the Court of Appeals' opinion "has the potential to affect every sentencing proceeding in Pierce County." *Id.* at 577; *see also Matter of Arnold*, 189 Wn.2d 1023, 408 P.3d 1091 (2017) (three published opinions with "likely incorrect holdings" are of substantial public interest).

Kilo Six cannot show how a similar result would be reached here.

It contends that the Court of Appeals decision "carves a new stream of law" and "has shifted course" from prior precedent, *see* Pet. at 11, 16, but offers no explanation of how that could occur. The decision Kilo Six seeks to have reviewed was unpublished, and thus "ha[s] no precedential value and [is] not binding on any court," and courts "should not, unless necessary for a reasoned decision, cite or discuss" it in any future decision. GR 14.1(a), (c). What's more, the decision did not purport to set forth a rule of law. Instead, consistent with the applicable standard of review, the Court of Appeals found the trial court had not abused its discretion, under the particular factual circumstances of this litigation. *Kilo 6 Owners Ass'n*, 2019 WL 451376, at *2 (recognizing that, to reverse, the trial court's order would have to be based on "untenable grounds or reasons").

This decision is thus like the main run of appellate decisions that do not warrant this Court's review. Where a trial court simply applies a flexible doctrine to the unique facts before it, reaching a conclusion comfortably within the bounds of precedent, no substantial public interest is implicated. *See, e.g.*, *Matter of Sanchez*, 189 Wn.2d 1023, 1023, 408 P.3d 1089 (2017); *In re Dependency of Bryant*, 163 Wn.2d 1032, 2007 WL 5273745, at *1-2 (2007) (where "the Court of Appeals opinion … extensively analyzed the issue" its opinion does not involve "an issue of substantial public interest"). RAP 13.4(b)(4) does not justify review.

A. This Case Is Particularly Unsuited for Further Appellate Review.

Finally, Kilo Six asserts its Petition is "the ideal vehicle" to consider re-defining judicial estoppel. Pet. at 11. This could not be less true. As may be expected where a decision applying an equitable doctrine to facts arising from a five-year-long dispute that spawned two trials and four appellate decisions, there are many additional factors upon which the Court of Appeals could have relied which would have supported the same outcome. *See LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P. 2d 1027 (1989) ("an appellate court can sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof").

First, as the Superior Court and Court of Appeals recognized, Kilo Six took positions in the Snohomish County litigation inconsistent with its arguments in the King County trial. In Snohomish County, "the parties did not contest that lot 13 remained undeveloped and 'vacant.'" *Kilo 6 Owners Ass'n*, 2019 WL 451376, at *4 (footnote omitted). Based on that position, Sessions sought to avoid payments his entities would otherwise owe for shared maintenance. *Id.* Despite these actions, "just 10 days after [Sessions'] e-mail exchange, and after Everett Hangar asserted that lot 13 was ineligible to vote on Association matters because Kilo Six had not certified lot 13 as substantially complete, Kilo Six certified lot 13 as

substantially complete." *Id.* Kilo Six cannot now claim that the parties' reversal caused it any "unfair detriment." *Id.*

But that is not all. In this very litigation, Kilo Six took a position diametrically opposed to the position it asserts in this Petition. *See* 14A Wash. Prac., Civil Procedure § 35:59 (3d ed. Nov. 2018 Update) (judicial estoppel also "prevent[s] taking inconsistent positions at successive stages in the [same] case"). In this Petition, it seeks the opportunity to show that the Snohomish County litigation resolved the question of whether Kilo Six's development of its leasehold was substantially complete, thereby granting it voting rights in the Association Membership. But when it wanted to avoid the transfer of this case to the Snohomish County court—where it had lost at trial—Kilo Six took the opposite position, arguing that the Snohomish trial "had nothing to do with the parties' voting rights in the Association." EX 598 at 2-3; *see also* Supp. CP 132 ¶ 2; RP 7/18/2017 (P.M.) 68:3-21; RP 7/24/2017 (A.M.) 335:11-15, 339:2-340:8. Kilo Six prevailed, and Everett Hangar's motion was denied. Supp. CP 150-52. If any party is subject to judicial estoppel, it should be Kilo Six.

