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No. 72334-1-I
King County Superior Court Case No. 12-2-23972-0 SEA

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**COURT OF APPEALS**
**DIVISION I**
**OF THE STATE OF WASHINGTON**

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NIKOLAY BELIKOV, a married individual; TECHNO-TM ZAO, a Russian closed joint stock company; and R-AMTECH INTERNATIONAL, INC.,[1]

Respondents,

v.

MARYANN HUHS and ROY E. HUHS, JR. and the marital community thereof,

Appellants.

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# CORRECTED BRIEF OF RESPONDENTS

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[1] R-Amtech International, Inc. is a Respondent and Nominal Appellant.

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## I. INTRODUCTION

Following a four week bench trial, the Honorable Helen Halpert found in favor of Plaintiff Nikolay Belikov ("Belikov") on all but one of his claims against the Defendants/Respondents Maryann Huhs and Roy E. "Al" Huhs, Jr. Belikov asks this Court to affirm the Judgment, because Judge Halpert's unchallenged Findings of Fact unequivocally demonstrate that the Huhses breached their fiduciary duties, committed conversion and fraud, and unjustly enriched themselves at Belikov's expense in their scheme to defraud Belikov and loot R-Amtech International, Inc. ("R-Amtech"), the company that Belikov founded. Judge Halpert's Judgment restored Belikov as the rightful owner of R-Amtech, removed the Huhses as officers, directors, and employees of R-Amtech, declared void as fraudulent a licensing agreement between R-Amtech and the Huhses' Nevada company, Techno-TM LLC, and ordered the Huhses to return and issued a monetary judgment for $3,112,329 in cash, securities, dividends, and royalties that the Huhses and their Nevada company wrongfully took. Judge Halpert also awarded Belikov $919,317.25 in reasonable attorneys' fees and costs. Judge Halpert also properly concluded that Al Huhs, a Washington attorney, violated RPC 1.8(c) by preparing instruments to effectuate a gift of a $1.5 million house at the Suncadia resort in Cle Elum, Washington, from his client Belikov to the Huhses, and that rescission of the gift was the proper remedy.

The Huhses appeal the judgment against them, but ignore the trial court's Findings and do not challenge or assign error to them. They

instead improperly ask this Court to retry this case, based on a version of events that was rejected at trial. Unchallenged findings are verities on appeal, and thus the only question for this court is whether the trial court's conclusions are supported by its findings. The unchallenged factual record amply supports Judge Halpert's conclusions.

The Huhses' remaining challenges to Judge Halpert's decisions similarly lack merit. The Court should uphold Judge Halpert's discretionary decisions to strike Belikov's jury demand in a case predominated by equitable claims and the award of attorneys' fees to Belikov for the Huhses' egregious breaches of their fiduciary duties. The trial court's decisions should be affirmed.

## II. RESTATEMENT OF ASSIGNMENTS OF ERROR

**1.** In a case dominated by equitable claims and relief, did the trial court act within its broad discretion by granting Belikov's motion to strike his jury demand?

**2.** Where the trial court found that Belikov did not, and could not reasonably have known of the wrongful acts of Maryann and Al Huhs before July 15, 2009—three years before this action was filed—and that Belikov had no reason to be concerned about the ownership of R-Amtech until November 2010, did the trial court properly reject the Huhses' statute of limitations defense?

**3.** Did the trial court properly rule that Belikov was R-Amtech's legal and beneficial owner, based on evidence such as corporate records, capital funding, and defendants' admissions that they falsified company meeting minutes and accounting records as part of their efforts to prove their claimed ownership of R-Amtech?

**4.** Did the trial court properly conclude that Al Huhs violated RPC 1.8(c) based upon findings that Al Huhs was Belikov's attorney at all relevant times and that he prepared gift transaction documents

to obtain a house valued at $1.5 million in the Suncadia resort, Cle Elum, Washington?

5. Did the trial court properly rescind the Suncadia gift as void against public policy?

6. Did the trial court properly conclude that the statute of limitations did not apply to the Suncadia transaction because it was void as against public policy?

7. Did the trial court abuse its discretion in awarding reasonable attorneys' fees and costs to Belikov on the basis of the Huhses' egregious breaches of their fiduciary duties?

8. Did the trial court abuse its discretion by releasing the post-judgment *lis pendens* filed by the Huhses against Suncadia after their request for a stay was denied for failure to post adequate security?

## III. STATEMENT OF THE CASE

### A. Overview of Case and Procedural History.

Nikolay Belikov filed this lawsuit in July 2012 after learning that his long-time friends and trusted fiduciaries, Maryann and Al Huhs, had violated his trust and taken control of his company, R-Amtech. Belikov founded the company in 1996 and entrusted Maryann Huhs to manage it as R-Amtech's President, and Al Huhs, an attorney, to oversee its legal affairs. (CP 1838, Finding 4). Maryann Huhs reported to Belikov from 2007 to 2009 that R-Amtech's sole customer, a fire suppression technology company known as Fireaway LLC, had produced "virtually no revenue for R-Amtech" and that both she and the company were broke. (CP 1851, Finding 51). In fact, in 2008, the Huhses had diverted the licensing rights to R-Amtech's intellectual property (IP) and its royalty

revenue stream to their own Nevada company, Techno-TM LLC, intentionally named by the Huhses in a virtually identical manner to Belikov's Russian company that held the original Russian fire suppression patents. (CP 1850, Findings 45, 47). When the Huhses' deceit was uncovered in 2011 and early 2012, Al Huhs attempted to perpetuate the theft of R-Amtech and its assets and to dupe Fireaway by falsifying corporate records including board and shareholder meeting meetings. (CP 1841, Finding 13; CP 1850-51, Findings 49, 50). But the Huhses' actions were uncovered and Belikov filed suit to regain control of R-Amtech and recover its stolen assets and royalty revenues.

Belikov's case against the Huhses included claims to recover control of two houses that he had bought for the Huhses. (CP 1836-37). In response, the Huhses asserted counterclaims for promissory estoppel, based upon an alleged promise by Belikov to give them annual cash gifts of up to $300,000, and tortious interference and defamation claims resulting from Belikov's statements that he owns R-Amtech. (CP 1836). A bench trial was heard from May 13, 2014 to June 12, 2014. (CP 1835).

The over-arching theme of the case was the Huhses' breach of their fiduciary duties to Belikov. (CP 1855, Conclusion 66). After four weeks of trial, the trial court found in Belikov's favor on all but one claim and issued its 30-page Memorandum Opinion on July 17, 2014. (CP 1074-1106). On August 4, 2014, Judge Halpert entered detailed Findings of Fact and Conclusions of Law (copy attached hereto as Appendix A) based upon the Memorandum Opinion. (CP 1835-65). In finding that the Huhses'

committed fraud, Judge Halpert succinctly summarized the Huhses' wrongdoing:

> Maryann and Al Huhs undertook to induce Mr. Belikov to rely on their good faith management of his company, repeatedly and knowing made false and material statements about the status of the company, and made those statements with the expectation and intent that he would rely upon them. Given the Huhses' role as fiduciaries, Mr. Belikov's reliance was reasonable, putting the Huhses' [*sic*] in a position to loot R-Amtech, and causing resulting damage to R-Amtech and its sole owner, Mr. Belikov.

(CP 1857, Conclusion 71). To remedy the harm and restore the stolen property, the trial court awarded Belikov and R-Amtech broad-ranging equitable relief, including:

- Declaring that Belikov is the sole owner and sole shareholder of R-Amtech (CP 1250);
- Removing the Huhses as officers, directors and employees of R-Amtech (CP 1251);
- Declaring that the licensing agreement, dated December 28, 2007, between R-Amtech and the Huhses' Nevada company, Techno-TM LLC, is void as fraudulent (*Id.*);
- Ordering that the transfer of the Suncadia house is rescinded based upon Al Huhs' violation of RPC 1.8 and ordering the Huhses to immediately transfer title to Belikov (*Id.*);
- Ordering the Huhses to return to R-Amtech $3,112,329 and awarding a monetary judgment against them in that amount consisting of:
    - $1,429,084 in cash and securities that the Huhses transferred to their family trust to "loot" R-Amtech (CP 1251 and 1841, Finding 15);
    - $485,735 in dividends that the Huhses took improperly (CP 1251 and 1846, Finding 33); and

- $1,197,510 for royalties the Huhses collected from Fireaway under the 2008 Technology Licensing Agreement between Fireaway and Techno-TM Nevada (CP 1251 and 1847, Finding 34).

CP 1862 (Relief Awarded). Based upon the Huhses' repeated and egregious breaches of their fiduciary duties, the court also entered an additional judgment against the Huhses awarding Belikov $919,317.25 in reasonable attorneys' fees and costs. (CP 1276, 1281). The Huhses appeal the Amended Judgment, and the judgment awarding fees and costs, as well as the trial court's discretionary decisions to strike Belikov's jury demand and to release the Huhses' *lis pendens* against Suncadia.

**B. History of R-Amtech.**

Nikolay Belikov is a Russian citizen and electrical engineer who first conceived of the idea of marketing Soviet technology to the United States after organizing an exhibition of Soviet software and technology in 1990 in conjunction with the Goodwill Games. (CP 1837, Findings 1, 3). At the time, Belikov was in charge of managing the computer game Tetris as director of the Soviet company Elorgprogramma. (CP 1837, Finding 2). He later obtained the IP rights to Tetris through his wholly-owned company ZAO Elorg (later Elorg LLC). (CP 1837, Finding 2).

To fulfill his idea of marketing Soviet technology Belikov, with the assistance of Russian-speaking attorney John Huhs, established INRES, Inc. (CP 1837, Finding 3). John Huhs is the brother of defendant Al Huhs and the brother-in-law of defendant Maryann Huhs. (*Id.*). INRES was funded with Belikov's royalties from Tetris. (CP 1837-38, Finding 3).

After the original president of INRES proved unsatisfactory, John Huhs recommended Maryann Huhs as president. (CP 1837-38, Finding 3).

In 1996, Belikov formed R-Amtech as a replacement for INRES, with Maryann Huhs continuing as president. (CP 1838, Finding 4). Al Huhs was general counsel. (*Id.*). Belikov was Chairman of the Board, with other board members including Maryann Huhs and Al Huhs. (*Id.*). R-Amtech's purpose, like INRES's, was to patent and market Russian fire suppression and other technologies in the United States and other countries. (*Id.*). Belikov arranged for his Russian corporation, Techno-TM ZAO, to assign its Russian patents to R-Amtech, with an understanding for the Russian inventors of the patents to be paid royalties if the project proved to be financially successful.[2] (*Id.*).

Through 2004, R-Amtech earned no income. (CP 1838, Finding 5). But from 1996 through 2005, R-Amtech received approximately $9.5 million from Tetris income, assigned to it from Belikov, to fund its operations. (*Id.*). Belikov sold his interest in the Tetris IP in 2005, which ended that source of income. (*Id.*). For her work for R-Amtech, Maryann Huhs received salary and bonuses totaling approximately $793,137. (CP 1841, Finding 15). She also received approximately $343,750 for serving as Managing Director of The Tetris Company. (CP 1841-42, Finding 15.).

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[2] Techno-TM ZAO was a co-plaintiff with Belikov and asserted claims against R-Amtech for royalties. At trial, Plaintiffs agreed that if the Court were to decide the issue of R-Amtech's ownership in Belikov's favor, the royalty claim would be rendered moot. (CP 1836, n.1).

In 2005, R-Amtech and Fireaway entered into a licensing agreement concerning the Russian fire suppression technology. (CP 1841, Finding 13). That contract was only modestly successful until the Russian fire suppression technology passed the Underwriter's Laboratory tests. (CP 1849, Finding 43). In 2007, after Fireaway passed the most difficult test (the "crib" test), Jim Lavin, CEO of Fireaway, approached R-Amtech to renegotiate and extend the license agreement. (CP 1849-50, Finding 44).[3] The Huhses decided to use this opportunity to "completely take over R-Amtech, by falsifying corporate records and duping Fireaway into believing that it was contracting with a Belikov-owned firm." (CP 1841, Finding 13). The Huhses did this by transferring the licenses on the fire suppression technology for a paltry $1,000 to a newly-formed Nevada LLC, purposefully named Techno-TM LLC by the Huhses to "obfuscate" its ownership.[4] (CP 1850, Finding 45). Maryann Huhs told Marc Gross, Fireaway's COO (CP 1841, Finding 14), that "we" formed the Nevada LLC for tax purposes, (CP 1850, Finding 46), which he understood was Maryann Huhs and Belikov. (*Id.*; RP 5/14/14 43:9-44:17). "In fact, there were no tax advantages, and significant tax liability resulted from the change from corporate ownership to an LLC." (CP 1850, Finding 46).

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[3] Lavin's letter to R-Amtech stated that Fireaway was "preparing a proposed amendment to the licensing agreement which we think will better serve R-Amtech and ourselves by increasing the likelihood of a significant long term royalty stream." (Ex. 271).

