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No. 71103-2-I

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

FLIGHT SERVICES & SYSTEMS, INC.,

Appellant,

v.

AIR SERV CORPORATION,

Respondent.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

In attempting to salvage a $235,000 windfall recovery, AS concedes the trial court failed to apply the correct measure of damages—the fair and reasonable market value of services. AS now admits the trial court applied contractual expectation damages. Resp't Br. at 33-34 ("The court's remedy was made to ensure that Air Serve was placed in no worse of a position than it would have been in had FSS honored its representations."). AS's arguments rely upon the faulty and unproven premise that an agreement was reached on its stated price based upon representations of the parties. Resp't Br. at 9-12. But, AS's contract claims were dismissed by Judge Rogers on summary judgment (CP 1581-82) and *res judicata* precludes AS from relitigating the claims again. *In re Estate of Black*, 153 Wn.2d 152, 170, 102 P.3d 796 (2004).

AS also admits it failed to provide any market evidence to support its inflated rate. Resp't Br. at 32 ("Nor could Air Serv provide any rate beyond the figure it was willing to accept for payment."). Recognizing this fatal error and needing a way to support its recovery, AS argues the trial court should have used a wholly different and unsupported measure of damages—disgorgement of total gross revenues for both international and domestic flights—which as explained below, is both unsupported in the law and in conflict with the trial court's preamble statement—"the

issue for the court to determine was the reasonable value of services rendered." CP 2180. Furthermore, AS never rendered any services on domestic flights, which accounts for the majority of the total revenues.

AS's excessive rate is demonstrated by, *inter alia*: Delta invoices identifying revenues received for international flights (Tr. Exs. 3-10; Appellant Br. at Appx. A); FSS's market analysis (Tr. Ex. 17 & 57); and AS' and FSS' contracts with Delta showing both the market rates for out-of-scope services and the contracted rates for performing all cleaning services (Tr. Exs. 51 & 61). In fact, AS's inflated rate exceeds the amount received by FSS for performing *all the cleaning services*, which generally takes 6-14 employees depending on the airplane type.[1]

Finally, as discussed below, even assuming *arguendo* that AS had met its burden of proving the reasonable value of its services, there is no contractual, statutory or other recognized ground in equity for attorneys'

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[1] AS's rates greatly exceeded the "out-of-scope" service rates, and also exceeded the contract rates for both AS and FSS for cleaning the entire airplanes. AS's $175 per aircraft "price" translates to an hourly rate of $350. *See* Tr. Ex. 17 at pp. 4-5 (showing that it took 30 minutes total AS time per plane); VRP 354-55 (Priola testimony). FSS had agreed with Delta to accept $14.05 per hour for all out-of-scope services, the same rate FSS offered to pay AS. Tr. Ex. 51 at p.5; Tr. Ex. 17 at 4-5. AS similarly contracted with Delta to accept $16.31 per hour for out-of-scope services. Tr. Ex. 61 (at p.3). The $83,300 (476 planes x $175) AS sought below, which the trial court awarded, greatly exceeded what FSS received from Delta *for the entire cleaning services performed by FSS on international flights*. *See* Tr. Exs. 3-10 (invoices) & Appx. A to Appellant's Brief (summary of invoices). Only 14.47% of the flights cleaned were international flights. *See* Appx. A. FSS received total gross revenues of just $62,595.73 for Delta international flights, which amounted to an average total payment per flight of $108.48 for the entire cleaning operation performed by FSS with a crew of 6-14 workers. *Id.*

fees and costs to overcome the American Rule followed by Washington courts. Judge Spector did not even conduct a lodestar analysis to evaluate the reasonableness of the claimed fees. She also failed to provide any specificity to support her alternative avenue of awarding fees and costs through sanctions. This is because her stated intent at trial was to find a way to fashion a make-whole remedy. CP 2300 ¶3.h & VRP 412.

II. COUNTER-STATEMENT OF THE CASE

Respondent distorts the facts on many key issues:

- AS's misguided argument for a different measure of damages rests upon *the disgorgement of FSS' total gross revenues from both domestic and international flights*. In numerous instances, AS misleadingly refers to "monthly revenues in excess of $130,000" and gross revenues of "over $400,000, Resp't Br. at 3-5, 30-36 and 50, which corresponds to total gross revenues for *both* domestic and international flights. AS claims "there is substantial evidence to show that plaintiff provided cleaning and/or supervision of cleaning of 476 flights *involving both domestic and international travel*." Resp't Br. at 26 (italics added). This is false. There is no dispute that AS only provided supervisory services on international flights, not any domestic flights. Resp't Br. at 5-7. Invoices show total gross revenues for international flights were only $62,595.73—just 14.47% of the flights cleaned were international. *See*

Appellant Br. at Appx. A. The trial court committed reversible error because it considered revenues from *both* international and domestic flights. CP 2180-81 ("undisputed that [AS] provided cleaning and/or supervision of cleaning of 476 Delta flights involving both domestic and international travel...between May 28, 2011 through September 30, 2011"); 2184 (¶13 – "in excess of $400,000").

- AS admitted at trial that it began discussions with Delta in May 2011 to take over the cleaning contract from FSS. VRP 131. This was just days before AS began making its rate demand to FSS. *Id.*

- FSS never operated "illegally" contrary to AS's conjecture. Resp't Br. at pp. 1, 6 & 8. There was never any such finding. CP 2182-85. When FSS found out a compliance agreement was required, it took immediate steps well before it began providing services to obtain its own compliance agreement. Tr. Ex. 1; CP 918 at ¶40.

- AS fails to describe the work it actually performed. *See* Resp't Br. at 4-7. AS was only responsible for monitoring the handling of the transfer of bags of trash from FSS to Gate Gourmet (the company hired by Delta to do the incineration). CP 907-908. This supervisory task took just 5-10 minutes per airplane to complete. Tr. Ex. 57; VRP 352, 354-355. AS blindly assumed one hour to supervise even though it failed to speak to anyone with knowledge about the work. VRP 144-45.

- AS's *post hoc* argument that its inflated price was justified because it faced fines of "up to $250,000" is inaccurate. AS' general manager of cleaning operations at Sea Tac, Gil Green, could not recall a fine *ever* being imposed over the past 20years. VRP 297. According to AS's VP of Finance, if any fines were levied, "most . . . don't end up coming to fruition into a monetary penalty . . . because most of the time they mitigate th[e] circumstances." VRP 138 (Nguyen).