Third, Everett Hangar does not concede that the positions it took in these actions were sufficiently "diametrically opposed" to apply judicial estoppel. *Seattle-First Nat. Bank*, 31 Wn. App. at 344 (no estoppel despite assertion of two different values for an asset in two different proceedings).

Kilo Six's argument conveniently conflates two different voting bodies of the Association—the Board and the Membership. In the Snohomish suit, Everett Hangar asserted that Kilo Six controlled the ***Board*** of the Owners' Association, as that was the entity which had the power to take the actions Everett Hangar sought in that suit. *See* EX 194 at 8-9 ("Mr. Sessions has the controlling votes ***on its Board***") (emphasis added); *id.* at 26-27 ("Sessions exercises control of the votes … of a majority of the entities that comprise ***the Board***.") (emphasis added). To the extent that Everett Hangar described Sessions' power over the ***Membership***, that was nothing more than an accurate description of how he acted at the time (though it was later revealed he lacked the legal right to do so). *Save Columbia CU Comm. v. Columbia Cmty. Credit Union*, 134 Wn. App. 175, 185-86, 139 P.3d 386 (2006) (allegation that "board members are in fact serving" is not inconsistent with legal challenge to whether "board members are properly serving"). Moreover, as noted above, voting rights were not at issue in the Snohomish litigation, and thus any inconsistencies are not material. *Kellar v. Estate of Kellar*, 172 Wn. App. 562, 582, 291 P.3d 906 (2012).

Finally, Kilo Six's argument would not serve the interests of judicial integrity, but rather undermine them. "[T]he doctrine of judicial estoppel protects the integrity of the judicial process, not the interest of a defendant attempting to avoid liability." *Miller v. Campbell*, 164 Wn.2d

529, 544, 192 P.3d 352 (2008) (judicial estoppel "is not meant to be a technical defense for litigants seeking to derail … meritorious claims") (citation & internal quotation marks omitted). Judge Andrus found Kilo Six's certification of substantial completion was false, and that Kilo Six violated the duty of good faith in making such a certification. *Kilo 6 Owners Ass'n*, 2019 WL 451376, at *4-9. The Court of Appeals affirmed these conclusions. *Id.* at *9. And Kilo Six has *not* sought review of them. Thus, Kilo Six is arguing its admitted breach should be ignored, and its false certification of substantial completion should be blessed by judicial fiat. Judicial estoppel is not a tactical litigation tool to "create a windfall" at the expense of a party who prevailed on the facts and the law at trial. *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 102, 138 P.3d 1103 (2006); *Gosney v. Fireman's Fund Ins. Co.*, 3 Wn. App. 2d 828, 884, 419 P.3d 447 (2018), *review denied*, 191 Wn.2d 1017 (2018). "Such a result would bestow a valuable benefit to [Kilo Six] while doing nothing to advance the integrity of the judicial process." *Chonah*, 5 Wn. App. at 150.

V. CONCLUSION

The Court should deny the Petition for Discretionary Review, and award Everett Hangar its fees and costs.[2]

[2] Pursuant to RAP 18.1, Everett Hangar asks that this Court award it attorneys' fees and costs for the appeal, as provided for in Section 4.2 of the CC&Rs. EX 546 at 11.

RESPECTFULLY SUBMITTED this 17th day of May, 2019.

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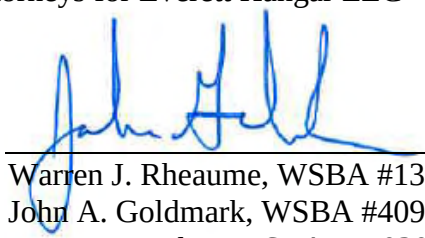
Attorneys for Everett Hangar LLC

By 

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CERTIFICATE OF SERVICE

I hereby certify that on the date stated below, I caused the foregoing document to be served electronically, pursuant to the parties' agreement, on counsel at the following email address:

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DATED April 17, 2019

s/ John A. Goldmark
John A. Goldmark, WSBA #40980

APPENDIX A

The Honorable Millie M. Judge
Noted: June 26, 2015 at 1pm
Dept. 9
With Oral Argument

SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF SNOHOMISH

EVERETT HANGAR, LLC, a Washington limited liability company,

Plaintiff,

v.