[4] Techno-TM ZAO is the Russian corporation owned by Belikov that held the underlying Russian patents for the fire suppression technology. (CP 1838, Finding 4; CP 1841, Finding 14).

From 2008 through 2011, Fireaway paid Techno-TM Nevada approximately $1,147, 260 in royalties. (CP 1850, Finding 47). From 2007 through 2009, however, Maryann Huhs represented to Belikov that she and R-Amtech were broke. (CP 1851, Finding 51). Prompted by concerns from the Russian inventors about lack of payment, Marc Gross did some investigation between 2008 and 2011 and discovered that Techno-TM Nevada was owned by the Huhs family, and was not connected with the prior Belikov-owned entities. (CP 1850, Finding 47). Fireaway's CEO met with Belikov to explore issues of the ownership of the license and patent rights to the Russian fire suppression technology on November 30, 2011, and Fireaway subsequently sent a letter suspending all payments to Techno-TM Nevada as "improper self-dealing." (CP 1850, Finding 48). Also in November 2011, Belikov requested R-Amtech records from his former attorney, John Huhs, who in turn contacted Maryann Huhs. (CP 1841, Finding 15). In response, Maryann and Al Huhs emptied R-Amtech's accounts, moving $1.4 million to a family trust. (*Id.*)

Fireaway continued to communicate with Maryann Huhs regarding ownership of the patents, and ultimately, on May 8, 2012, Jim Lavin met with Maryann and Al Huhs at their Mercer Island home to review corporate documents. (CP 1850-51, Finding 49). The documents shown included company board and shareholder meeting minutes purporting to (1) transfer the rights to Russian patents from R-Amtech and (2) show the resignation of Belikov from the Board. (*Id.*). At trial, Al Huhs admitted that he did not create the December 2007 board minutes until January 18,

2012. (RP 6/5/14 35:21-39:2; Ex. 558-A). Al Huhs admitted that he created and backdated the 2007 shareholder meeting minutes on May 6, 2012, two days before the meeting with Mr. Lavin." (*Id.*; RP 6/4/14 43:18-46:2; Ex. 539-A). The shareholder meeting minutes purported to show that Maryann Huhs was reported to be the sole shareholder. Al Huhs also admitted creating in January and May 2012 shareholder meeting minutes for other years that falsely reflected that Belikov participated. (RP 6/4/14 48:15-53:19; RP 5/27/14 6:2-6; *e.g.*, Exs. 535-537).

### C. The Huhses Were Close Personal Friends, and Al Huhs Was Belikov's Attorney at Relevant Times and Violated RPC 1.8 by Drafting Legal Documents for an Expensive Gift for Himself and Maryann Huhs.

The trial court found that the Huhses were Belikov's "extremely close friends" (CP 1847, Finding 35) and traveled together for business and pleasure (CP 1842, Finding 16). Maryann Huhs had access to all of Belikov's financial information (CP 1847, Finding 35) and was very involved in his move in 2003 to Costa Rica, by finding a school for his daughter and buying furniture (CP 1839, Finding 7). Al Huhs was Belikov's attorney, the attorney for R-Amtech, and was a trusted personal friend. (CP 1842, Finding 16; CP 1838, Finding 4). He wrote Belikov an email on November 29, 2007 (3 months before forming the Nevada company to which the Huhses transferred the R-Amtech technology licensing rights), "We will always be there for you. You can trust and rely upon us." (*Id.*) (quoting Ex. 109). When Belikov received the proceeds of the Tetris IP sale in 2005, Maryann Huhs found a financial advisor for him

at Morgan Stanley (then Smith Barney). (CP 1842, Finding 16; RP 5/15/14 PM 36:4-11).

Belikov had a level of financial naivety that Judge Halpert described as "surprising." (CP 1091). Belikov had managed Tetris at Elorgprogramma, but as a citizen of the USSR Belikov had no experience with credit cards, bank accounts, or any other financial instruments. (CP 1847, Finding 36). He grew up in a cash-based society and was paid in cash. (*Id.*). His first bank account was when he moved to Costa Rica. (*Id.)*. The trial court also noted that Belikov's English language skills were "somewhat limited." (CP 1837, Finding 1).

Al Huhs' legal training played a significant role in the level of trust that Belikov placed in Al Huhs. When Belikov sold the Tetris IP to his former partner, Henk Rogers, two of Belikov's transaction attorneys appeared only telephonically. (CP 1839, Finding 9). The closing took place in Panama, and Belikov was present with Maryann and Al Huhs on his side, and Henk Rogers and his attorney on the other side. (*Id.*). Although Al Huhs testified that he was not representing Belikov personally and was only representing R-Amtech and his wife, the trial court stated that she was "satisfied that Mr. Belikov believed and was led to believe by Al Huhs, that Al Huhs was representing his interests during the sale." (*Id.*). Prior to the Tetris sale, Al Huhs had also represented to a third party, his brother John Huhs, that he was representing Belikov as his attorney. (CP 1848, Finding 40). Al Huhs wrote in a September 2003 email that he "represented Mr. Belikov . . . and repeatedly recommended

that he dismiss you [John Huhs] as his attorney . . . . Because of my legal representation of Mr. Belikov, my conversations with Mr. Belikov are protected and not discoverable." (*Id.*, quoting Ex. 48).

Al Huhs also represented Belikov's interests in connection with visa applications for him in January 2006 and February 2007, "which Mr. Huhs signed as 'Lawyer for Applicant and Friend.'" (CP 1840, Finding 11; Exs. 82, 87). Al Huhs prepared additional legal documents that are directly relevant to the court's RPC 1.8 decision. Specifically, Al Huhs prepared Trial Exhibit 91—Declaration of Gift for Mezzaluna Condominium Unit 12 in Costa Rica and for the home in Suncadia. Al Huhs also prepared the Operating Agreement for the Victory Real Estate Holdings, LLC (Ex. 93), through which Belikov acquired title for the Suncadia home, and a document transferring Belikov's membership in the LLC to the Huhses. (CP 1840, Finding 12; CP 1859, Conclusion 77). Al Huhs did not advise Belikov to seek independent counsel in connection with the $1.5 million real estate gift at Suncadia. (CP 1841, Finding 12).

Based upon these findings, the trial court concluded that Al Huhs had violated Rule 1.8(c) of the Washington Rules of Professional Conduct (RPC) for attorneys, which prohibits attorneys from drafting instruments that provide a substantial gift from a client to an attorney. (CP 1859-60, Conclusions 76-79). The idea for the Suncadia house purchase first became known to Belikov at a December 2006 meeting between Belikov and his financial advisor, Jim Ferguson, which Maryann Huhs attended. (CP 1840, Finding 12). When Ferguson asked about major expenses

planned for 2007, Maryann Huhs volunteered that "Nikolay" was going to buy a home at Suncadia for $1.5 million. (*Id.*). Belikov had no prior knowledge of this plan, but reluctantly agreed to the purchase. (*Id.*). Al Huhs prepared an Operating Agreement to facilitate the sale through an LLC called Victory Real Estate Holdings. Ex. 93. Al Huhs drafted the Operating Agreement to show Belikov as the sole member, in order to comply with Smith Barney requirements. (CP 1840-41, Finding 12). Al Huhs believed he drafted a subsequent document transferring membership in Victory from Belikov to the Huhs family, but the document was lost. (CP 1859, Conclusion 77). Subsequently, Al Huhs and Maryann Huhs signed a Quit Claim Deed on behalf of Victory that transferred title to the Suncadia house to themselves as individuals. (*Id.*) Because Al Huhs was Belikov's attorney, and he drafted documents, including the missing document, to obtain a substantial gift from a client for himself and his wife, the trial court concluded that Al Huhs violated RPC 1.8(c). (CP 1859-60, Finding 78).

## IV. ARGUMENT

### A. The Trial Court's Findings of Fact Are Verities and It Is Improper for the Huhses to Ask This Court to Weigh Evidence that the Trial Court Already Considered.

Unchallenged findings are verities on appeal.[5] The appellate court "defer[s] to the trier of fact on 'issues of conflicting testimony, credibility

[5] *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002).

of witnesses, and the persuasiveness of the evidence.'"[6] Where the appellant does not assign error to the trial court's findings of fact, they are verities.[7] The process of applying the law to the facts, as found by the court, is a question of law and subject to de novo review.[8] The appellate court reviews de novo the conclusions of law "to determine if they are supported by the findings of fact."[9] A respondent in a bench trial is "entitled to the benefit of all evidence and reasonable inferences therefrom in support of the findings of fact entered by the trial court."[10] A trial court's findings of fact following a bench trial will not be overturned if supported by substantial evidence.[11] "Though the trier of fact is free to believe or disbelieve any evidence presented at trial, 'appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier of fact.'"[12]

The trial court, the Honorable Helen Halpert, issued Findings of Fact and Conclusions of Law dated August 4, 2014, that contained fifty-seven (57) separately numbered paragraphs of findings of fact. (CP 1835-

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[6] *State v. Samalla*, 344 P.3d 722, 215 WL 968754 (Wash. App. Div. 3, 2015) (quoting *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004)).

[7] *Dodge City Saloon, Inc. v. Washington State Liquor Control Bd.*, 168 Wn. App. 388, 395, 288 P.3d 343 (2012).

[8] *In re Marriage of Raskob*, 183 Wn. App. 503, 510, 334 P.3d 30 (2014).

[9] *State v. Manion*, 173 Wn. App. 610, 633, 295 P.3d 270 (2013).

[10] *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 852, 792 P.2d 142 (1990) (quoting *Lidstrand v. Silvercrest Indus.*, 28 Wn. App. 359, 364, 623 P.2d 710 (1981), (quoting *Hallin v. Bode*, 58 Wn.2d 280, 281, 362 P.2d 242 (1961))).

[11] *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959).

[12] *Jensen v. Lake Jane Estates*, 165 Wn. App. 100, 104, 267 P.3d 435 (2011) (quoting *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009)).

65). The Huhses did not challenge any of the trial court's findings. Each fact found by the trial court in this action is therefore a verity on appeal.

The Huhses' appeal is fundamentally flawed because they rely upon their now-rejected version of the evidence they presented at trial. Belikov presented his side of the case, the Huhses presented theirs, and Judge Halpert chose which of it to believe.[13] An example, which is discussed in more detail below, is their argument that the statute of limitations barred Belikov's claim for ownership of R-Amtech. The trier of fact, Judge Halpert, performed her role and found that, "Mr. Belikov did not and could not reasonably have known of the wrongful acts of Maryann and Al Huhs before July 15, 2009—that is three years before this action was filed. (CP 1848, Finding 37). The Huhses improperly ask this Court to re-evaluate the evidence, undo the trial court's factual findings, and decide that the Huhses' testimony is more credible. Specifically, the Huhses advance a theory that Belikov knowingly refused stock ownership based on legal advice of his former attorney, John Huhs. (Appellants' Br. at 8 (citing RP 6/5/14 72:12-75:23) and 10 (citing RP 6/5/14 107:25-108:15)). Belikov, on the other hand, denied refusing stock, and testified that he had never told anyone that he did not want R-Amtech stock and that, apart from the initial Board meeting, he had never discussed issuance of stock certificates with Maryann or Al Huhs. (RP 5/22, 806:11-807:12.)

[13] *Quinn*, 153 Wn. App. at 717 ("There was conflicting evidence in this case. The trial judge weighed that conflicting evidence and chose which of it to believe. That is the end of the story.")

This case was a classic swearing contest, for which greater deference is afforded to the trial court's determinations of witness credibility.[14] In addition to finding that on the statute of limitations issue Belikov "easily met this burden." (CP 1858, Conclusion 74), the trial court made multiple specific findings that the Huhses' testimony and statements were not credible, for example:

- The court specifically does not find credible Maryann Huhs's testimony that the $26,000 [Belikov's initial investment] was "trailing royalties" from INRES. (CP 1843, Finding 20; *see also, e.g.*, RP 6/5/14 62:20-65:24 (M. Huhs testimony); RP 5/29/14 71:4-17, 72:10-83:25 (Forensic Accounting and Fraud Expert L. Barrick testimony); Ex. 188).

- The court finds that Ms. Huhs' trial testimony was not credible and that she is the author of this document [a R-Amtech letter identifying Belikov as its "principal owner" who provided its "revenue source from Tetris.™"] (CP 1843-44, Finding 21, n.8; RP 5/21/14 671:22-674:22; Ex. 30).

- Maryann Huhs ... indicated that R-Amtech did not have sufficient funds to meet this obligation [a legal bill] (Ex. 123).... The statement about R-Amtech's finances was false. At this point, R-Amtech had substantial sums [over $2 million] in its Morgan Stanley account [Exs. 220.3, 220.4] and Maryann Huhs had taken, without authority, substantial dividends [Exs. 226 at 2, 6, 227 at 1, 4, 258 at 3, 7]. (CP 1844, Finding 23, n.9).

- Although the signed version has been lost, at her deposition, Maryann Huhs admitted signing the letter [describing Belikov as the beneficial owner of R-Amtech]. Her testimony to the contrary at trial is not credible. (CP 1846, Finding 30; Ex. 610; RP 6/5/14 144:11-145:16; RP 5/21/14 675:5-676:25.)