- AS's price demand already included an additional $5 per airplane charge for general liability insurance. VRP 144-45. AS also set its inflated $175 per airplane price with the intent that FSS would indemnify AS. Tr. Ex. 67 (AS's draft contract with the $175 per airplane rate *contained an express indemnification clause*). There is no dispute that FSS had agreed to indemnify AS. Tr. Ex. 55; VRP 132-133. But, AS then contradicted itself by claiming the $175 rate was not based upon indemnity and tacking on an additional $150 per airplane to support its unprecedented rate. VRP 147. AS, however, admitted that the $150 per airplane charge would not apply if it had considered indemnification. *Id.* Conveniently, AS's Mr. Nguyen testified that he kept no records on how he came up with AS's price, nor did he use the normal approach used by AS for valuing cleaning services. VRP 139. It is also undisputed that AS paid its supervisors no more than $12 per hour. Tr. Ex. 60.

- AS' Nguyen slightly reduced his price demand from $250 to $175 per plane because he had initially thought AS would be performing all the cleaning services. VRP 85. AS' general manager testified it took at least nine employees to clean an airplane and preferably more. VRP 303-06. FSS testified that it took 6-14 employees. CP 908 (Weitzel decl.). But, AS' Nguyen never explained why his price dropped so little after finding out only a supervisor was necessary. Contrary to its representation, Resp't Br. at 13, AS never provided any of the actual cleaning services. Its citation to Tr. Ex. 53 is fictitious.

- AS states that "Mr. Weitzel did not object to Mr. Nguyen's stated price of $175 per plane." Resp't Br. at 10. This is false. Mr. Nguyen testified that Mr. Weitzel objected to the inflated rate in their phone conversation on June 24, 2011. VRP 140 & Tr. Ex. 55. Mr. Nguyen further testified that Mr. Weitzel informed him that the amount demanded by AS exceeded the total amount of compensation FSS received for performing all the cleaning services. VRP 141.

- Contrary to the myriad of inaccurate representations, AS admitted that it knew FSS' local manger, Mr. Kim, had no authority to approve AS's price demands and that any such approval would have to come from FSS' headquarters. VRP 299 (Green).

- FSS tendered payment of its market valuation of AS's

services (Tr. Ex. 17 & 57; CP 1528, n.6) based upon time spent performing the task and the agreed out-of-scope service rate from FSS's contract with Delta (Tr. Ex. 51 at p.5). This tender was rejected by AS. Tr. Exs. 58 & 59. Both AS and FSS negotiated with Delta on a specific rate for all out-of-scope services. Tr. Ex. 51 at p.5 & Tr. Ex. 61 at p.3. AS confirmed that out-of-scope services under the Delta contract meant all "[s]ervices that are not defined in the contract." VRP 137.

- AS makes several spurious allegations of discovery misconduct, *see* Resp't Br. at 15-24, each of which were presented and rejected by Judge Rogers. *See, e.g.*, CP 1121, 1353 (claiming failure to respond to written discovery and/or did not obey Judge Rogers discovery order); CP 1240-69 (failure to prepare for 30(b)(6) deposition);[2] and CP 1564-70 claiming violation of local rules). AS has not cited to any findings of discovery violations. Likewise, the allegation that any declarations were submitted in bad faith is also not supported by any findings. In fact, AS made only one motion to compel before trial, which occurred in March-April 2013. CP 15-338. After FSS supplemented its discovery in April 2013 in compliance with the discovery order, AS never sought to compel any further discovery. At the June 7, 2013 hearing,

[2] AS also had a second opportunity to depose the FSS' CR 30(b)(6) deponent, Robert P. Weitzel, but elected not to do so. *See* CP 1535.

Judge Rogers admonished AS's counsel for his unprofessional pre-trial conduct. CP 1514; VRP (June 7, 2013) at 57:22-25 & 58:1-4.

- There were never any misrepresentations made to Judge Rogers. Resp't Br. at 20-21. AS's citation to VRP 371:21-372:14 pertains only to the trial record where AS' counsel falsely accused FSS' counsel of making misrepresentations. As a result, FSS has designated the entire verbatim transcript from the June 7 & 14, 2013 hearings before Judge Rogers. There is nothing in the verbatim transcript even remotely supporting AS' spurious allegations. Remarkably, AS has not cited to anything from the actual verbatim report of proceedings.

- FSS has never misrepresented Judge Rogers' orders. Resp't Br. at 23. AS made the same allegation of failure to produce cost and revenue information to Judge Rogers on summary judgment (*see, e.g.*, CP 1353) who, in-turn, struck AS' claim and supporting declaration concerning disgorgement of total gross revenues that were based upon AS's spurious discovery allegation. CP 1523-24.

III. ARGUMENT

A. AS's Response Confirms the Trial Court Erred by Applying the Wrong Measure of Damages.

AS admits the trial court used the wrong measure of damages because it now argues for an entirely different measure—disgorgement of

"total gross revenues" for cleaning "international *and* domestic" flights (even though AS undisputedly only provided services on international flights). Although the trial court correctly stated in her preamble that "the issue for the [trial] court to determine was the reasonable value of services rendered," CP 2180, it then erroneously applied contractual expectation damages based upon the contract claim dismissed by Judge Rogers on partial summary judgment.[3] CP 1581-82. Judge Rogers specifically held that *there was no contract as to price* for AS's services that were arranged by Delta and he dismissed AS' contract claims.[4] *Id.*

AS does not dispute the legal error occurred. Instead, AS argues the trial court should have applied a completely different measure of damages based upon a misguided disgorgement of "total gross revenues" theory. Resp't Br. at 31-35. As explained below, this windfall measure of recovery is without merit. Nevertheless, by advocating for a wholly different measure of damages, AS verifies the trial court did not use the

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[3] AS admits that the trial court applied contractual expectation damages. Resp't Br. at 33-34 ("The court's remedy was made to ensure that Air Serve was placed in no worse of a position than it would have been in had FSS honored its representations.").

[4] AS inaccurately contends the trial court had the authority to overrule Judge Rogers' order granting summary judgment. Resp't Br. at 28-29, fn 34. Nevertheless, this flawed argument confirms that the trial court erred by overruling Judge Rogers summary judgment orders. It is well established that a grant of summary judgment becomes a final judgment on the merits and, if not appealed, becomes *res judicata* as to the rights determined. *In re Estate of Black*, 153 Wn.2d at 170. AS neither appealed nor sought reconsideration of Judge Rogers' summary judgment orders.

measure of damages stated in her preamble, CP 2180. In fact, AS entirely abandons the reasonable value of services measure of damages and makes *no attempt* to support it. Resp't Br. at 34. ("[B]eing required to prove a 'reasonable market rate' is not the law."). Therefore, because AS' response confirms that the trial court failed to use the measure of recovery stated in the FFCL, the decision below should be reversed.