KILO 6 OWNERS ASSOCIATION, a Washington nonprofit corporation; KILO SIX, LLC, a Washington limited liability company; HISTORIC HANGARS, LLC, a Washington limited liability company; HISTORIC FLIGHT FOUNDATION, a Washington nonprofit corporation; and JOHN SESSIONS, an individual;

Defendants.

Case No. 14-2-02264-4

~~[PROPOSED]~~ ORDER GRANTING PLAINTIFF'S MOTION FOR FEES AND COSTS

This matter has come came before the Court on Plaintiff's Motion for Fees and Costs (the "Motion") against defendants Kilo 6 Owners Association; Kilo Six, LLC; Historic Hangars, LLC; Historic Flight Foundation; and John Sessions (collectively "Defendants"). The Court has considered the Motion, the declarations of Warren Rheaume and Peter Gowell, any papers submitted in support of or in opposition to the Motion, and the pleadings on file in this action. Based on the record, as well as the oral argument of counsel, and being otherwise fully informed, THE COURT

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1. GRANTS the Motion; and

2. Plaintiff is awarded attorneys' fees ~~and costs~~ and costs against Defendants, in the amount of $819,053.37 plus statutory costs to be submitted in a cost bill, as

3. A hearing on Defendants request for alternate security pursuant to RAP 8.1 (b)(4) is set for 9 am 7/31/15 - ce

IT IS SO ORDERED this 6th day of July, 2015.

MILLIE M. JUDGE, Judge

Presented by:

DAVIS WRIGHT TREMAINE LLP
Attorneys for Plaintiff

By _____

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APPENDIX B

The Honorable Millie M. Judge

SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF SNOHOMISH

EVERETT HANGAR, LLC, a Washington limited liability company, Plaintiff, v. KILO 6 OWNERS ASSOCIATION, a Washington nonprofit corporation; KILO SIX, LLC, a Washington limited liability company; HISTORIC HANGARS, LLC, a Washington limited liability company; HISTORIC FLIGHT FOUNDATION, a Washington nonprofit corporation; and JOHN SESSIONS, an individual; Defendants.	Case No. 14-2-02264-4 **ORDER FOR CONTEMPT**

THIS MATTER came before the motion of Plaintiff's Motion for Contempt. The court has considered:

- Plaintiff's Motion for Contempt and the accompanying Declaration of Greg Valdez, Declaration of Jeff Wood, and Declaration of Jeff A. Kohlman in support of the motion;
- Defendants' Opposition to Plaintiff's Motion for Contempt, and the accompanying Declaration of Jeff Ewart in Support of Defendants' Opposition to Plaintiff's Motion for Contempt; and
- Reply in support of Plaintiff's Motion for Contempt and accompanying Declaration of Tom Wyrwich;

- Documents, photograph, and videos submitted in conjunction with each Declaration as attached exhibits.

Based on the foregoing and being otherwise fully informed, the court finds as follows:

1. As to Paragraph Nos. 1 and 2 of the Amended Order Granting Permanent Injunction ("the Injunction"), the Plaintiff has not met its burden of proof to demonstrate that Historic Hangars, LLC and Historic Flight Foundation ("the Defendants") have violated its terms by placing objects in the Object Free Area ("OFA") and/or blocked access to Kilo 7 taxi lane. The Injunction specifies: "*For all Everett Hangar aircraft using Lot 11 for access to Kilo 7, the OFA shall be determined by reference to the applicable circular or other applicable FAA guideline.*" (Injunction at p. 2)

It is clear from the evidence provided and arguments of counsel that there still exists a dispute as to the exact location of the OFA. At trial, the evidence revealed that the painted lines near the ramps of Lots 11 and 12 purporting to identify the OFA were incorrectly drawn. Accordingly, Defendants are not entitled to use those painted lines as evidence they are in compliance with the Injunction. In order to ensure future compliance and lessen the disputes between the parties, the Court finds that the parties should be ordered to meet and confer within the next 30 days to determine the exact location of the OFA with regard to Everett Hangar's aircraft. The parties should consult with Paine Field officials, as necessary, and take whatever steps are necessary to paint new OFA lines on the appropriate areas of the ramps in front of Lots 11 and/or 12.