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[14] *City of Bellevue v. Pine Forest Properties, Inc.*, 340 P.3d 938, 948, 2014 WL 7338757 (Wash. App. Div. 1, 2014) (quoting *Dolan v. King County*, 172 Wn.2d 299, 311, 258 P.3d 20 (2011)).

- [The Huhses] owed him a fiduciary duty and yet lied to him and to others regarding their actions and intentions. (CP 1852, Finding 55; RP 5/14/14 42:7-24, 174:9-176:11).

- Over the years, they lead Mr. Belikov to believe that they were acting in his best interests while secretly taking steps to assert sole control over his company. (CP 1859, Conclusion 75).[15]

The trial court's findings and conclusions are well-reasoned and factually supported. The Huhses' attempt to re-argue their case, often without proper citation to the record, is fundamentally flawed.[16]

## B. The Trial Court Properly Exercised Its Broad Discretion in Holding that All Claims Would Be Tried to the Bench.

Appellants have mistaken both the record and the law in challenging the trial court's informed exercise of its broad discretion in granting Belikov's motion to strike his own jury demand. In cases involving questions of both equity and law, the Court may determine whether legal or equitable claims predominate, and has broad discretion in

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[15] For example, Maryann Huhs requested on March 17, 2008, that Belikov pay legal fees for maintenance of R-Amtech's patents (Ex. 123), without telling him that it was their position that they had removed him from the R-Amtech Board and transferred the licensing rights to those patents to their own Nevada company for $1,000 in December 2007. (Ex. 545). As it turns out, the Huhses created board minutes in January 2012 and backdated them to December 2007 in an effort to support their claims in negotiations with the licensee, Fireaway. (Ex. 558; RP 6/5/14 35:9-38:2). The Huhses also did not inform Belikov of the new license agreement with Fireaway (Ex. 543), which was negotiated over a period of months beginning in the fall of 2007 (RP 5/14/14 172:1-6) and signed on March 30, 2008, and contained a minimum royalty provision—now destined for the Huhses' company—of $4 million. (Ex. 543; RP 5/14/14 177:8-25). Instead, Maryann Huhs told Belikov that Fireaway continued not to pay, and advised him in late January 2008 of the prospect of Fireaway suing R-Amtech in the event R-Amtech cancelled the license for nonpayment of royalties. (Ex. 119).

[16] Belikov objects to multiple instances in Appellants' Brief of factual assertions without any citation to the record, *e.g.* pages 32-38, which should be stricken or disregarded by this Court. *See Nelson v. McGoldrick*, 127 Wn.2d 124, 141, 896 P.2d 1258 (1995) (striking "numerous factual assertions unsupported by the record").

this exercise.[17] That "wide discretion" includes the latitude "to allow a jury on some, none or all" of the issues presented and will not be disturbed "except for clear abuse."[18] A jury cannot consider equitable claims.[19] Here, the trial court properly went beyond the pleadings to ascertain the real issues in dispute and studied the *Scavenius* factors before determining that the case would be tried to the bench.[20] The trial court's inquiry appropriately examined the remedies sought rather than the strict form of causes of action pled, as required under Washington law.[21]

The Huhses admit in their opening brief,[22] as they conceded below, that this lawsuit includes "claim[s] for equitable relief." (CP 808). They

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[17] *See Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 365, 367-68, 617 P.2d 704 (1980) (approving and adopting *Scavenius v. Manchester Port Dist.*, 2 Wn. App. 126, 129-30, 467 P.2d 372 (1970)).

[18] *Brown*, 94 Wn.2d 359, 367-368, 617 P.2d 704 (1980) (internal citation and quotation omitted). Historically, where any one of the issues in an action was equitable in nature, the parties had no right to trial by jury on *any* issue. *Coleman v. Highland Lumber*, 46 Wn.2d 549, 550, 283 P.2d 123 (1955). Only in 1970 did the Washington State Court of Appeals hold in *Scavenius* that new Civil Rules, CR 38 and 39, allowed "more discretion in the trial court than *Coleman*", and provide a nonexclusive list of factors for trial courts to consider in exercising that "wide discretion." *Scavenius*, 2 Wn. App. at 129-130. In 1980, *Brown, supra*, adopted these *Scavenius* factors. The Huhses' arguments for a jury in this mixed equitable and legal case thus stand on limited rights to a jury expanded in recent decades but always subject to the broadest discretion of the trial court.

[19] *Dep't of Ecology v. Anderson,* 94 Wn.2d 727, 730, 620 P.2d 76 (1980) ("Even when a case presents a mixture of legal and equitable issues, a court has the discretion *only* to try the *legal* issues before a jury") (emphasis added).

[20] *Auburn Mech., Inc. v. Lydig Constr., Inc.,* 89 Wn. App. 893, 898, 951 P.2d 311 (1998) (citing *Brown,* 94 Wn.2d at 368). The trial court considered extensive briefing on the *Scavenius* factors (e.g., CP 802-03; CP 810-812; CP 2054-55) and referenced those factors in its Order Granting Plaintiffs' Motion to Strike Jury Demand, which added its own *Scavenius* analysis to the form order presented by Plaintiffs. CP 815-16 (court order adding underlined language).

[21] *Auburn Mech., Inc.*, 89 Wn. App. at 899, (citing *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990) and 1 Dan B. Dobbs, *Dobbs Law of Remedies* § 2.6(3) at 156 (2d ed. 1993))

[22] *See, e.g.,* Appellants' Br. at 15 (acknowledging equitable claims and remedies); 19 (admitting "equitable remedies"), 20-21 (acknowledging equitable claims for relief).

conceded below that the three promissory estoppel claims, asserted by *both sides* are "claim[s] for equitable relief." (CP 807). And they conceded below and here that the relief Belikov sought for conversion, fraud, and breach of fiduciary were the "equitable remedies" of resulting trust, constructive trust, declaratory judgment and extensive injunctive relief.[23] (CP 807-08, 810-11). Finally, the Huhses did not contest below the premise that Belikov's numerous requested remedies were fundamentally equitable remedies (*e.g.*, an order transferring patents back to R-Amtech, requiring the execution of property transfer documents, injunctive relief, etc.). (CP 801-02). The best the Huhses could do was to argue that "[m]onetary remedies predominate[d] over equitable remedies, just as claims at law are primary claims." (CP 811). But Washington law guarantees a right to a jury trial only "where a civil action is *purely* legal in nature."[24] In the light of this standard and the record, the trial court's exercise of its discretion to strike the jury was well within its discretion.[25]

The Huhses stretch too far in attempting to characterize Belikov's claims in a way that would somehow trump the thoughtful discretion of the trial court. For example, equitable claims were much broader than the Huhses admit here. Belikov's fiduciary duty claim and his fraud claims sounded in equity, not at law, because he sought equitable remedies of

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[23] Appellants' Br. at 15 (acknowledging that claims for promissory estoppel, unjust enrichment, resulting trust, constructive trust, preliminary and permanent injunction, and declaratory judgment are equitable).

[24] *Brown*, 94 Wn.2d at 365 (emphasis added).

[25] *See also Dep't of Ecology v. Anderson*, 94 Wn.2d 727, 730, 620 P.2d 76 (1980) ("the trial court [has] a wide discretion in cases involving both legal and equitable issues to submit to a jury some, none or all of the legal issues presented.").

constructive and resulting trusts to redress those violations. (CP 1823-27, 1830-31). Washington law teaches that "[a]ctions involving fiduciary relationships that seek accountings and imposition of constructive trusts are invariably equitable."[26] Similarly, "[n]either equity nor a court of law can be said to have exclusive jurisdiction in matters of fraud. If equitable relief is sought, the case would be tried as one in equity."[27]

The trial court properly followed Washington law that:

> The distinction between legal and equitable claims is based on the nature of the action, not the form of the action. The court must examine the pleadings on file at the time the court rules on the motion to strike the jury demand, and should go beyond the pleadings to ascertain the real issues in dispute . . . . More importantly, courts must examine the remedy sought."[28]

"Overwhelmingly, courts characterize claims according to the remedies sought rather than according to the subject matter or substantive rules involved."[29] Belikov's requests for equitable relief from fraud, fiduciary breach, and conversion caused those claims to sound in equity.

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[26] *Whatcom County v. Reynolds,* 27 Wn. App. 880, 882, 620 P.2d 544 (1980). Similarly, Belikov did not seek damages personally but rather a restoration of funds to R-Amtech. (CP 1105, 1862, 1823-25, 2103). Under these circumstances also the fiduciary breach claims are equitable. *Accord, Allard v. Pac. Nat'l Bank*, 99 Wn.2d 394, 400-01, 663 P.2d 104 (1983) (where beneficiaries assert fiduciary duty claims to restore funds to a trust rather than themselves, "the action is considered equitable in nature").

[27] *Reed v. Reeves*, 160 Wash. 282, 284, 294 P. 995 (1931); *see also Ranta v. German,* 1 Wn. App. 104, 459 P.2d 961 (1969) (upholding denial of jury trial because fraud claims seeking rescission and restitution were equitable); *Millet v. Pacific Cider & Vinegar Co.*, 151 Wash. 561, 566-67, 276 P. 863 (1929) (upholding trial court's refusal to empanel a jury because the fraud claim for relief was equitable despite claim for money damages).

[28] *Auburn Mech, Inc.,* 89 Wn. App. at 899 (emphasis added; internal quotation and quotations omitted).

[29] *Id.,* n.16 (citation and quotation omitted).

### 1. The Trial Court Properly Considered the *Scavenius* Factors.

The Huhses incorrectly argue that the trial court "did not explain its rationale in striking" the jury demand and that "[n]othing in the record suggests the trial court considered the *Scavenius* factors at all." (Appellants' Br. at 19). The Huhses use these mischaracterizations to assert without supporting authority that this purported "abuse of discretion" requires a "de novo" review. But Washington law is that the trial court's decision will be deferred to "except for clear abuse."[30] Moreover, the Huhses have forfeited their claim by not arguing to the trial court that it had failed to adequately address *Scavenius* factors. This court may decline to review arguments not raised below.[31]

In fact, the trial court examined detailed briefing on the law framing its discretion, including the *Scavenius* analysis, and examined the same concepts that have been repeated here.[32] The trial court succinctly applied the *Scavenius* factors in its Order Granting Plaintiffs' Motion to Strike Jury Demand (CP 815-16), stating: (a) "Although some legal claims remain after summary judgment, the primary claims are equitable."; (b) "In addition, the relief sought by plaintiff goes well beyond a request for money damages."; (c) that "the legal and equitable claims, in large part, are factually-related;" and, (d) "submission of the legal claims to a jury

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[30] *Foster v. Gilliam*, 165 Wn. App. 33, 46, 268 P.3d 945 (2011).

[31] RAP 2.5(a); *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 299, 38 P.2d 1024 (2002) ("where the trial court had no opportunity to address the issues, we decline to consider it.").

[32] *Id.*, nn.28-29 (CP 797-817, 2052-58).

while trying the equitable claims to the court is neither practical nor desirable. The jury demand is hereby stricken. . . ." (*Id.*). These findings covered all of the *Scavenius* factors that required analysis and were not otherwise facially obvious from the pleadings. They addressed: factor (3) "are the main issues primarily legal or equitable in their nature," factor (4) "do the equitable issues present complexities in the trial which will affect the orderly determination of such issues by a jury," factor (5) "are the equitable issues easily separable," and, (7) "the trial court should go beyond the pleadings to ascertain the real issues in dispute before making the determination as to whether or not a jury trial should be granted on all or part of such issues." (*Id.*).

What the trial court did *not* discuss in its Order were the *Scavenius* factors that were facially obvious: (1) "who seeks equitable relief" (both parties, as was clear from the briefing), (2) "is the person seeking equitable relief also demanding trial of the issues to the jury" (clearly the Huhses sought equitable relief and were also seeking a jury), (3) "if the nature of the action is doubtful, a jury trial should be allowed" (by reciting the guideline, the trial court would have added nothing to its analysis).[33] Thus, the trial court's analysis reflected a review of the pleadings, an application of the *Scavenius* factors, and in all ways a considered exercise of its discretion.

[33] *See* Plaintiffs' Motion to Strike Jury Demand and related pleadings, including the trial court's order (CP 797-817, 2052-58.).

### 2. Belikov's Claims Are Dominated by Equity.

The Huhses strain to support their jury argument by resorting to mischaracterizing claims as legal and then counting them, arriving at a number that they incorrectly suggest "overwhelmingly" outweighs the equitable claims and remedies in this action. (Appellants' Br. at 14-15, 23-27). No authority teaches that counting claims is appropriate; instead, trial courts are required to go behind the pleadings, examine the true nature of the action, and pay particular attention to the remedies sought.[34]

The heart of this case was overwhelmingly equitable. Belikov sought the return of his company, its stolen funds, and its technology licensing rights, and to remove the Huhses from their positions in his company. Belikov also sought to rescind, after discovering that the Huhses had defrauded him, two gifts of real estate he had made to them under the false pretense of loyal service. The Huhses focus attention on the large amount of stolen funds ordered to be returned to R-Amtech and the resulting money judgment as the basis for their jury argument. (Appellants' Br. at 24-27). But because Belikov sued to return funds to a corporation instead of to himself personally, that claim too is equitable.[35] This Court in *Whatcom Cnty. v. Reynolds*, affirmed the denial of a jury trial in an action similar to this one, seeking to impose a constructive trust

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[34] *See, supra.*, § IV(B). *Brown,* 94 Wn.2d at 365.