B. AS Admits It Failed to Present Any Evidence to Prove Reasonable Market Value.

AS admits that it failed to "provide any rate beyond the figure it was willing to accept for payment" and, according to AS, "no market was ever identified [at trial]." Resp't Br. at 32. The party seeking money damages bears the burden of establishing the reasonable market value for the services rendered. *Dailey v. Testone,* 72 Wn.2d 662, 664, 435 P.2d 24 (1967); *Eaton v. Engelcke Mfg., Inc.*, 37 Wn. App. 677, 682, 681 P.2d 1312 (1984).[5] Here, AS acknowledged that it has not met its burden of proof by admitting that it only provided a "figure it was willing to accept for payment" without establishing whether its price was reasonable in the market in an arm's length transaction. CP 2180 ("the issue for the court to

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[5] AS had the burden of proof. *RWR Management, Inc. v. Citizens Realty Co.*, 133 Wn. App. 265, 277, 135 P.3d 955 (2006) (plaintiff met burden of proving reasonable value of services with "evidence from another development coordinator showing six percent of total project costs as an acceptable development fee"); WPI 303.01 (proof of damages cannot be based on speculation, guess, or conjecture).

determine was the reasonable value of services rendered ...."). Therefore, the decision below should be reversed and the claims dismissed based upon AS's own admission that it has failed to provide a shred of evidence to establish the reasonable value of its services.

C. AS's Election Not To Present Any Evidence of Reasonable Market Value is Fatal to Its Claims.

AS made *no attempt* to evaluate the market value of its service of monitoring the handling of bags of trash from FSS to Gate Gourmet—a task performed by a common laborer making no more than $12 per hour (Tr. Ex. 60). In *quantum meruit* and unjust enrichment cases, the recipient is generally required to pay the fair market value or "market price" for services rendered. *Young v. Young*, 164 Wn.2d 477, 485 & 490, 191 P.3d 1258 (2008). AS argues since "no such market was ever identified," the trial court "was left to determine how much FSS benefited/profited."[6] Resp't Br. at 32. Without citation, AS also argues "there is no established market rate" and "no market for similar services was ever proven to exist." Resp't Br. at 35-36.[7]

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[6] This contradicts the trial court's preamble statement stating that the issue was to determine the reasonable value of the services rendered. CP 2180.

[7] Taking words out of context, AS cites FSS's partial motion for summary judgment as an admission that this "case is unique, one-of-a kind private dispute" involving an "atypical" relationship in an "unusual situation." Resp't Br. at 14, *citing* CP 901-902. But, the summary judgment motion had nothing to do with whether the services had a fair market value in the cabin cleaning industry. The argument was whether AS could prove

In fact, *no proof on this issue* was ever offered by AS.[8] The trial court made no finding that there was no market for the services.[9] No evidence was offered at trial that there was no market.[10] AS's failure of

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the "public interest" element of its Consumer Protection Act claim or whether the transaction involved "essentially a private dispute" between competitors. *See* CP 901-902. FSS consistently argued the services have a market value, which AS chose to ignore because it is so much lower than its $250 and $175 per plane demands. FSS motion for summary judgment (CP 887:6-13, 889, 900:3-4, 904:4-12); FSS trial brief (CP 1596-1598); and FSS response trial brief (CP1649-1652).

[8] AS's analysis fails to account for the burden of production. *See Federal Signal Corp. v. Safety Factors, Inc.*, 125 Wn.2d 413, 433, 886 P.2d 172 (1994) ("The burden of producing evidence on an issue means the liability to an adverse ruling (generally a finding or directed verdict) if evidence on the issue has not been produced."). When fair market value is the primary measure of damage among others, "the plaintiff bears the burden of producing evidence to show which measure of damages applies." *Cf. Sherman v. Kissinger*, 146 Wn. App. 855, 873, 195 P.3d 539 (2008) (for damage to personal property, measure of damages usually depends on fair market value, unless none exists). If the plaintiff wants to establish another measure of damage, "the plaintiff must produce evidence showing that the [service] does not have a fair market value." *Id.* at 874; *see also Russell v. City of New Bedford*, 910 N.E.2d 404, 411 (Mass. App. 2009). "If the plaintiff claiming damages meets this burden, then the burden shifts to the other party to present evidence on the measure of damages." *Sherman,* 146 Wn. App. at 874. Here, AS completely failed to produce evidence that there is no market value for these services. The burden never shifted to FSS to prove fair market value. Nevertheless, as explained below, FSS did provide evidence that there was a market rate already established (the out of scope services rate negotiated and agreed upon with Delta).

[9] In deciding the "reasonable value of services rendered by [AS]" [CP 2180] was "$175/flight or $83,300" [CP 2184 at ¶16], the trial court failed to explain its methodology or weighing of factors. When a court determines value, it "must set forth on the record which factors and method were used in reaching its finding" of value. *Cf. In re Marriage of Berg*, 47 Wn. App. 754, 757, 737 P.2d 680 (1987). "Because of the complexities involved in valuing" intangible assets or services, "which may not have a readily ascertainable market value," "an appellate court must be able to determine the method by which the trial court determined valuation and the weight that the trial court gave to the factors relevant to valuation." *Id.* and n. 3, *citing In re Marriage of Hall*, 103 Wn.2d 236, 247, 692 P.2d 175 (1984). Here, the trial court provided no explanation and failed to reconcile the $150 "potential liability" charge AS used to pad the $175 per flight rate since it turned out there were no liabilities whatsoever. AS's attempt to provide *post hoc* rationale for the trial court's valuation is pure speculation and conjecture.

[10] AS did not allege that there was no market. It claimed it didn't know what the market value was, and anyway it was irrelevant. "So Air Serv doesn't know what other companies think the reasonable value of services are. All they know is the price and how

proof does not equate to a negative finding on whether there was a market.