2. As to Paragraph No. 4 of the Injunction, the Court finds by a preponderance of the evidence that the Defendants violated its express terms on July 15, 2017, August 10, 2017, August 18, 2017 and September 1, 2017, as follows:

a. On July 15, 2017, the Defendants' flight museum ("the Museum") hosted a barbecue on the airside of Lot 11, during which dozens of individuals were walking out on the Lot 11 ramps, viewing vintage aircraft. While some Museum personnel were visible on the ramp wearing yellow vests during this event, one Museum guest was

allowed to walk unescorted by security from Lot 11 over onto the corner of the hangar belonging to Everett Hangar, on the Lot 12 ramp.

b. On August 10, 2017, a man walked unescorted from Defendants' Lot 11 directly onto the Lot 12 ramp without permission, and entered inside of the open hangar belonging to Everett Hangar. Afterward, he was seen by Plaintiff's staff returning to the Museum on Lot 11.

c. On August 18, 2017, a man walked unescorted from Defendants' Lot 11 directly onto Everett Hangar's Lot 12 ramp without permission, and continued out to the Everett Hangar Learjet on the ramp. The man identified himself as a Museum guest but had no security escort and was not wearing a visitor badge. He repeatedly sought entry into the aircraft. He was finally turned away by Everett Hangar's pilots and returned to the museum.

d. On September 1, 2017, Defendants' concede that one of their guests entered into Lot 13, the unimproved parking lot next to Plaintiff's Lot 12, and walked past the bicycle fencing enclosing Lot 13 onto the airside of Lot 12, and traversed Everett Hangar's ramp, using it as a shortcut to reach the Museum on Lot 11.

The Defendants have an affirmative duty to prevent their invitees, guests, members of the public, personnel and volunteers from entering onto Lot 12 without permission. Although Defendants referenced some steps they have taken to prevent violations, they are plainly insufficient. Each of these incidents constitutes a clear violation of the terms of the Injunction.

3. As to Paragraph No. 5 of the Injunction, the Court finds that the Defendants violated its express terms on July 15, 2017, August 10, 2017 and September 11, 2017. On each of these occasions, the gate for Lot 13 parking lot was left open to the public, unlocked, and no gate attendant was immediately present. Defendants presented no evidence to rebut these facts. Each of these incidents constitutes a clear violation of the terms of the Injunction.

4. Through their actions and/or failures to act in accordance with the terms of the Injunction, the Defendants have demonstrated their contempt for this Court's lawful order, and the Court finds said contempt has been ongoing, and is likely to continue in the future without the imposition of sanctions pursuant to Chapter 7.21 RCW *et seq*.

NOW THEREFORE,

IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. Sanctions are imposed jointly and severally against the Defendants in the amount of $5,000 per violation. The court finds that the Injunction was violated on seven (7) separate occasions. Accordingly, the Court imposes the sum of $35,000.00 against the Defendants, jointly and severally. Payment shall be made to the Clerk of the Snohomish County Superior Court within 60 days. If further actions constituting contempt of the Injunction are found, the Court may consider additional sanctions and/or may make changes to the Injunction.

3. The parties are ordered to meet and confer within the next 60 days to determine the exact location of the OFA with regard to Everett Hangar's aircraft. The parties should consult with Paine Field officials, as necessary, and take whatever steps are necessary to paint new OFA lines on the appropriate areas of the ramps in front of Lots 11 and/or 12 as soon as practicable.

4. Everett Hangar is awarded its costs and reasonable attorney's fees in having to bring this motion, in an amount to be determined upon further submittals.