[35] *Allard v. Pac. Nat'l Bank*, 99 Wn.2d 394, 400-01, 663 P.2d 104 (1983) (where beneficiaries assert fiduciary duty claims to restore funds to a trust rather than themselves, "the action is considered equitable in nature"). Appellants claim that Belikov sought recovery only for himself (Appellants' Br. at 27). But that is *not* the case here. Mr. Belikov sought a return of funds to R-Amtech, not himself (CP 1823-25, 2103), which is exactly what the trial court awarded. *See* CP 1105, 1250, 1862.

and for an accounting because "[a]ctions involving fiduciary relationships that seek accountings and imposition of constructive trusts are invariably equitable."[36]

Other claims that the Huhses assert are "legal" are also inherently equitable in nature, such as Belikov's corporate waste,[37] fiduciary duty, and fraud claims.[38] The Huhses also ignore Belikov's equitable claim for rescission of a real estate gift under RPC 1.8, which could be tried only to the court.[39] The trial court considered the parties' claims, the remedies requested, and properly exercised its wide discretion.

### 3. Appellants Misunderstand the Proper Timing of the Jury Inquiry and the Relief Granted.

The Huhses incorrectly suggest that the trial court ultimately granted "little" equitable relief, improperly using hindsight to argue that striking the jury was improper. (Appellants' Br. at 15, 18-23). In fact, the relief the trial court granted was overwhelmingly equitable. But more fundamentally, the Huhses' argument ignores that this Court reviews the trial court's discretionary act from "the time the court rules on the motion to strike the jury demand."[40] The principle disputes in the case

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[36] 27 Wn. App. 880, 882, 620 P.2d 544 (1980).

[37] *Scott v. Trans-System,* 148 Wn.2d 701, 716, 64 P.3d 1 (2003) (corporate waste claims brought under the Business Corporations Act were "fundamentally equitable").

[38] *Supra.*, § IV(B) and nn.26-27.

[39] *Behnke v. Ahrens*, 172 Wn. App. 281, 297, 294 P.3d 729 (2012) ("the question of whether an attorney's conduct violated the relevant RPC's is a question of law for the court to decide"), *review denied*, 177 Wn.2d 1003, 300 P.3d 415 (2013); (CP 1075) ("Mr. Belikov seeks to rescind two gifts of real estate...."); *Hornback v. Wentworth*, 132 Wn. App. 504, 513, 132 P.3d 778 (2006) ("Rescission is an equitable remedy and requires the court to fashion an equitable solution.") (internal quotation and citations omitted).

[40] *Auburn Mech, Inc.,* 89 Wn. App. at 899 (internal quotation and citations omitted).

"concern[ed] breach of fiduciary duties and the question of who owns [R-Amtech]," both equitable issues.[41] The court identified other major equitable issues: rescission of property, and promissory estoppel.[42] The determination by the trial court here was well within its discretion given the record at the time of the court's order striking the jury.

Moreover, Appellants' characterization of the court's relief as "overwhelmingly ... legal" (Appellants' Br. at 24) is incorrect. Of the nine paragraphs in the "Relief Awarded" section of the Court's decision, all the material paragraphs reflected *equitable* relief: paragraphs 1. (declaratory relief[43] that Belikov is R-Amtech's legal owner or alternatively its beneficial owner based on that equitable principle;[44] 2. (removal of Appellants as officers and directors), 3. (declaring licensing agreement void); 4. (ordering rescission and transfer of Suncadia property);[45] 5. (denying rescission of Costa Rica property); 6. (ordering the Huhses to pay and awarding monetary judgment *to R-Amtech*, not to Belikov, in response to Belikov's equitable fiduciary duty and fraud claims, among

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[41] CP 1074; *See also* CP 1836.

[42] CP 1075; *see also* CP 1836. The Huhses ignore their *own* equitable claims.

[43] Appellants' Br. at 15 (declaratory judgment an equitable remedy).

[44] *See* Memorandum Opinion at 14-15 (CP 1087-88) and Washington law citations therein; *see also* CP 1846. Contrary to Appellants' contention, beneficial ownership is a long recognized equitable issue. *See, e.g., Hansen v. Agnew*, 195 Wash. 354, 375, 80 P.2d 845 (1938) (beneficial ownership of stock decided in an "action in equity."). And contrary to Appellants' claims (Appellants' Br. at 26), Washington law does support the court's rulings, as the court's Memorandum Opinion reflects. *See, e.g.,* CP 1087-088, nn.16, 17. *See also O'Steen v. Wineberg's Estate*, 30 Wn. App. 923, 932-33, 640 P.2d 28, 34 (1982); *Rogich v. Dressel*, 45 Wn.2d 829, 844, 278 P.2d 367 (1954).

[45] *See, infra,* nn.27, 39 (rescission is an equitable remedy).

others); and 8. (denying *the Huhses'* equitable counterclaims for laches and promissory estoppel).[46]

**4. Equity Was Necessary for Full Relief.**

The Huhses are simply wrong to argue that Belikov was not entitled to relief in equity because he had "adequate remedy at law in the form of monetary damages." (CP 809-12). Belikov sought substantial equitable nonmonetary relief, without which he would not have achieved a complete remedy. (CP 801-02). Unlike *Kucera*, cited by the Huhses, where "[t]he specific injuries...may be easily compensated by money damages,"[47] full and essential relief for Belikov included, among other things, removal of the Huhses from R-Amtech, transfer of legal ownership in R-Amtech to Mr. Belikov, and an order declaring the transfer of the licensing rights to R-Amtech's technology to the Huhses' Nevada company void (CP 1823-25, 1105, 1862, 2103). Without this relief, the Huhses could have continued to act in R-Amtech's name, generating new causes of action after trial. Because of these requests, which the money damages could not reach to provide full relief, and because Belikov's principle causes of action and claims for relief sounded in equity, the trial court should be affirmed.

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[46] CP 1862-63. *See also* (CP 1104-105) (same). Legal or equitable character of counterclaims is part of the assessment of whether an action is primarily equitable or legal and whether a jury is appropriate. *See, e.g., Shepler Const., Inc. v. Leonard*, 175 Wn. App. 239, 249, 306 P.3d 988 (2013). *See* Appellants' Br. at 16 (admitting promissory estoppel is equitable). Appellants ignore their own equitable claims.

[47] *Kucera v. Dep't of Transportation*, 140 Wn.2d 200, 201-11, 995 P.2d 63 (2000) (The *Kucera* court acknowledged that money damages are inadequate where "the injury complained of by its nature cannot be compensated by money damages" and where "the remedy at law would not be efficient because the injury is of a continuing nature.").

### 5. The Trial Court Correctly Decided the Other *Scavenius* Factors as Well.

The Huhses disagree with the trial court's finding under *Scavenius* factor 4 that the trial presented complexities that made presentation to a jury "neither practical nor desirable." But the trial court's findings on this issue are well within its discretion, particularly considering that in a four-week trial that it described as a "remarkably complicated case" (CP 1103), the trial court admitted 325 exhibits (CP 1108-50) and heard 60 hours of testimony—including expert testimony, regarding more than 15 years of business dealings among numerous parties involved in complex business transactions. The Huhses' opening brief admits the complexities.[48] Finally, the Huhses apparently agree with the trial court that the legal issues are not easily separable from the equitable issues (*Scavenius* factor 5) (Appellants' Br. at 29) and they "overlap," but misunderstand that this is a reason to *strike* a jury.[49]

The record reflects a proper exercise of the court's equitable discretion that effectively makes a retrial to a jury of "legal" claims moot. A jury cannot consider equitable claims.[50] The court's holdings in equity cover all the ground necessary for the entirety of the relief it granted. Retrial would be a massive waste of time and expense with its outcome and relief already settled.

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[48] Appellants' Br. at 5 ("complex ownership transition"), 7 ("business and financial structure ... very complex"), and 57 ("complexity of legal and evidentiary issues").

[49] *See, e.g., Brown*, 94 Wn.2d 359, 369 (trial court did not abuse discretion in denying jury trial, in part because "the trial court did not err in ruling that the legal issues would not be easily separable for submission to the jury.").

[50] *Anderson, supra,* 94 Wn.2d 727, 730.

## C. The Trial Court Properly Rejected the Huhses' Statute of Limitations Defense.

A cause of action usually accrues when the party has the right to apply to a court for relief.[51] The burden is on the Huhses to prove those facts that establish the affirmative defense of statute of limitations.[52] "Under the discovery rule, a cause of action does not accrue—and as a result the statute of limitations does not begin to run—until the plaintiff knows, or has reason to know, the factual basis for the cause of action."[53]

The Huhses challenge the trial court's conclusion that the statute of limitations does not bar Belikov's claims to R-Amtech ownership. (Appellants' Br. at 30-37). But the Huhses do not challenge the factual finding that Belikov did not know and could not reasonably have known the factual basis for his R-Amtech ownership claims before July 15, 2009, which is therefore a verity[54] (CP 1848, Finding 37). Even if the Huhses had challenged the court's fact findings, those findings are supported by substantial evidence, which is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.[55]

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[51] *Haslund v. City of Seattle*, 86 Wn.2d 607, 619, 547 P.2d 1221 (1976).

[52] *Id.* at 620-621.

[53] *Kinney v. Cook*, 150 Wn. App. 187, 193, 208 P.3d 1, 4 (2009) (quoting *Bowles v. Wash. Dep't of Ret. Sys.*, 121 Wn.2d 52, 79-80, 847 P.2d 440 (1993)). In arguing that Belikov must show that he could not have discovered the relevant facts sooner, the Huhses cite to a case, *Martin v. Dematic*, 178 Wn. App. 646, 315 P.3d 1126 (2013), without noting that the case was reversed, on other grounds, by the Washington Supreme Court in December 2014. *Martin v. Dematic*, 182 Wn.2d 281, 340 P.3d 834 (2014).

[54] There is no dispute that the three year statute of limitations applies to Belikov's claims for breach of fiduciary duty, unjust enrichment, fraud, negligence, and negligent misrepresentation.

[55] *Fred Hutchinson Cancer Research Center v. Holman*, 107 Wn.2d 693, 712, 732 P.2d 974, 985 (1987) (internal citations omitted).

The court's findings and supporting evidence that Belikov did not know and could not reasonably have known the factual basis for his R-Amtech ownership claim include:

- Belikov "at all times [Belikov] intended to be, and believed he was the managing owner of R-Amtech." (CP 1852, Finding 57; RP 5/21/14 761:3-9).

- "There is no *credible* evidence in the record that Mr. Belikov ever relinquished his ownership of R-Amtech or his position as Chairman of the Board." (CP 1845, Finding 26 (emphasis added); RP 5/27/14 5:7-6:1).

- "Although it is clear that Mr. Belikov did not want his ownership to trigger the requirement that R-Amtech file IRS Form 5472, it is equally clear that both he and Maryann Huhs believed he owned R-Amtech. [RP 5/22/14 805:7-20]. As Maryann Huhs testified, Mr. Belikov was the 'intended owner' of R-Amtech.... [RP 5/20/14 619:1-3] Nonetheless, Mr. Belikov's unwise attempt to avoid *record* ownership[56] of R-Amtech did not serve to vest ownership in Maryann Huhs. Significantly, no one apparently ever informed Mr. Belikov of any potential legal detriments of not maintaining record ownership, presumably because none could have been foreseen during this time period." (CP 1844-45, Finding 25 (emphasis added); RP 5/27/14 44:10-19).

- "Mr. Belikov has established that near the time of formation he was the lawful owner of 95.2% of R-Amtech. His subsequent equity contributions render Maryann Huhs's $1000 equitable contribution *de minimis.*" (CP 1846, Finding 29; RP 5/29/14 72:15-76:9).

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[56] The Huhses mischaracterize the record by (1) suggesting that the trial court's finding regarding "record ownership" was a determination that Belikov "did not want to own R-Amtech" and (2) arguing that the trial court's findings are inconsistent. Appellants' Br. at 30. The trial court did not find that Belikov did not want to own R-Amtech. The opposite is true. Judge Halpert found that Belikov "at all times intended to be, and believed he was the managing owner of R-Amtech." (CP 1852, Finding 57). This finding is unchallenged.

- "As with INRES, Mr. Belikov funded R-Amtech with the Tetris income. Through ZAO Elorg, Mr. Belikov assigned 60% of the Tetris royalties to R-Amtech, while retaining ownership of the Tetris IP rights. R-Amtech received approximately $9.5 million from Tetris income to fund its operations from its formation in 1996 to the sale of Tetris by Mr. Belikov in 2005. (CP 1838, Finding 5; Exs. 152-154).