Without testimony by a knowledgeable witness, no effort at investigation, or diligence to determine whether a market exists, AS cannot make a bald assertion that no market exists. AS provided no expert opinion that its services could not be evaluated for fair market value. Only AS's lay witness employees, Mr. Nguyen and Mr. Green, testified that AS had not agreed to such services before, implying they had no knowledge of what similar services would have cost FSS if it had retained another company. VRP 75, 101(Nguyen); VRP 274 (Green).[11]

AS's evidence was contradicted by Tr. Ex. 65, which showed at least one other cleaning company subcontracted with another at Sea-Tac Airport *at the same time and in the same way* Delta requested AS subcontract with FSS. Tr. Ex. 65 at 3 (CBP email dated May 28, 2011

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they came up with the price point that they were going to provide the services to FSS...." VRP 51-52. Based on speculation, AS argued a "huge value" *from FSS's point of view. See* VRP at 50-51 ("[FSS] might have been willing to pay half the contract to make sure that somebody could get those flights off the ground or face losing a multimillion dollars contract with Delta in the process because they failed to be compliant.") Fair market value is not based on desperation or duress conditions. *Dillon v. O'Connor*, 68 Wn.2d 184, 186, 412 P.2d 126 (1966); WPI 150.08 (fair market value is based on a willing buyer and a willing seller, neither of them compelled to do business with each other).

[11] Claiming no market rate, AS falsely argues AS billing manager Tessie Ong testified that "all rates were by plane," Resp't Br. at 14 n. 14, even though its own contract with Delta contained an hourly rate for out-of-scope services. Tr. Ex. 61. Ms. Ong's testimony was based on "providing bills for cabin cleaning service for Air Serv at numerous airports...." VRP 191:8-21. Ms. Ong disclosed no experience with billing for similar services between AS and another cleaning company like FSS. She was not involved in any pricing decisions made by AS, including its rejected offer of $175 per plane. VRP 187:6-13; 203:13-15. Ms. Ong did not testify there was no "market rate" in

providing list of cleaning service groups currently under USDA approval to handle regulated garbage and noting that "Evergreen [Eagle] sub-contracts with World Service to clean BA [British Airways]").[12]

Subcontracts are common and required in the aircraft cabin cleaning industry. For example, the federal government requires that cleaning companies have emergency backup systems with other cleaning companies. *See* USDA-APHIS, *Manual for Agricultural Clearance*, Appx. B "Completing Regulated Garbage Compliance Agreements" at B-1-5, B-1-13, B-1-14, B-1-20, B-1-38, B-1-10 – 11 (emergency backup system), available at http://www.ifsanet.com/portals/0/Manual%20for%20Agricultural%20Clearance,%20Appendix%20B.pdf (05/2013 version last viewed July 25, 2014).[13] FSS President, Robert P. Weitzel, testified to

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the industry, only how Mr. Green wanted her to bill FSS.

[12] During closing, the trial judge noted the absence of fair market value evidence, but erroneously assumed "FSS" had failed to carry its burden of proof. *See* VRP 402:22-25 (THE COURT: "Where's the evidence of what all those other companies in that exhibit, that listed out the six other companies, where is their market value? Where is that in the record?"). FSS answered that AS had the burden of proof under *Young* and other implied contract cases, but the judge was unpersuaded. VRP 403:9-25. From the dearth of evidence, the trial court presumed against FSS as if FSS had the burden (VRP 406):

> THE COURT: Where are they, other than Tschumi, where are they in this lawsuit? Where is Delta?
>
> FSS COUNSEL: They're not involved. No.
>
> THE COURT: So they didn't retain them. So how can you say that? FSS retained Air Serv.

[13] Emergency backup systems must operate under an approved compliance agreement. *Appx B., supra* at B-1-10 - 11. "[A]irline cleaners **must** have a back-up entity that can meet and clean the plane in the event that they cannot, and a back-up hauler or caterer that can pick up the regulated garbage from them...." *Id.* at B-1-10 (bold

industry custom and practice of arranging for backup with other cleaning companies. *See* CP 1773-1774 (Weitzel Dep. April 22, 2013 at 98-99); CP 1820 (Weitzel Dep. at 158) ("[W]e've been asked to supervise other companies, and more recently, in the last several months, other companies have come to us to say, "Will you be our backup company," and we would say "Sure, we'll be your back up company. Here's how much we would charge you." So it's very prevalent in the industry . . . .").[14]

AS had the burden of proving the reasonable value of its services by more than speculative evidence or its own subjective notions of value.[15] Here, the only evidence of a $175 per plane value was testimony by Toan Nguyen, AS's vice-president of finance (the same person who originally demanded the $250 per airplane rate), but he admitted he had no personal

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in original). "Backup systems are *not* for routine use but are initiated in cases of emergency or other non-routine situations" when "the primary processing equipment or facility fails or if the compliance agreement holder is otherwise unable to perform their regulated garbage handling duties." *Id.* "All necessary contracts and agreements between participating establishments **must** be in place prior to inclusion in compliance agreements as emergency backup systems." *Id.* at B-1-11 (bold in original). AS's compliance agreement identified its Emergency Backup System as its caterer, LSG Sky Chefs. Tr. Ex. 29 at 5 (Compliance Agreement of June 2, 2011, §§ B and C).

[14] CR 32(a)(4) allowed FSS to introduce relevant portions of the Weitzel deposition at trial. AS originally offered portions of the Weitzel deposition. VRP 102:24-105:3. FSS offered supplemental designations. *Id.*; CP 1672-1827. AS never objected at trial to FSS' designations. *See* CR 32(b); VRP 314:22-315:1 (AS counsel) & 418:5-8 (same); *see Zimny v. Lovric*, 59 Wn. App. 737, 741, 801 P.2d 259 (1990) (failure to object at trial constitutes waiver); *Sturgeon v. Celotex Corp.*, 52 Wn. App. 609, 619, 762 P.2d 1156 (1988) (failure to object to evidence operates as waiver).

[15] *See Young*, 164 Wn.2d at 490 ("fair market value" focuses on "the claimant's position," which "refers to similar providers of like services, not the actual claimant").

knowledge about what a reasonable rate in the cabin cleaning industry would be and he set the price arbitrarily without checking with anyone else. VRP 101, 111, 115-116, 139, 150. *AS had to ask Delta Airlines how much to charge FSS.* Tr. Ex. 53 at 1 (Gil Green email to Roy Tschumi dated May 28, 2011 – AS Green: "So what should I charge these guys anyway?" Delta Tschumi: "[C]harge them a lot.").[16]

D. AS' Alternative Flawed Measure of Damages of Disgorging Total Gross Revenues Has No Support in Law or Fact.

AS's inaccurately contends *Young* allows for a disgorgement of "total gross revenues" for the international and domestic flights. Resp't Br. at 31-33, *citing Young*, 164 Wn.2d at 489-490.[17] As discussed above, AS was only involved with international flights. In addition, Washington

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[16] *Cf. SentinelC3, Inc. v. Hunt*, No. 89317–9, --- P.3d ----, 2014 WL 3765314 at *6 (Wash. July 31, 2014) (in action to establish fair value of shares owned by shareholders, lay testimony regarding value "must be based on firsthand knowledge or observation" and could not be based on hearsay or unauthenticated expert reports); *TVL Associates v. A & M Construction Corp.*, 474 A.2d 156, 160 (D.C. App. 1984) (reversing award of *quantum meruit* for insufficient evidence as to reasonable value of services where only evidence was contractor President's testimony about number of hours spent at estimated cost *from his point of view*, but no specific evidence of *reasonableness* such as expert testimony or evidence of market value).