SO ORDERED this 17th day of November, 2017.

Judge Millie M. Judge
Snohomish County Superior Court

APPENDIX C

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

EVERETT HANGAR, LLC, a Washington limited liability company,

Plaintiff,

vs.

KILO 6 OWNERS ASSOCIATION, a Washington nonprofit corporation; KILO SIX, LLC, a Washington limited liability company; HISTORIC HANGARS, LLC, a Washington limited liability company; HISTORIC FLIGHT FOUNDATION, a Washington nonprofit CORPORATION; and JOHN SESSIONS, an individual,

Defendants.

No. 14-2-02264-4

[PROPOSED] ORDER GRANTING MOTION FOR RECONSIDERATION

This matter comes before the Court on the Motion for Reconsideration filed on November 30, 2017 by Defendants Historic Flight Foundation and Historic Hangars, LLC (the "Motion for Reconsideration"). The Court has considered the Motion for Reconsideration, Everett Hangar's response, and Defendants' reply, and has considered the other papers and pleadings on file.

Being fully advised, it is hereby ORDERED that the Motion for Reconsideration is GRANTED. It is further ORDERED that the Court's Order of Contempt, filed November 20,

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2017, is hereby modified to impose a reduced sanction of $2,000 per violation against Defendants Historic Flight Foundation and Historic Hangars, LLC. The total sanction imposed is therefore reduced to $14,000, payable to the Clerk of the Snohomish County Superior Court within 60 days of November 20, 2017. The Court's Order of Contempt is otherwise unchanged.

DONE THIS 13th day of December, 2017.

HON. MILLIE D. JUDGE
SNOHOMISH COUNTY SUPERIOR COURT JUDGE

Presented by:

HILLIS CLARK MARTIN & PETERSON P.S.

By _____
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Jake Ewart, WSBA #38655
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Attorneys for Defendants
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APPENDIX D

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

Everett Hangar, LLC

Plaintiff

vs.

Kilo 6 Owners Association et al

Defendant

No. 14-2-02264-4

COVER SHEET

ATTACHED HERETO IS: Order on Attorney's Fees

The Honorable Millie M. Judge
Noted for Motion: December 8, 2017
Without oral argument

SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF SNOHOMISH

EVERETT HANGAR, LLC, a Washington limited liability company,

Plaintiff,

v.

KILO 6 OWNERS ASSOCIATION, a Washington nonprofit corporation; KILO SIX, LLC, a Washington limited liability company; HISTORIC HANGARS, LLC, a Washington limited liability company; HISTORIC FLIGHT FOUNDATION, a Washington nonprofit corporation; and JOHN SESSIONS, an individual;

Defendants.

Case No. 14-2-02264-4

~~[PROPOSED]~~ ORDER GRANTING MOTION FOR ATTORNEYS' FEES UPON CONTEMPT

This matter came before the Court on Plaintiff's Motion for Attorneys' Fees and Costs re Contempt Order (the "Motion"). The Court has considered the Motion and Declaration of Warren J. Rheaume in support, any further papers submitted in support of or opposition to the Motion, and the pleadings on file in this action. Based on foregoing, and being otherwise fully informed, THE COURT

1. GRANTS the Motion; ~~and~~ but finds that the amount requested is clearly unreasonable as to the hours worked.
2. Awards Plaintiff attorneys' fees against defendants Kilo 6 Owners Association; Kilo Six, LLC; Historic Hangars, LLC; and Historic Flight Foundation, jointly and severally, in the amount of ~~$73,741.00~~ $18,000.00.

The court finds that the billing records reflect significant duplications in work and expects ~~signif~~ more oversight on hours spent when a team approach is used.

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IT IS SO ORDERED this 22nd day of December, 2017.

MILLIE M. JUDGE
Superior Court Judge

Presented by:

DAVIS WRIGHT TREMAINE LLP
Attorneys for Plaintiff

By: _____
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DAVIS WRIGHT TREMAINE - SEA

May 17, 2019 - 4:33 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	77365-8
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Superior Court Case Number:	16-2-09635-2

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