- Maryann and Al Huhs point to two exhibits as putting Mr. Belikov on inquiry notice. Exhibit 733 was written in 2004 and Exhibit 613 was written in 2005. However, these oblique references, buried deep within e-mail strings, are simply insufficient to have put Mr. Belikov on notice that this longtime friends and fiduciaries were now seeking to oust him from the company he founded in 1996. In addition, subsequent to 2005, Maryann Huhs continued to deal with him as the owner of R-Amtech. For example, in March of 2008, Maryann Huhs asked Mr. Belikov to [*sic*] personally to pay attorney Von Funer's legal bills, falsely asserting that R-Amtech was insolvent, and sought his assistance with the Russian patents. (CP 1848, Finding 38; Exs. 123 and 125).

- Mr. Belikov had no reason to be concerned about ownership of his company until November 2010, when an issue arose concerning title to his car. As he testified, it was then that he decided to begin an investigation concerning what the Huhses had done with his money and his car. (CP 1848, Finding 39; RP 5/27/14 7:12-21).

The Huhses argue that their evidence of inquiry notice went beyond the two emails that the trial court referenced (Appellants' Br. at 32). But the trial court did not say that the Huhses' evidence was limited to those two items, rather that this was the principle evidence relied upon by the Huhses, the best they had, and still it was insufficient. (CP 1848, Finding 38). Further, much of the evidence that the Huhses present in support of their "additional inquiry notice evidence" argument is directly contrary to the court's findings. For example, without providing citations to the record, the Huhses refer to unspecified board meetings and

unidentified "communications" wherein Maryann Huhs was stated as "R-Amtech's sole owner." (Appellants' Br. at 32). Belikov presumes that the Huhses are referring to R-Amtech shareholder and board meeting minutes, but Al Huhs admitted to fraudulently creating and backdating them during the months of January and May 2012 to show to third parties.[57] (CP 1851, Finding 50). The trial court's unchallenged findings state that "the December 28, 2007 board meeting and the various shareholder meetings never took place and that the minutes were created as part of the scheme to defraud Mr. Belikov," (CP 1845, Finding 27) and are supported by substantial evidence. (*e.g.*, RP 6/4/14 43:18-46:2; RP 6/5/14 35:21-39:2). To suggest that doctored documents created as a fraudulent scheme constitute "overwhelming and uncontested evidence" is unfathomable.

The Huhses also contend that Belikov "was notified that Maryann Huhs was R-Amtech's sole owner at or around the time of the Tetris sale in January 2005." (Appellants' Br. at 35). This is yet another attempt to dance around the trial court's findings with the Huhses' own discredited version of events. The trial court rejected another of the Huhses' theories, that Belikov refused to own R-Amtech and could not own R-Amtech

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[57] For example, when shown Word document properties for Ex. 539, which purported to be minutes from a Dec. 28, 2007 shareholder meeting authorizing transfer of R-Amtech's IP rights to Techno-TM Nevada, Plaintiffs' counsel asked: "Q: … Take a look at what it says. And what it shows, sir, is that you created these 2007 meeting minutes on May 6th, 2012. That's two days before your meeting with Mr. Lavin and Mr. Schreiber. A: Okay. Q: Did you, in fact, create these minutes on May 6th, 2012? **A: I did.**" RP 6/4/14 45:20-46:2. Later, Plaintiffs' counsel asked, "Q: … So the shareholder minutes that were drafted in May of 2012, for the meeting that took place in 2007, were based on the board meeting minutes that you drafted in January, 2012? **A: That's correct.**" RP 6/5/14 38:23-39:2 (emphasis added).

because he would incur significant tax liabilities associated with the Tetris sale in January 2005.[58] In an attempt to find any person other than the Huhses to support their claim, Maryann Huhs testified at deposition that Belikov had been so advised by Michael Brown, his transaction attorney. (RP 5/21/14 658:2-659:5). In fact, Michael Brown testified (CP 1949-50)[59] and the trial court "specifically [found] that Michael Brown did not tell Mr. Belikov, in conjunction with the 2005 sale of Tetris that his ownership of R-Amtech would result in massive tax liability" and that, contrary to the Huhses' theory, "no such tax liability would accrue." (CP 1845, Finding 27).

### D. The Huhses Breached Their Fiduciary Duties.

An understanding of the Huhses' roles as Belikov's fiduciaries is critically important to reviewing the trial court's conclusions regarding Belikov's legal and beneficial ownership of R-Amtech. The Huhses' Opening Brief approaches the discovery rule from an arms-length distance and cites cases regarding the discovery rule that addressed the discovery of personal injury claims against pharmaceutical companies, equipment

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[58] Before trial, the Huhses had contended that Belikov had refused R-Amtech ownership due to disclosure reasons well before the 2005 Tetris sale. (CP 520-24). Had this been true, there would have been no reason for Michael Brown to be advising Belikov in 2005 that ownership of R-Amtech would have been disadvantageous from a tax perspective. The Huhses' defenses throughout this lawsuit evolved into several conflicting stories, none of which persuaded the trier of fact.

[59] The relevant testimony of Michael Brown was designated by Belikov and was read by the trial court outside of courtroom time. (RP 5/20/14 645:25-647:19). Thus, the designations were not read into the record and are not part of the official Verbatim Report of Proceedings. Also, the trial court did not sustain the only objection raised to the M. Brown deposition testimony. (CP 2174). The designated portion used at trial was also attached to a declaration in a summary judgment response. (CP 1949-50).

manufacturers, and other defendants with whom there was no fiduciary relationship.[60] As the trial court concluded:

> Fundamentally, a fiduciary relationship arises "in circumstances in which 'any person whose relation with another is such that the latter justifiably expects his welfare to be cared for by the former.'" It 'allows an individual to relax his guard and repose his trust in another.' Consequently, a fiduciary relationship exists where the plaintiff is dependent on the defendant and the defendant undertakes 'to advise, counsel and protect the weaker party. For example, a plaintiff's lack of business expertise, and a defendant's undertaking the responsibility of providing financial advice to a close friend or family member, may indicate a fiduciary relationship.' Indeed, friendship commonly gives rise to fiduciary relationships, even where the plaintiff is a "'a shrewd and successful business man.'"

(CP 1855, Conclusion 66 (citations omitted)). The only case that the Huhses cite on the statute of limitations issue in a fiduciary context, *Sherbeck v. Lyman's Estate*, is easily distinguishable because the evidence showed that the plaintiff received "all the facts necessary to place the signatory on notice of Lyman's interest in the property."[61] In contrast, Judge Halpert concluded that Belikov "easily met" his burden of showing that he did not and could not reasonably have known of the wrongful acts of Maryann and Al Huhs before July 15, 2009. (CP 1858, Finding 74). With respect to the Huhses' laches defense to the R-Amtech ownership claim, Judge Halpert concluded,

> In this case, the evidence at trial overwhelmingly demonstrates the bad faith of Maryann and Al Huhs in their dealings with Mr. Belikov-the man who had benefitted

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[60] *E.g. Green v. APC*, 136 Wn.2d 87, 91, 960 P.2d 912 (1998); *In re Estates of Hibbard*, 118 Wn.2d 737, 826 P.2d 690 (1992).

[61] *Sherbeck v. Lyman's Estate*, 15 Wn. App. 866, 869, 552 P.2d 1076 (1976).

> them so greatly and to whom they owed the highest fiduciary duty. Over the years, they lead Mr. Belikov to believe that they were acting in his best interests while secretly taking steps to assert sole control over his company. Maryann and Al Huhs diverted assets and altered company accounting data and board and shareholder minutes to perpetuate the hijacking of R-Amtech.[62] With their unclean hands, Maryann and Al Huhs cannot now rely on equity to complain that Mr. Belikov should have brought his suit against them sooner.

(CP 1858-59, Conclusion 75). The existence of a fiduciary relationship, and the associated uncontested findings and conclusions, is a circumstance that the trial court and this Court properly take into consideration.[63]

"Those who serve in a fiduciary capacity as a stockholder or director of a corporation may not personally profit at the expense of the corporation."[64] "One who stands in a personal fiduciary relationship to another is similarly under a duty not to profit at the expense of the other."[65] The Huhses argue that Belikov "failed to discuss ownership of R-Amtech" with multiple persons, including Maryann Huhs and his former attorney, John Huhs,[66] and that he did not have a stock certificate or other documentation, as if Belikov's role as Chairman and Founder, his

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[62] On the issue of accounting data, Al Huhs admitted that on February 17, 2012, he "eliminated the identification of 'Belikov" ... as the depositor for the purchase of common stock." He stated, "I made a change to the stock register, that's right." RP 6/4/2014 34:22-35:2. After Al Huhs' change, the Quickbooks entry said "Deposit," where previously it had said, "Deposit from Belikov." RP 6/5/14 29:25-30:7; Ex. 781-H.

[63] *Sherbeck*, 15 Wn. App. at 869.

[64] *Arneman v. Arneman*, 43 Wn.2d 787, 798, 264 P.2d 256 (1953).

[65] *Id.*

[66] The Huhses' repeated references to John Huhs as Belikov's attorney are misleading at best, since John Huhs ceased representing Belikov in any capacity (whether for Belikov, R-Amtech, or Elorg LLC) in 2003 (RP 5/29/14 32:1-15) due to a conflict of interest related to John Huhs' representation of The Tetris Company, which managed customer contracts, collected revenues, performed quality assurance, and protected against infringement for the Tetris computer game. (CP 1839, Finding 6) Ex. 48 (Al Huhs email to John Huhs identifying conflict of interest); RP 5/22/14 819:6-820:11.

investment of over $9 million into R-Amtech, and the undisputed fact that Maryann Huhs was a R-Amtech employee and answered to him were meaningless and irrelevant. (CP 1838-39, Findings 5, 6). Even without taking into account the fiduciary relationship between Belikov and the Huhses, the facts found by the trial court do not support the Huhses' claim that Belikov should have discovered the Huhses' wrongdoing sooner. The fiduciary relationship and close personal friendship between the Huhses and Belikov reinforces the conclusion that Belikov reasonably did not know of the Huhses' betrayal sooner.

### E. The Trial Court Properly Ruled That Belikov Is the Legal and, Alternatively, Beneficial Owner of R-Amtech.

The trial court concluded that Belikov is the "legal owner" of R-Amtech. It is black letter law that legal ownership of a corporation does not require possession or issuance of a stock certificate. "*A share issue does not require that a certificate be issued.* So shares of stock may be 'issued and outstanding' where the corporation has accepted property or services under an agreement to give such shares for the property or services, although no certificates have been issued for the shares."[67] The trial court concluded that "evidence at trial established that all but $1,000 of the millions of dollars invested in R-Amtech came from Mr. Belikov." (CP 1854, Conclusion 65). Contrary to the Huhses' assertion, the trial court did not state that Belikov gave R-Amtech "his" money (Appellants'

[67] William Meade Fletcher, 11 Fletcher Cyclopedia of the Law of Corporations, § 5126 (2012 ed.).

Br. at 38); the trial court concluded that the funds "came from Mr. Belikov," which is entirely correct. (CP 1846, Finding 31). "Through ZAO Elorg, Mr. Belikov assigned 60% of the Tetris royalties to R-Amtech, while retaining ownership of the Tetris IP rights." (CP 1838, Finding 5). The trial court further stated in a footnote that, "The arrangement actually had all Tetris revenue coming to R-Amtech, with the requirement that R-Amtech provide 40% of the revenues to Elorg LLC." (CP 1838, Finding 5, n.4). Adding to the complexity, "[t]he principal employees of R-Amtech, Maryann Huhs and Cindy Verdugo, were also employees of The Tetris Company; the Tetris Company paid them a salary for their work." (CP 1839, Finding 6). While there were overlapping roles and multiple assignments and license agreements between the entities involved, the trial court was not required to ignore Belikov's investment in R-Amtech merely because its source was another entity controlled by him. (CP 1842-43, Finding 19; RP 5/21/14 766:15-16, 770:6-771:12). To deny Belikov a remedy, under these circumstances, and to allow the Huhses to walk away with Belikov's investment, his company, and the company's revenues, would inflict a substantial injustice, because the Huhses themselves have no equitable or legal claim to R-Amtech ownership. The trial court made a related finding that, "Mr. Belikov's unwise attempt to avoid record ownership did not serve to vest ownership in Maryann Huhs." (CP 1845, Finding 25).

The Huhses mischaracterize the trial court's decision as a finding that "Belikov consciously avoided legal ownership of R-Amtech," and

assert that he did so to avoid paying Russian taxes. (Appellants' Br. at 1, 8-9, 37). The trial court did not find, and there is no credible evidence in the record, that Belikov avoided record ownership to avoid paying U.S. or Russian taxes. (CP 1844-45, Findings 25, 26; RP 5/27/14 5:7-6:1). The testimony of the Huhses' Russian legal expert was excluded as irrelevant, and they have not challenged that evidentiary decision on appeal. (CP 950-51, 635-52). Furthermore, Belikov testified that record ownership was a concern to him because of Russian organized crime (referred to as "The Roof"), which threatened to and in fact did interfere with Belikov's legitimate business activities. (5/27/14 RP 42:10-25.) There is nothing "repugnant" about avoiding criminal enterprises wanting to commit extortion.