[17] AS attempts to stretch *Young*'s holding in ways the Supreme Court never imagined. Unlike *Young*, there is no real property here that could be improved by services so that an enhanced value could be measured by a qualified appraiser of land values, comparing it to sales of comparable parcels sold on the open market. AS offered no evidence at trial, neither experts nor lay witnesses, that FSS could only have earned those revenues solely through the subcontract with AS, and not with some other cleaning company.

The 3-year cleaning contract valued at $1.1 million was terminated by Delta after 6 months to enable AS to assume the cleaning contract without FSS, which was why AS wanted to perform the services. *Cf. National Security Corp. v. Immunex Corp.*, 176 Wn.2d 872, 880, 297 P.3d 68 (2013); *see also* Tr. Ex. 54 at 1.

courts have only disgorged "profits," not "total gross revenues," and primarily in breach of contract cases where a party breached a fiduciary duty.[18] AS has not cited *a single Washington authority* supporting disgorgement under the facts here, and FSS's research reveals none.[19]

AS's theory of disgorgement of total gross revenues was based on speculation and conjecture made entirely through argument of counsel, rather than proof.[20] Without any evidence, the trial judge adopted AS's

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[18] *See Shoemake ex rel. Guardian v. Ferrer*, 168 Wn.2d 193, 202, 225 P.3d 990 (2010); *J & J Celcom v. AT & T Wireless Services Inc.*, 162 Wn.2d 102, 110-112, 169 P.3d 823 (2007) (Madsen, J., concurring); *Eriks v. Denver*, 118 Wn.2d 451, 462-463, 824 P.2d 1207, (1992); *Ryan v. Plath*, 18 Wn.2d 839, 867-868, 140 P.2d 968 (1943).

[19] AS cites two Washington cases that are inapposite. *See* Resp't Br. at 31, n. 37, *citing Wright v. Dave Johnson Ins., Inc.*, 167 Wn. App. 758, 275 P.3d 339 (2012) (enforcing intent of parties under express oral agreement, court affirmed order requiring return of life insurance policies to rightful owner under constructive trust theory to avoid unjust enrichment); *Olwell v. Nye & Nissen Co.*, 26 Wn.2d 282, 173 P.2d 652 (1947) (owner of egg-washing machine awarded "reasonable value of defendant's use of the machine," measured by "saving in labor cost" ($25 per month for 36 months) to user who converted machine for business use; machine owner was not awarded restitution of wrongful user's revenues or profits from the sale of eggs washed by the owner's machine). Here, AS had no property or contractual interest in FSS's contract with Delta Airlines. Since "restitution [is] not punitive," *Olwell*, 26 Wn.2d at 286, *quoting* Rest. of Restitution, awarding more than "an amount which will restore the plaintiff to the position in which he was before the defendant received the benefit," *id.*, amounts to punitive damages and a windfall for the plaintiff. The "reasonable value" of AS services depends on what FSS would have had to pay another provider of similar services. *See Young*, 164 Wn.2d at 490.

[20] *See* VRP 42 ("...Air Serv is requesting...the profit that FSS received for the services which it could only provide because Air Serv allowed it to work under – as a subcontractor under its compliance agreement."); VRP 50-51 (AS counsel: "[FSS] might have been willing to pay half the contract to make sure that somebody could get those flights off the ground or face losing a multimillion dollars contract with Delta in the process because they failed to be compliant."); VRP 53 ("[A] reasonable value of services could be the price of the entire contract or the price they received throughout the summer for both domestic and international flights. We could have argued that. Because Delta, if they wouldn't have been able to provide services on the international level, could have canned them for the domestic flights as well and found another vendor. So

rhetoric as fact.[21] Although the trial court decided not to award disgorgement of gross revenues, it expressed its belief that "[w]ithout Air Serv [FSS] wouldn't be able to survive" and "FSS retained Air Serv." VRP 404-407. There was no proof of either proposition.

Courts have rejected disgorgement claims in similar circumstances. *See, e.g., Armstrong World Industries Inc. v. Sommer Allibert, SA*, 1998 U.S. Dist. LEXIS 18637 (E.D. Penn. 1998) (in action for breach of contract and fraud involving failed merger, district court dismissed claim for disgorgement of defendant's profits where proof of profits was based on unsubstantiated speculation and conjecture).

Axon's services were greatly beneficial to defendant, but this does

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the reasonable value of the services to FSS could be huge."); VRP 54 ("...because chances are if they can't facilitate Delta's contract and they're in breach of that contract, Delta might just cut the contract and find another vendor, and that would have taken away hundreds of thousands of dollars revenue"); VRP 376 ("...the benefit conferred to FSS for the services that it took from Air Serv *and could not have provided to Delta without Air Serv's services*. It would have been illegal for them to do so."); VRP 377 ("...because Delta would have most likely canceled the contract even for the domestic flights if FSS did not service them"). However, AS's counsel also admitted: "It's not like they forced – Air Serv was not – didn't have to provide these services, there were other vendors that could. FSS shopped around. They admitted they talked to other companies." VRP 51. AS concedes the same in its brief. Resp't Br. at 10 n. 10.

[21] FSS did not concede at trial that "disgorgement of profits is an appropriate remedy for cases involving services." *See* Resp't Br. at 32, n. 40 citing RP 389-340. In colloquy with the judge during closing arguments, FSS argued disgorgement of profits might be appropriate "in certain circumstances" (VRP 389:20-21), but was not an appropriate remedy *in this case*. VRP 390:1 – 394:19. "If it's a simple services contract, you know, what – what is the equity in this thing, it would be to provide the value [of] the services that were performed. That's what – that's what they did. There is...no rhyme or reason to provide anything more than that. They should get paid for the market value of the services performed, provided they maintain their burden on that, okay." VRP 393:24-394:6. This statement is supported by *Young*.

> not mean that plaintiff should be regarded as having, itself, provided all of these benefits. By the same token, the fact that plaintiff's introduction of defendant to the agent, coupled with the agent's services rendered thereafter, made it possible for plaintiff to obtain a $23,000,000 contract does not mean that "restitution" can properly be measured by the amount of profit defendant may have derived from its performance of the contract.