The trial court further concluded that, "Even if legal ownership had not been established, Mr. Belikov is entitled to relief as he has established that he is the equitable owner of R-Amtech." (CP 1853, Finding 61). The trial court explained, "Beneficial ownership is an equitable principle under which property is held in the name of one person for which another is its true owner." *Id.* The trial court's definition of beneficial ownership is well supported in the case law. The concept of beneficial ownership has in fact existed in western jurisprudence since the 12th century, during the Crusades, when an absent crusader was treated as the owner of land by the

equity courts.[68] Washington courts have repeatedly recognized beneficial ownership of corporations.[69]

Excerpts of Belikov's affirmative evidence strongly support his claims to legal and beneficial ownership of R-Amtech:

- It was Belikov's initial idea, starting with INRES in 1991, and continuing with R-Amtech in 1996, to market Soviet technology in the United States and other countries. (CP 1837-38, Findings 3, 4; CP 1842, Finding 18; RP 5/21/14 750:22-752:10, 758:24-759:25).

- Belikov funded R-Amtech with income from the Tetris game, and his funding exceeded $9.5 million. (CP 1838, Finding 5; RP 5/29/14 86:13-88:5).

- Belikov initially funded R-Amtech with $26,000, and up until Al Huhs changed R-Amtech's general ledger on its QuickBooks records on February 17, 2012, the books reflected Belikov's ownership interest. (CP 1843, Finding 20; Ex. 188; RP 5/29/14 72:10-84:10; RP 6/5/14 54:13-55:18).

- Maryann Huhs held R-Amtech Share Certificate Number Two. There was no explanation of what happened to Certificate Number One. (CP 1843, Finding 20; Ex. 562; RP 5/21/14 662:14-15; RP 5/22/14 807:2-4; RP 6/3/14 85:24-87:3).

- Maryann Huhs wrote documents and stated on multiple occasions to third parties that Belikov was R-Amtech's owner and founder. (CP 1843-44, Findings 21-24, Exs. 30, 123, 125, 213; RP 5/14/14 17:21-18:6, 98:23-99:3; RP 5/15/14 AM 233:1-10; RP 5/20/14 515:14-18, 519:12-22, 529:8-16, 575:23-576:10).

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[68] *See, e.g.* Alastair Hudson, *Equity and Trusts*, at 35 (4th ed.) (London: Cavendish Publishing, 2005) (during the Crusades an absent crusader was treated as the owner of his land by courts of equity and the person exercising taxing and other legal authority in the crusaders' absence was treated by common law courts as the owner of the land).

[69] *E.g., In re Rapid Settlements, Ltd. v. Symetra Life Ins. Co.*, 166 Wn. App. 683, 693-94, 271 P.3d 925, 931 (2012) (recognizing concept of beneficial ownership of a company); *Rogich v. Dressel*, 45 Wn.2d 829, 844, 278 P.2d 367 (1954) (court upheld judgment for plaintiff where stock was only in defendant's name and defendant denied that there was an understanding that he would hold the stock for the plaintiff).

- Maryann Huhs wrote documents and stated to third persons that Belikov was the "beneficial owner" of R-Amtech that she was his "nominee," holding R-Amtech's 99% ownership of Games on behalf of Belikov. (CP 1846, Finding 30; Exs. 71, 610).

- In their attempts to prove ownership, the Huhses falsified corporate accounting records (CP 1843, Finding 20) and company meeting minutes (CP 1841, Finding 13; CP 1851, Finding 49). *See also* Sections IV.C and IV.D above.

In sum, substantial evidence supports the conclusions that Belikov is R-Amtech's legal owner, or alternatively, its beneficial owner.

## F. Al Huhs Violated RPC 1.8(c).

The trial court determined that Al Huhs violated RPC 1.8(c) by drafting gift documents for the Suncadia residence. (CP 1859-860, Findings 77, 78). "Whether a given set of facts establish an RPC violation is a question of law subject to de novo review."[70] The facts upon which the RPC determination is based are reviewed under the substantial evidence standard.[71]

### 1. Al Huhs Was Belikov's Lawyer.

At trial, Al Huhs vigorously argued that he was not Belikov's lawyer at the time he drafted gift documents, in February-March of 2007,[72] or at any time.[73] The trial court found that at all relevant times, Al Huhs was Belikov's attorney, and that the record is replete with evidence

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[70] *LK Operating, LLC v. Collection Group, LLC*, 181 Wn.2d 48, 72, 331 P.3d 1147 (2014), citing *In re Disciplinary Proceeding Against King,* 170 Wn.2d 738, 741, 246 P.3d 1232 (2011).

[71] *In re Disciplinary Proceeding Against Poole*, 156 Wn.2d 196, 222, 125 P.3d 954 (2006).

[72] RP 6/5/14 9:4-10:9.

[73] RP 6/3/14 89:18-106:11, 111:3-114:5.

in this regard (CP 1848, Finding 40), including a signed legal document in which Al Huhs identified himself as Belikov's lawyer in February 2007. (CP 1849, Finding 42; Ex. 87). The determination of whether an attorney-client relationship exists is a question of fact,[74] and the Huhses have not challenged this finding on appeal. (Appellants' Br. at 2-5).

### 2. The Huhses' Reading of RPC 1.8(c) Would Destroy the Protection of the Rule.

RPC 1.8 (c) prohibits a lawyer from drafting gift documents for a substantial gift from a client to the lawyer or the lawyer's family: "A lawyer shall not . . . prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift. . ."[75] The trial court found that Al Huhs violated RPC 1.8(c) by preparing a Declaration of Gift and an operating agreement and transfer document for a limited liability company through which title of the $1.5 million Suncadia resort property would pass from Belikov to Al Huhs and his wife. (CP 1859-60, Conclusions 77, 78).

Except for the missing transfer document (discussed below), the Huhses do not deny that Al Huhs drafted these documents. Instead, they parse the language of RPC 1.8(c) and assert that these documents were not prepared "on behalf of the client." This myopic reading of 1.8(c) has no merit. Enforceable gifts require that the donor intend to make a gift and

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[74] *State v. Reeder*, 181 Wn. App. 897, 910, 330 P.3d 786 (2014).

[75] The only exception is where the person giving the gift is a related to the lawyer. RPC 1.8(c). It is uncontested that this exception does not apply here. (Appellants' Br. at 2-5). The Huhses did not allege that Belikov is related to the Huhses by blood, marriage or adoption. (RP 6/12/14 114:6-7).

deliver it to the donee.[76] Al Huhs drafted documents for the Suncadia gift to meet these requirements. He did so on behalf of Belikov. The Declaration of Gift that Al Huhs drafted manifests *Belikov's* intention to make a gift to the Huhses. Similarly, the Victory Holding documents that Al Huhs prepared reflect *Belikov's* instructions to deliver title to the property. These documents were prepared for Belikov's signature and on his behalf. (Exs. 90, 91, 93).

The Huhses' reading of the phrase "on behalf of" would destroy the protection of the rule. If, as the Huhses contend, "on behalf of" were viewed from the standpoint of the lawyer receiving the gift, then the protection of the Rule would be illusory. For example, in the most common RPC 1.8(c) scenario, will drafting,[77] offending lawyers would be able to sidestep liability by arguing, paradoxically, that they were acting on their own behalf and protecting their own interests, as opposed to their clients' interests, in writing themselves into their clients' wills. That is not a defense, but a violation of the Rule. It is precisely the type of self-interested conduct that RPC 1.8(c) prohibits, especially where, as here, no other lawyer was involved in the gift transaction. To accept the Huhses' argument suggests that the gift is being made at the behest of the lawyer, not the client, which would run afoul of RPC 1.8(c)'s companion provision prohibiting gift solicitation.[78]

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[76] *Sinclair v. Fleischman*, 54 Wn. App. 204, 207, 773 P.2d 101 (1989).

[77] Tom Andrews, Rob Aronson, Mark Fucile & Art Lachman, *The Law of Lawyering in Washington*, at 7-57 (2012).

[78] RPC 1.8(c) states: "A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, ..."

### 3. The Gift Instruments Al Huhs Drafted Fall Squarely Within the Language of RPC 1.8(c).

The Huhses parse the language of RPC 1.8(c) further by arguing that only the drafting of a gift *conveyance* document—"an instrument *giving* the lawyer or a person related to the lawyer any substantial gift.... " —is prohibited by the Rule. RPC 1.8(c) (emphasis added). (Appellants' Br. at 43-44). Pointing principally to the Declaration of Gift (Ex. 91), the Huhses argue that Al Huhs did not draft any conveyance documents. (*Id.*). The Huhses' argument is wrong, both legally and factually.

It is beyond argument that lawyers violate RPC 1.8(c) by drafting wills for clients in which the lawyer or lawyer's family member is a substantial beneficiary.[79] But wills themselves are not typically conveyance documents. A will may be revoked before the testator's death. Further, title to bequeathed personal property does not pass directly via the will itself, but instead passes through the personal representative.[80] But wills play in important role by documenting an essential element of an enforceable gift—donative intent.[81]

The Washington Supreme Court has rejected the Huhses' argument, finding that a lawyer violated RPC 1.8(c) by drafting a client's will that included the lawyer as a beneficiary, regardless of whether any

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[79] *In re the Discipline Proceedings Against Gillingham*, 126 Wn.2d 454, 465, 896 P.2d 656 (1995).

[80] *City of Bellevue v. Cashier's Check for $51,000.00 & $1,130.00 in U.S. Currency*, 70 Wn. App. 697, 702, 855 P.2d 330 (1993).

[81] *Estate of Lennon v. Lennon*, 108 Wn. App. 167, 181, 29 P.3d 1258 (2001).

property transfer actually occurred.[82] The same holds true for the Declaration of Gift. It manifests donative intent.[83] That is why the Huhses relied on the Declaration of Gift on summary judgment to try to prove that the gift was enforceable and not subject to rescission. (CP 12-14, 27-30).[84] As a matter of public policy, if Al Huhs's drafting of the Declaration of Gift is meaningless, then RPC 1.8(c) will be inapplicable to the most commonplace instrument—a client's last will and testament. Further, the Huhses' conveyance argument conflicts with the plain language of Comment 7 of Rule 1.8, which provides that the rule applies to any type of "legal instrument, *such as* a will or conveyance." (Emphasis added). These two examples are illustrative not exhaustive.

The Huhses' argument is also factually misplaced because the trial court found that Al Huhs also drafted conveyance documents, namely the operating agreement and subsequent transfer document for the limited liability company (Victory Holding[85]) which held title to Suncadia. The Huhses now deny that Al Huhs drafted one of these documents, namely the missing transfer document, but ignore their affirmative testimony to

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[82] *Gillingham,* 126 Wn.2d at 466-67 (lawyer would have inherited 20 percent of testator's estate).

[83] The Declaration states, "In consideration of love affection, and my sincere appreciation for the warm and enduring relationship between our families, I have instructed: . . . My financial brokers at Smith Barney . . . to transfer and give to you $1,500,000 to purchase a home located at 57 Blackberry Court at Suncadia in Cle Elum Washington 98982." (Ex. 91).

[84] *See also* the trial court's order denying defendants' second summary judgment motion (CP 514) ("It is argued that the gifts were made prior to the document being created. That distinction is meaningless. ***The Gift document was argued previously as the critical document proving the intent to gift.***") (emphasis added).

[85] This is an abbreviated name of the entity, used by the trial court. The full name of the entity is Victory Real Estate Holdings, LLC. (Ex. 93, at pg. 1).

the contrary (Appellants' Br. at 43; CP 1859-860, Conclusions 77, 78). In a March 6, 2007 email Al Huhs described for Belikov the transfer plan:

> Nikolay,
>
> Please execute the signature page of the attached Operating Agreement for Victory Real Estate Holdings L.L.C., and then fax the executed signature page to Maire at the Amerititle. The fax number is 509-674-6812.
>
> Because of the last minute technicalities at Smith Barney, we will have to handle the transfer of Suncadia in the same manner as we have Mezzaluna. When we return to Costa Rica in April, ***we will have you execute an assignment of your interest in Suncadia to the Huhs family, and we will then modify the Operating Agreement, changing the Members*** and recognizing your gift and access to the property.

(Ex. 92) (emphasis added).

At trial Al Huhs acknowledged Ex. 92 (RP 6/3/14 135:10-136:2), confirmed the transfer plan (*id.,* 134:13-135:5), contended that "we [the Huhses] had such a document" but can't find it (*id.,* 137:25 to 138:14), that he, as a lawyer, would have had Belikov sign it (*id.*, 139:10-19), and that he does not recall whether he drafted the transfer document, but he would have "done something." (*Id.,* 139:20-140:3). The Huhses assume, incorrectly, that RPC 1.8(c) only applies if he drafts *all* documents conveying a gift, but even assuming *arguendo* that the drafting of the missing transfer document were required, the Huhses' contention that, "[a]t most, Al Huhs testified he did not recall how the transfer was documented. . . ." (Appellants' Br. at 43) is inaccurate.