ATACS Corp. v. Trans World Communications, Inc., 2002 U.S. Dist. LEXIS 15070, *6-7, (E.D. Pa. 2002) (rejecting disgorgement of profits theory and ruling that reasonable finder's fee of $250,000 was proper restitution based on testimony of expert regarding the reasonable market value of the services rendered).

As in *ATACS*, here the value of AS' services was far less than FSS's total gross revenues (what AS improperly characterizes as "profits"). FSS staff and equipment was responsible for cleaning Delta's flights, and FSS remained liable to Delta under the cleaning contract. AS was able to take the Delta cleaning contract away from FSS in November 2011, leaving FSS without any revenues or profits for the remaining 2.5 years left on the rescinded 3-year cleaning contract with Delta.

E. AS' Response Confirms the Trial Court Erred in Awarding $116,700 in Attorneys' Fees and Costs Under the Claims of *Quantum Meruit* and Unjust Enrichment.

Even assuming *arguendo* that AS had met its burden of proof for establishing the reasonable value of its services, as part of its stated intent of fashioning a "remedy to make plaintiff whole," CP 2300 ¶3.h & VRP

412, the trial court awarded "fees and costs under both theories of *quantum meruit* and unjust enrichment." CP 2184. AS makes *no attempt* to support this erroneous decision. *See* Resp't Br. at 37-49. AS cites no cases and identities no contractual, statutory, or otherwise recognized ground in equity to override the American Rule followed by Washington courts.[22] *Dayton v. Farmers Ins. Grp.*, 124 Wn. 2d 277, 280, 876 P.2d 896 (1994). Therefore, the decision should be reversed.

F. The Trial Court Did Not Consider Lesser Sanctions as Required Under *Burnet* Before Excluding Robert P. Weitzel Severely Limiting the Testimony of Mr. Priola.

As stated in the opening brief, before excluding testimony, "the trial court must explicitly consider [on the record] whether a lesser sanction would probably suffice, whether the violation at issue was willful or deliberate, and whether the violation substantially prejudiced the opponent's ability to prepare for trial." *Jones v. City of Seattle*, 179 Wn.2d 322, 338-339, 314 P.3d 380 (2013); *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997). AS does not refute that the trial court failed to consider lesser findings, but instead argues without citation that the *Burnet* factors do not apply. Resp't Br. at 44. AS is wrong as the

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[22] "Because virtually all litigation compels a party's opponent to litigate, Washington courts have narrowly limited the type of actions where attorney fees may be awarded as damages." *City of Seattle v. McCready*, 131 Wn.2d 266, 278, 931 P.2d 156 (1997). The types do not include unjust enrichment or *quantum meruit*. *Id.* at 274.

Burnett factors apply. Here, Robert P. Weitzel (Bobby) never made any false or misleading representations and should have been allowed to testify.[23] Likewise, Mr. Priola, FSS' Director at Sea-Tac, should have been able to testify without the severe limitations placed upon him by the trial court. AS's claim that the exclusion was "harmless" and/or "cumulative" is without merit. Resp't Br. at 44. AS itself fount it important to designate portions of Mr. Weitzel's deposition testimony as evidence in the case. AS cannot have it both ways.

G. The Trial Court's Sanctions are Nothing More than an Alternative Method to Support its Make-Whole Remedy.

The belt and suspenders approach of the trial court's make-whole remedy could not be any clearer.[24] The trial court judge was involved in the case for exactly two days. She initially awarded fees and costs under

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[23] The trial court never provided any opportunity for FSS to explain the misunderstanding between Robert P. Weitzel ("Bobby") and Robert A. Weitzel ("Senior"). Bobby filed a true and accurate declaration of his whereabouts on June 11, 2013. CP 1549-1553. It included his prescheduled vacation travel arrangements of June 15-22, 2013 and his vacation went through June 23. CP 1552. Senior, however, misunderstood Bobby's vacation plans, believing Bobby would still be traveling on vacation between June 24-26 with his family. As it turned out, Bobby's spouse and daughter were traveling during this time period while Bobby was taking care of his other two daughters. The trial court, however, never provided any opportunity to evaluate the situation and explain what happened. VRP 337-42. The trial court told Bobby that he would be called back (VRP 339) and then she refused to allow counsel to call him back (VRP 342). The trial court denied FSS' request for a continuance, VRP 338 & 341, and excluded Bobby by requiring him to appear by the end of the day (which she knew was impossible). VRP 366-71. Nevertheless, Bobby never provided any misrepresentations to the court and was fully ready, willing, and able to testify via Skype.

[24] The trial court failed to even conduct a lodestar analysis as required by established law to determine whether AS' fees were reasonable. CP 2298-2301.

the claims of *quantum meruit* and unjust enrichment. CP 2184. Then, realizing the legal error, when AS filed a "*combined* application for attorney fees and costs and motion for sanctions," CP 2186-2290, which did not even contain any lodestar analysis, the trial court used the occasion to bolster its make-whole remedy, entering an order that failed to specify any sanctionable conduct, but awarding $151,700 (100% of AS' $116,700 attorneys' fees and costs and an additional sanction of $35,000). CP 2298-2301. This is wrong as sanctions should never be used as a disguised method for a trial court's intent to fashion a make-whole remedy in contravention to established Washington law.

The law is clear that "it is incumbent upon the trial court **to specify the sanctionable conduct** in its order." *Biggs v. Vail,* 124 Wn.2d 193, 201, 876 P.2d 448 (1994) (bold added); *Dexter v. Spokane County Health Dist.,* 76 Wn. App. 372, 377, 884 P.2d 1353 (1994). Without such findings, effective appellate review is impossible. *Id.* Here, AS' response confirms that the trial court failed specify the sanctionable conduct in a manner that would allow for appellate review because AS makes *no mention* of the trial court's combined fee and cost and sanctions order. *See* Resp't Br. at 37-50. Instead, AS launches into a lengthy dissertation on disputed matters, proving the lack of specificity. *See id.*

As discussed previously, everything identified by AS was

previously presented to and rejected by Judge Rogers. *See* Section II above. Judge Rogers never found that FSS failed to comply with discovery obligation; never found that FSS failed to respond to written discovery; never found that FSS failed to prepare for its 30(b)(6) deposition;[25] never found that FSS submitted numerous affidavits in bad faith; never found that FSS violated numerous local rules; and never found that FSS made numerous misrepresentations. *See* Section II (pp. 7-8). In fact, it was AS' counsel who was admonished by Judge Rogers. CP 1514; VRP (June 7, 2013) at 57:22-25 & 58:1-4.

AS' spurious allegations amounted to nothing more than trumped up hyperbole to support the trial court's make whole remedy. If there is sanctionable conduct, then the trial court should be required to specify the sanctionable conduct on the record so there can be appropriate appellate review. Vague citations to entire pleadings does not equate to any notion of reasonable specificity. Here, AS fed the trial court its vague unsupported allegations and the trial court entered AS' proposed order without modification. CP 2200-03. Therefore, the trial court's imposition of $151,700 in sanctions should be reversed.

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[25] In fact, Judge Rogers even allowed AS to depose FSS 30(b)(6) witness for a second time to resolve any issue, which AS elected not to do. CP 1535.

H. Using Sanctions as a Way to Fashion a Make-Whole Remedy Contravenes Established Law.

Conflating tort and restitution concepts as if they are one and the same,[26] the concept of "making a plaintiff whole" cannot be found in unjust enrichment or *quantum meruit* cases. No tort claims were even pleaded below. Trial was limited to determining "the reasonable value of services [arranged by Delta]" under AS's remaining implied contract claims: unjust enrichment and *quantum meruit*. CP 1584 (summary judgment order); CP 2180 (findings). "Prelitigation misconduct, to be sanctionable by an order to pay the other party's attorney fees, necessarily involves some disregard of judicial authority." *Greenbank Beach and Boat Club, Inc. v. Bunney*, 168 Wn. App. 517, 526, 280 P.3d 1133 (2012), *rev. denied*, 175Wn.2d 1028, 291 P.3d 254 (2012). Where the alleged bad faith conduct "is the same conduct that served as grounds for the lawsuit,"

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[26] *See* VRP 412:4-6 ("THE COURT: And I know I sit as a Court of equity and I need to make him whole and I need to figure out what is reasonable here."); *Aker Verdal A/S v. Neil F. Lampson, Inc.*, 65 Wn. App. 177, 828 P.2d 610 (1992) (it is "the prevailing principle of tort litigation...*to make the* plaintiff *whole* for the damages suffered at the hands of the defendant."); *Tennant v. Lawton*, 26 Wn. App. 701, 704, 615 P.2d 1305 (1980) ("make the plaintiff whole" used in tort cases involving negligence or misrepresentation as rationale for awarding consequential damages beyond the "benefit of the bargain...which follow as the natural and ordinary consequences of the wrong"). However, "making a plaintiff whole" does not mean awarding attorney's fees or other litigation expenses not claimed at trial. *See Tennant*, 26 Wn. App. at 704-705 (denying fees on appeal because there was no basis for award).

"The purpose of restitution is to remedy unjust enrichment." *Ehsani v. McCullough Family Partnership*, 160 Wn.2d 586, 594, 159 P.3d 407 (2007). "Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it." *Young*, 164 Wn.2d at 484.

and there was no judicial ruling that the plaintiff was "clearly in the right," attorney's fees cannot be awarded against the defendant for litigating a nonfrivolous claim or defense, even if it turns out to be a losing argument. *Id.* at 527-528. The legal standard is not met here.

Ten days before trial, AS argued that FSS accepted AS's offer of $175 per flight by failing to reject the services under the "silence as acceptance" rule of contracts. CP 1526-1530. AS's attorney stated on the record, "[t]here is no way the court can assume that this is a fraudulent contract when we have two sophisticated parties who know much more than we do about this industry…All there is is silence and inaction." VRP (June 14, 2013) at 10:22–11:6.

1. John Kim - Gilbert Green communications.

The trial court found "Mr. Green was told that Air Serv would be paid in full, and he relied upon defendant's representation." CP 2184, ¶8. This finding is not supported by substantial evidence. According to Green, Kim did not indicate payment would "not be made." VRP 285. Green testified that he'd asked Kim "on several occasions": "[W]hat's going on with the invoice? Are we going to get paid?" VRP 309-310. According to Green, "John [Kim] had assured us that we – there was no reason for me not to believe that we were not going to get paid." *Id.* at 310. This is insufficient evidence of a "clear and definite promise" to pay

$175 per plane, supporting Judge Rogers' summary judgment decision.

Even if John Kim told Mr. Green that AS would be "paid in full," an unclear and indefinite statement that Kim denied saying, Green clearly understood that Kim had no authority to speak or make promises for FSS. VRP 299, 311; *King v. Riveland*, 125 Wn.2d 500, 506, 886 P.2d 160 (1994) ("the [first] element of promissory estoppel requiring a promise...is not satisfied if the promise is made by an unauthorized agent); *Lectus, Inc. v. Rainier Nat. Bank*, 97 Wn.2d 584, 589-90, 647 P.2d 1001 (1982) (disputed oral agreement to "ultimately" pay money merely a future conditional promise not actionable under promissory estoppel theory). No evidence was offered to show Kim had either actual or apparent authority to bind FSS. *See Smith v. Hansen, Hansen & Johnson, Inc.*, 63 Wn. App. 355, 363, 818 P.2d 1127 (1991) (authority depends on *objective manifestations of the principal* either to the agent or third party). AS presented no evidence that Green or other AS personnel *subjectively believed* that Kim had apparent authority to bind FSS, or that such belief was reasonable because of objective manifestations communicated to AS. *See Smith*, 63 Wn. App. at 364-365. In fact, just the opposite was testified to by Green—Green admitted he subjectively knew and believed that Kim

had *no authority* to bind FSS.[27] As in *Smith*, since Kim was merely an employee with no authority, Green's admitted knowledge put Green and AS "on notice as a matter of law that further inquiry of [FSS] was needed." *Smith*, 63 Wn. App. at 368.

Significantly, the trial court's finding contradicts its own ruling during trial that Kim had no speaking authority to bind FSS. When AS objected to FSS questions about whether Kim accepted any of Air Serv's proposed contracts, either at the $250 or $175 price [VRP 226-227], the judge overruled the objection, adding "Oh, he can answer if he made any representations. *I don't think he has speaking authority.* I don't think – just like with that last witness, I don't – Ms. Ong, that she had any agency *any more than he had agency.*" VRP 227:5-9 (italics added).[28]

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[27] Green testified that he was not involved in pricing or price negotiations. VRP 297-298. He admitted that Kim "made clear he had no authority to enter into any agreement with…Air Serv." VRP 299:15-19. And when Kim allegedly told Green Air Serv "would be paid," Green "knew that any approval had to come from [FSS] corporate headquarters." VRP 311:12-20.