On appeal, the Huhses rely on Al Huhs's professed inability to recall all of the details of the transaction in an effort to create an

immaculate transfer. But the trial court's finding that Al Huhs believes he drafted the second missing document is supported by his testimony, as well as the Huhses' admission in their first summary judgment motion that the gift was completed in this manner. (CP 12-14, 29).

### G. The Trial Court Correctly Ordered the Remedy of Rescission.

The Huhses challenge the court's rescission remedy by arguing that if Al Huhs did violate RPC 1.8(c) by drafting the Suncadia gift documents, he may be subject to professional disciplinary action, but the trial court was required to let him keep the ill-gotten property. (Appellants' Br. at 47-49). Existing case law rejects the Huhses' claim. It has been well-established, both before and after the Washington Supreme Court's July 2014 decision in *LK Operating*, that transactions that violate a public policy expressed in RPC 1.8 are not enforceable.[86] In affirming rescission of a contract found to violate the public policy of RPC 1.8(a), the Washington Supreme Court reaffirmed this well-settled law: "We have previously and repeatedly held that violations of the RPCs or the former Code of Professional Responsibility in the formation of a contract may render the contract unenforceable as violative of public policy."[87]

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[86] *LK Operating*, 181 Wn.2d at 85.

[87] *Id.* citing *Valley/50th Ave. LLC v. Stewart,* 159 Wn.2d 736, 743, 153 P.3d 186 (2007) (*en banc*); *Belli v. Shaw*, 98 Wn.2d 569, 657 P.2d 315 (1983). Similarly, attorney fee agreements that violate the RPCs are against public policy and unenforceable. *See, e.g., Simburg, Ketter, Sheppard & Purdy, LLP v. Olshan,* 109 Wn. App. 436, 445, 33 P.3d 742 (1999); *Rafael Law Grp. PLLC v. Defoor*, 176 Wn. App. 210, 308 P.3d 767 (2013).

### 1. The *LK Operating* Holding, Rescinding a Transaction Under RPC 1.8(a), Applies With Added Force to Violations of RPC 1.8(c).

The *LK Operating* holding that a business transaction between lawyer and client was unenforceable because it violated the public policy set forth in RPC 1.8(a) applies with even greater force here, to violations of RPC 1.8(c). Not all RPCs serve as basis for public policy to void a transaction: RPCs that are merely aspirational, or lack a direct nexus to an attorney-client transaction, would not provide a basis for rescinding a transaction.[88] But RPC 1.8(a) may be the basis for setting aside a transaction because it terms are "mandatory, clear and go directly to the formation and terms of business transactions, including contracts, between attorneys and their clients."[89] RPC 1.8(c) is also mandatory, clear, and goes directly to formation and terms of the transaction, here a gift. RPC 1.8(c) is even clearer and stricter than 1.8(a) because while 1.8(a) addresses conduct—business transactions with a client—that is permissible under certain conditions (e.g., fair and reasonable terms, informed written consent), 1.8(c), with the exception of gifts from a family member, is absolute and unconditional:

> A lawyer shall not . . . prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client.

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[88] *LK Operating*, 181 Wn.2d at 87.
[89] *Id.* at 88.

Unlike other rules governing conflicts of interest, there is no exception for the client's informed consent.[90] The reason is because "the practice is inherently permeated with the dangers of self-dealing and undue influence."[91] That self-dealing was particularly obvious here.

*LK Operating* also found that the concerns about using the RPCs in malpractice cases—that it could encourage attorneys to emphasize their RPC duties to clients over duties owed to the court to avoid malpractice liability—did not apply to using RPC 1.8(a) as a basis for setting aside contracts. The reason is that RPC 1.8(a) is designed to "temper the attorney's zeal in entering business transaction with clients, not representing them."[92] Compliance with RPC 1.8(a) "serves both the client and the integrity of the legal profession, whereas noncompliance has the potential to damage both the client and the profession."[93] The same is true of RPC 1.8(c). It is designed to temper an attorney's zeal in drafting documents to receive a substantial gift from a client. The conflict between serving the client and the courts that could exist if the RPCs were used in malpractice cases is likewise absent in RPC 1.8(c) cases. Compliance with 1.8(c) serves both the client and the integrity of the profession, whereas non-compliance damages both.

The Huhses' contrary assertions based on their interpretations of bare preamble language and commentary to the RPCs ignore the decades

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[90] *Gillingham*, 126 Wn.2d at 467.
[91] *Id.*
[92] *LK Operating*, 181 Wn.2d at 91.
[93] *Id.* at 91-92.

of Washington case law that have since addressed those concerns and others in determining the proper role of the RPCs outside of disciplinary proceedings, in regular law decisions. *Hizey v. Carpenter* decided that the RPCs do not set the standard of care in attorney malpractice actions.[94] As the Washington Supreme court stated in *LK Operating*, that is a different issue from whether the RPCs can be used to decline enforcing a transaction that offends public policy:

> By its own terms, *Hizey* is not controlling here: 'We realize courts have relied on the [former Code of Professional Responsibility] and RPC for reasons other than to find malpractice liability, and our holding today does not alter or affect such use.' *Id.* at 264, 830 P.2d 646. The RPCs do not set the professional standard of care applicable in a legal malpractice action, but the professional standard of care applicable in a legal malpractice action also does not set the standard for the public policy exception to enforceability applicable in a contract action.

*LK Operating*, 181 Wn.2d at 90.

The Huhses' other citation, to Comment 6 to RPC 1.8, is likewise out of context, stating that a lawyer may *accept* a substantial gift from a client if it meets "general standards of fairness" and is voidable under the "doctrine of undue influence." That is a very different issue from a lawyer *drafting* the documents for a substantial client gift to the lawyer, which RPC 1.8(c) expressly and unconditionally prohibits. *Estate of Marks*,[95] lays the Huhses' theory to rest by affirming a decision that found no undue influence in making a will, but invalidated portions of that will that

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[94] *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992).
[95] *Estate of Marks*, 91 Wn. App. 325, 957 P.2d 235 (1998).

benefitted the will drafters and their charitable organizations, because the non-attorney drafters engaged in the unauthorized practice of law, and, held to the standards of an attorney, violated RPC 1.8(c).[96] Other jurisdictions have reached the same result—gift transactions in violation of RPC 1.8(c) are unenforceable, and the offending attorney must return the gifted property.[97]

### 2. RPC 1.8(a) Saving Criteria Provide No Help to the Huhses.

*LK Operating* made clear that a violation of RPC 1.8(a) presumptively, although not automatically, establishes that the transaction violates public policy and is unenforceable.[98] If a violation is established, the burden shifts to the attorney to prove that the resulting transaction does not contravene the public policy behind RPC 1.8(a) by showing that there was no undue influence, that the lawyer gave the same advice as a disinterested attorney would have given, and the client would have received no greater benefit if the client had dealt with a stranger. [99]

The saving criteria for RPC 1.8(a) do not apply to a violation of the unconditional prohibition in RPC 1.8(c). As the trial court correctly held, "RPC 1.8(a) and (c) were intended to address different concerns." (CP

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[96] *Id.* at 335-36.

[97] *Shields v. Texas Scottish Rite Hosp. for Crippled Children*, 11 S.W.3d 457, 459-60 (Tex. App. 2000) ($2,000,000 gift transaction void as a matter of public policy and not enforced when an attorney violated Texas's equivalent rule); *Olson v. Estate of Watson*, 52 S.W.3d 865, 870 (Tex. App. 2001) (affirming summary judgment that declared void as a matter of public policy a will drafted by a lawyer that conveyed his client's house and other property to him.).

[98] *LK Operating*, 181 Wn.2d at 88.

[99] *LK Operating*, 181 Wn.2d at 89.

1861, Conclusion 83). Unlike RPC 1.8(a), RPC 1.8(c) does not contain an exception for informed consent.[100] The Washington Supreme Court views the practice of attorneys drafting gift documents in such circumstances "with extreme censure."[101] "[I] is an activity of which we disapprove, in which we believe no attorney should engage, and which should not occur in the future."[102]

Even assuming *arguendo* that such an inquiry in an RPC 1.8(c) case is permissible, it would be the attorney's burden to prove.[103] Al Huhs, however, admits that no other lawyer was involved in the gift transaction and that he did not advise Belikov to seek the advice of independent counsel. (CP 1841, Finding 12; RP 6/3/14 126:8-22).[104] As a result, he cannot meet his burden. The Suncadia gift collides head-on with the public policy prohibiting lawyers from drafting such gift documents. "If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance the client should have the detached advice that another lawyer can provide."[105] It is precisely this type of sequestering of the client and taking the client's property that rests at the heart of the public policy of RPC 1.8(c).

Wider examination of the other circumstances of this gift confirms this conclusion. Suncadia was a very large gift ($1.5 million) (CP 1840,

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[100] *Gillingham*, 126 Wn.2d at 467.
[101] *Gillingham*, 126 Wn.2d at 469.
[102] *Id.*
[103] *LK Operating*, 181 Wn.2d at 89.
[104] RPC 1.8, Comment 7.
[105] RPC 1.8, Comment 7.

Finding 12), was Maryann Huhs's, not Nikolay Belikov's idea (*id.*), and Belikov made the gift out of embarrassment. (CP 1859, Conclusion 76). The gift was induced by the Huhs's false claims of poverty— (CP 1852, Finding 54; Exs. 103, 123, 126) and the court found it "disturbing that this gift was made after Maryann Huhs began issuing R-Amtech dividends to herself without credible board authorization." (CP 1861, Conclusion 83, n.48, Exs. 226 at 2, 6, 258 at 3, 7).

Finally, the Huhses' irrelevant argument that Al Huhses did not solicit the Suncadia gift can be quickly dismissed. RPC 1.8(c) is written in the disjunctive: a lawyer may not solicit a gift from a client *or* draft gift documents for a substantial gift from the client to the lawyer or a person closely related to the lawyer. Either one standing alone constitutes a violation of the rule.[106] No court has held that an offending lawyer must both solicit and draft to violate the rule. Here, the trial court found that Al Huhs violated RPC 1.8(c) by drafting self-interested gift documents. (CP 1096-98, 1859-60, Conclusions 76-80). As a result, the trial court did not have to decide whether his wife Maryann Huhs's solicitation of the gift (CP 921) should be imputed to Al Huhs.

## H. The Trial Court Correctly Concluded That the Rescission of a Void Transfer Is Not Subject to the Statute of Limitations.

The trial court correctly concluded that Belikov's claims are not time-barred. (CP 1860, Conclusion 79). The Huhses argue that liability for a violation of the RPCs must be rooted in a tort or other civil cause of

[106] *See, e.g., In re the Discipline Proceedings Against Gillingham*, 126 Wn.2d 462–63.

action for undue influence, and consequently, they contend, a violation of RPC 1.8(c) is subject to the three-year statute of limitations applicable to torts such as conversion and breach of fiduciary duty. (Appellants' Br. at 49). The gift instruments were drafted in 2007 (Exs. 91, 93), more than three years before suit was filed in July 2012. (CP 199).

The Huhses' argument fails because, as the trial court properly held, and Washington case law confirms, RPC 1.8 may be the basis for a remedy that is independent of any related civil liability.[107] As previously discussed, Washington courts have repeatedly held that contracts that violate the public policy expressed in the RPCs are unenforceable.[108]

The trial court's ruling was based on and is also consistent with the holding in *Ocean Shores Park* and other cases applying the time-tested rule that agreements unenforceable as against public policy are void and are not subject to the statute of limitations. (CP 1860, Conclusion 79). *Ocean Shores Park* reversed a summary judgment order in favor of an attorney's widow based on alleged unethical conduct by the attorney under RPC 1.8(a) in obtaining shares in a corporation that owned real estate contributed by the client. The unethical conduct allegedly occurred eight years before the suit was filed.[109] The Court held that the statute of limitations did not apply:

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[107] *See, e.g., LK Operating,* 181 Wn.2d at 93; *In re Corporate Dissolution of Ocean Shores Park, Inc.*, 132 Wn. App. 903, 134 P.3d 1188 (2006), *rev. denied*, 159 Wn.2d 1009, 154 P.3d 918 (2007).

[108] *See, supra*, Section IV.G; *see also* n.87.