John Kim consistently testified that he informed Green that he had no authority to bind FSS. VRP 218:24-219:17. Kim did not accept AS's proposed terms, or provide assurances of acceptance or payment of invoices. VRP 223; 226-227; 229. Kim's limited role, explained to Green, was merely forwarding contracts to FSS's corporate office. *Id.*; VRP 221:25-222:5, 224. Kim was not aware of any agreement at the $175 price. VRP 221:25-222:2. When asked whether he had told Green that FSS "wouldn't pay $175 per plane," Kim answered "I said they probably won't go for it." VRP 237:12-17. Kim did not know whether FSS would pay $175 per plane or not. *Id.*; *see also* VRP 243:21-24 ("I never assumed that payments were being made. My assumption was that Air Serv corporate were in discussion with FSS corporate to come to an agreement.").

[28] The trial court's ruling at trial was correct. *See Ensley v. Mollmann*, 155 Wn. App. 744, 752-753, 230 P.3d 599 (2010) (under ER 801(d)(2) declarant is not a "speaking agent" unless evidence in the record shows that agent was expressly authorized to make

2. Robert P. Weitzel-Toan Nguyen communications.

The trial court found "FSS deliberately misled Air Serv to believe it would be paid its reduced price of $175 per flight." CP 2184 at ¶9. The sentence preceding this finding relates to Mr. Nguyen's testimony regarding "brief telephone conversations" he had with FSS's President, Robert P. Weitzel, which occurred on June 24, 2011. *Id.*; VRP 133, 140. But, the finding does not identify anything improper done by Mr. Weitzel. Weitzel was not allowed to testify in person, and there was no other evidence of Weitzel's state of mind at the time of the phone call. *See Nelson v. Bjelland*, 1 Wn.2d 268, 271, 95 P.2d 784 (1939) ("[W]here any mental state or condition is in issue, such as motive, malice, knowledge, intent, assent or dissent, unless direct testimony of the particular person is to be taken as conclusive of his state of mind, the only method of proof available is testimony of others to the acts or statements of such person.").

No one testified that Weitzel agreed to a $175 price or that he deliberately misled Nguyen. Not only is this generic finding ("FSS deliberately misled Air Serv") not supported by substantial evidence, it

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the particular statement at issue, or statements concerning the subject matter, on behalf of the party); *Kadiak Fisheries Co. v. Murphy Diesel Co.*, 70 Wn.2d 153, 163, 422 P.2d 496 (1967) (maintenance manager for commercial fishing company did not have "speaking authority"). The trial judge similarly ruled that Ms. Ong, AS's billing person, had no responsibility to respond to FSS's reconciliation of how FSS calculated a reasonable value because "I don't think she's been established as a speaking agent, so this becomes

also violates the law of the case in that Judge Rogers had previously dismissed AS's contract claims against FSS on the grounds "there was never a meeting of the minds as to price." CP 1581. After speaking with Mr. Weitzel on June 24, 2011, Mr. Nguyen sent an email to AS's contract people within minutes after Nguyen's receipt of Weitzel's email offering indemnification at 4:05 p.m. Tr. Exs. 55 & 68. Mr. Nguyen's internal message to Air Serv officials at 4:23 p.m. reported:

> Mike/Tim/Gil/Megan,
>
> Are all of you okay if we have an agreement that completely indemnifies us from all liability. If you are, *my thoughts are we move forward with a contract at $175 per aircraft* with invoicing every 2 weeks. *If they don't like those terms*, we walk and I will give Brad Wilson at Delta notice as to why.
>
> Toan

Tr. Ex. 68 (italics added).[29] Thus, the evidence confirms indemnity[30] as a

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really irrelevant." VRP 201.

[29] Nguyen did not report that Weitzel had agreed to a $175 price per plane, or that Weitzel lead Nguyen to believe FSS would agree to a $175 rate. Nguyen did not testify that Weitzel gave assurances or promises of payment during their conversation, or any agreement at the $175 per plane. VRP 100. Nguyen testified, "...I explained to Mr. Weitzel that our rate was not going to change and it was – it was $175 per aircraft. And that was the extent of – really the extent of our actual conversation." VRP 100:10-13.

[30] About indemnity, AS argues semantics. Resp't Br. at 21-22, 30 (Ass. of Error 10). The word "indemnify" means either "[t]o reimburse (another) for a loss suffered because of a third party's or one's own act or default" or "[t]o promise to reimburse (another) for such a loss." *Black's Law Dictionary* (9th ed. 2009). FSS promised to "indemnify AirServ for this function." Tr. Ex. 55 (Weitzel email to Nguyen dated June 24, 2011). Mr. Nguyen admitted that "Mr. Weitzel, [FSS] president, offered indemnification." VRP 136:21-23. However, FSS never had to reimburse AS because there were no liabilities, violations, fines, losses, or sanctions. Refusing to consider Weitzel's email an enforceable promise to indemnify because there was no two-party signed written contract

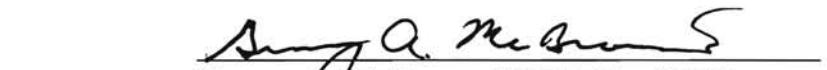
major factor in valuing AS's service. Refusing to consider indemnity in conformance with the evidence, the trial court resorted to irrational speculation to conclude that FSS somehow misled AS about "agreeing" to a $175 price. *See Dunham v. Tabb*, 27 Wn. App. 862, 869, 621 P.2d 179 (1980) (fraudulent intent finding requires proof by "clear, cogent, and convincing evidence").

IV. CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the trial court's decision be reversed and AS's claims dismissed.

Dated this 20th day of August, 2014.

LIVENGOOD ALSKOG, PLLC



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with an indemnity clause, the trial court erred as a matter of law. *See Seaboard Surety Co. v. Grupo Mexico, S.A.B. de C.V.*, No. 06–CV–0134–PHX–SMM, 2009 WL 4827029, at *2 &*14 (D. Ariz. Dec. 15, 2009) (one-sentence letter stating in part "Grupo Mexico will indemnify St. Paul Surety" sent by indemnitor held enforceable "promise to indemnify"); *Fluke Corp. v. Hartford Acc. & Indem. Co.*, 145 Wn.2d 137, 147, 34 P.3d 809 (2001) ("appears to be a straightforward promise to indemnify"); *Fluke Capital & Management Services Co. v. Richmond*, 106 Wn.2d 614, 620, 724 P.2d 356, (1986) ("This court has recognized that an implied promise to indemnify the surety by the principal can be enforceable without an express written agreement.").

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the United States of America and the State of Washington that on the date specified below, I filed and served the foregoing as follows:

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DATED: August 20, 2014, at Kirkland, Washington

Karen H. Suggs