[109] The lawyer formed the corporation in 1993, and sent stock shares to client in March 1994, informing the client that he had issued an equal amount of shares to himself (lawyer) and his wife. *Ocean Shores Park*, 132 Wn. App. at 908. The lawsuit was filed in

> **The statute of limitations does not apply where an act or instrument is void at its inception**. *Colman v. Colman*, 25 Wn.2d 606, 611, 171 P.2d 691 (1946); *See*, *Marley v. Dep't of Labor & Indus.*, 125 Wash.2d 533, 538, 886 P.2d 189 (1994). The issuance of corporate shares to the Sweets is void as a matter of public policy if Sweet behaved unethically toward his clients. *See*, *Danzig*, 79 Wash.App. at 616-17, 904 P.2d 312.[110]

Other cases agree. Contracts that violate public policy are void.[111] And the statute of limitations does not reach void contracts or transactions.[112] The statute of limitations "does not make an agreement that was void at its inception valid by the mere passage of time."[113] Likewise, the statute of limitations cannot through the mere passage of time cleanse and make valid a repugnant violation of public policy set forth in the RPCs. The trial court's ruling is thus consistent with established law in Washington and elsewhere. It is also based on sound policy, as discussed in *Gillingham*.[114]

On this issue, the Huhses rely on inapposite authority. They again cite to Comment 6 to RPC 1.8(c), which has no bearing on the lawyer's drafting of the gift documents, which is unconditionally prohibited. The

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Grays Harbor Superior Court in 2002, as is reflected in the first two digits of the case number, 02-2-01024-1. *Corp. Diss. of Ocean Shores Park, Inc., et al. v. Rawson-Sweet*, Grays Harbor County Superior Court Case No. 02-2-01024-1; *see also* Washington Courts, "Court case number format," *https://aoc.custhelp.com/app/answers/detail/a_id/309.*

[110] *Ocean Shores Park*, 132 Wn. App. at 913 (emphasis added). The statute of limitations was not an issue in *LK Operating.*

[111] *Scott v. Cingular Wireless*, 160 Wn.2d 843, 851, 161 P.3d 1000 (2007); *Fluke Corp. v. Hartford Accident & Idem. Co.*, 102 Wn. App. 237, 245, 7 P.3d 825 (2000).

[112] *Bloomfield v. Bloomfield,* 281 A.D.2d 301, 304, 723 N.Y.S.2d 143 (2001), *rev'd on other grounds, 97* N.Y.2d 188 (Ct. App. 2001) ("The Statute of Limitations does not apply in the case of an agreement void on its face."); *Thompson v. Ebbert*, 160 P.3d 754, 757 (Idaho 2007) ("Because the lease agreement was void ab initio, it could be challenged at any time and statute of limitations did not bar action challenging it").

[113] *Riverside Syndicate, Inc. v. Munroe*, 882 N.E.2d 875, 878 (NY 2008).

[114] *Gillingham,* 126 Wn.2d at 463 n.7, 468.

Huhses also quote *Burns v. McClinton.*[115] But that case involved neither RPC 1.8 nor even a lawyer. It was a case against an accountant for breach of an oral contract for overcharging, and the client unsuccessfully relied upon the continuing representation rule and discovery rule to argue that he should receive a rebate for six years of fees, instead of three years.[116] On appeal he argued in the alternative, that the fee increases were "voidable" and thus not subject to the statute of limitations, but he cited no authority and this Court rejected his theory for that reason.[117]

As in *Burns*, the Huhses have no authority supporting their argument that Al Huhs's egregious violations of RPC 1.8(c) are made valid through the passage of time. Their request to retain the Suncadia property obtained in violation of the strong public policy expressed in RPC 1.8(c) should be rejected.

## I. The Award of Attorneys' Fees and Costs Was Within the Trial Court's Discretion.

The Huhses argue that the trial court (1) erred in awarding attorneys' fees and costs and (2) abused its discretion in calculating the amount to award. Neither claim has any merit. Washington recognizes a number of exceptions to the no-attorney-fees rule, including equitable exceptions.[118] The power to award attorney fees for equitable exceptions

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[115] *Burns v. McClinton*, 135 Wn. App. 285, 301, 143 P.3d 360 (2006).

[116] *Burns*, 135 Wn. App. at 293.

[117] *Burns*, 135 Wn. App. at 301 ("Burns cites no authority for the proposition that voidability trumps the statute of limitations in a fee dispute, and we therefore reject that argument.").

[118] *Hsu Ying Li v. Tang*, 87 Wn.2d 796, 798, 557 P.2d 342, 344 (1976) (award of attorneys' fees to prevailing plaintiff in a partnership accounting and dissolution action

"springs from [courts] inherent equitable powers, (and) [courts] are at liberty to set the boundaries of the exercise of that power."[119]

One recognized equitable ground for awarding attorneys' fees is a successful claim for breach of fiduciary duty.[120] An award of attorneys' fees is especially appropriate when the fiduciary engages in egregious and persistent violations of his or her fiduciary duties.[121] An innocent party is entitled to his fees if the conduct constituting a breach of fiduciary duties is "tantamount to constructive fraud."[122]

As demonstrated above, the Court found that the Huhses not only breached their fiduciary duties but also engaged in a persistent pattern of willful, bad faith, fraudulent conduct using lies and falsified corporate documents to try to dupe Belikov (and the trial court). (CP 1858-59, Conclusion 75). The Huhses further harmed Belikov by causing him to spend large amounts of money in attorneys' fees and costs to uncover and stop their fraudulent conduct and to regain the company, its assets, and its technology that they stole. The Huhses' litigious conduct, including three separate summary judgment motions on R-Amtech ownership (CP 1-26; CP 256-283; CP 518-545) exacerbated the harm.

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was appropriate, where defendant was guilty of negligent breach of his fiduciary duty to plaintiff, which was tantamount to constructive fraud).

[119] *Id., quoting Weiss v. Bruno*, 83 Wn.2d 911, 914, 523 P.2d 915 (1974).

[120] *Green v. McAllister*, 103 Wn. App. 452, 468, 14 P.3d 795 (2000); s*ee also, Horne v. Aune,* 130 Wn. App. 183, 121 P.3d 1227 (2005); David K. DeWolf and Keller W. Allen, 16 Wash. Prac., Tort Law And Practice § 6:21 (4th ed.)

[121] *See Simpson v. Thorslund,* 151 Wn. App. 276, 288, 211 P.3d 469 (2009) (de facto partner's conduct in diverting company funds to his own use was an egregious and persistent violation of his fiduciary duty to his partner sufficient to support award of attorney fees).

[122] *Green*, 103 Wn. App. at 468.

The Huhses' argument that an award of attorneys' fees in a breach of fiduciary duty case is not "mandatory" misses the point. Courts have the discretion to award attorneys' fees in cases involving breach of fiduciary duty,[123] and Judge Halpert properly exercised that discretion. The Huhses' other argument, that attorneys' fees are to be awarded only when parties other than the litigant are benefitted, improperly conflates breach of fiduciary duty with the common-fund doctrine, and is directly contrary to Washington law.[124]

## J. The Amount of Attorneys' Fees and Costs Awarded Was Proper.

The Huhses, without a single record citation or billing description, mischaracterize the record in describing how fees covered by the award—for breach of fiduciary duty—were calculated. Specifically, the Huhses state that Belikov applied and the trial court accepted a blanket 30% reduction as the proper measure of recoverable fees and that Belikov did not remove billing entries that related to claims other than fiduciary duty. (Appellants' Br. at 52-53). In fact, Belikov's fee application included detailed billing and first removed billing entries that related to the prosecution of the one unsuccessful claim and claims other than fiduciary duty. (CP 2218, 2231-32, 2307-12). The remaining billing entries were for time spent on covered claims, and mixed billing entries involving time spent on tasks not readily segregable by claim, *e.g.* preparation of trial

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[123] *Horne*, 130 Wn. App. at 201.

[124] *Hsu Ying Li*, 87 Wn.2d at 800 (awarding attorneys' fees for breach of fiduciary duty where no common fund existed).

exhibit lists. (CP 2215-17, 2231-38, 2241-2306). Belikov's attorneys estimated that they spent approximately 30% of their time on average on non-covered claims. (CP 2219-20). Belikov then discounted the mixed billing entries by 30%, and then, in the interests of conservatism, also applied this 30% discount to entries associated with claims that that were exclusively or predominantly covered by the fee award. (CP 2220).

Further, the trial court reduced the amount that Belikov had requested by more than $400,000. (CP 2216, 1277). The Huhses' have not attempted to show, through record citations or examples, that the trial court's determination is improper. The trial court's order awarding Belikov fees and costs of $919,317.25 (CP 1277) should be affirmed.

### K. The Trial Properly Exercised Its Discretion to Release the *Lis Pendens* Filed Against the Suncadia House.

The trial court appropriately exercised its discretion in releasing the post-judgment *lis pendens* the Huhses filed on the Suncadia property. The issue on appeal is considerably narrower than that suggested by the Huhses' legal citations, which concern the general shelf life of a *lis pendens*. (Appellant's Br. at 54-55). The issue on appeal is whether the trial acted within its discretion in *releasing* the *lis pendens*, which the Huhses filed after their motion to stay the judgment was denied for failure to post security adequate to protect Belikov's interests as a judgment creditor. (CP 1264-66, 1663-64). Under RCW 4.28.320, a court, may, in its discretion, cancel a notice of *lis pendens* "at any time after the action shall be settled, discontinued or abated, on application of any person

aggrieved and on good cause shown."[125] The statute is a reflection of long-standing Washington case law recognizing that it is proper to release a *lis pendens* after adjudication at the trial court level, and that the losing party can protect against sale of the property pending appeal by posting a supersedeas bond:

> The appellant further contends that the releasing of the lis pendens was error. In view of the trial court's judgment dismissing the action upon the merits, it was also proper to clear the record of any cloud that the adverse party by its action had produced. The appellant was amply protected by superceding the judgment.[126]

The trial court in this case cancelled the *lis pendens* for good cause, and in so doing acted well within its discretion. The trial court cancelled the Huhses' *lis pendens* (CP 1743-44) after the property was awarded to Belikov after a trial and determination on the merits. (CP 1074-1106). Further, the Huhses filed the *lis pendens* ***after*** their motion to stay enforcement of the judgment was denied. (CP 1264-66; CP 1743-44). The Huhses then attempted to end-run the trial court's ruling and effectively block Belikov's property rights by a filing a *lis pendens* to cloud title. The Huhses could have legitimately protected their claim to the Suncadia property pending appeal by posting adequate security and staying the judgment, but failed to do so. The trial court properly exercised its discretion in releasing the *lis pendens*.

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[125] *Beers .v Ross*, 137 Wn. App. 566, 575, 154 P.3d 277 (2007).
[126] *Cashmere State Bank v. Richardson*, 105 Wash. 105, 109, 177 P. 727 (1919).

## L. In Remanded Cases, the Mere Issuance of an Adverse Decision Does Not Warrant Assignment of a New Judge.

The Huhses' request for a new judge in the event of a remand should be rejected. The standard for obtaining a change of judge is actual bias and prejudice.[127] Ruling against a party or finding that a party lacks credibility establishes neither.[128] There is a presumption that a trial judge acted properly and without bias or prejudice.[129] The party seeking to overcome that presumption "must provide specific facts establishing bias. Judicial findings alone almost never constitute a valid showing of bias."[130] The Huhses base their request entirely on Judge Halpert's judicial findings, including that the Huhses falsified records (something Al Huhs admitted at trial (RP 6/4/14 43:18-55:25, 48:15-59:21; 06/05/14 35:9-39:2)), made false statements, preyed upon their once good friend Nikolay Belikov, and repeatedly lacked credibility. (Appellant's Br. At 55-56, n. 114). The Huhses have not—and cannot—point to any statement from Judge Halpert reflecting bias or indicating that she made up her mind before hearing evidence at trial.[131] To the contrary, in the interests of ensuring a fair trial, Judge Halpert granted the defendants more than their allotted time to present their case after they used up most of their time in cross-examination. (RP 6/4/14 3:23-4:24).

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[127] *In re Davis*, 152 Wn.2d 647, 692, 101 P.3d 1 (2004).
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Application of Borchert*, 57 Wn.2d 719, 722, 359 P.2d 789 (1961) ("For a judge to be biased or prejudiced against a person's cause is to have a preconceived adverse opinion with reference to it, without just grounds or before sufficient knowledge.").

Moreover, were there a remand, retrial before Judge Halpert promotes judicial economy because she is the familiar with this remarkably complex case, the trial of which lasted a month, and involved testimony in Russian[132] and documents translated from Russian (*e.g.*, Exs. 38, 40, 149), extensive pretrial briefing (five summary judgment motions), and hundreds of exhibits (CP 1108-50).

## V. CONCLUSION

For the reasons set forth above, Respondents request that the Judgment be affirmed.

DATED this 15th day of May, 2015.

Respectfully submitted,

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[132] Belikov and two other Russian-speaking witnesses required an interpreter at trial. (RP 5/15/14 AM 212:11-262:1, RP 5/15/14 PM 2:8-35:4, RP 5/21/14 733:13-789:12, RP 5/22/14 796:4-907:15, RP 5/27/14 3:23-59:14, RP 5/28/14 2:6-102:19, RP 5/29/14 4:10-53:14, 6/2/14 143:9-199:13, RP 6/3/14 3:4-66:7).

## CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury according to the laws of the State of Washington that on this date she caused to be served a copy of the foregoing document ***via hand delivery*** on the following:

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DATED this 15th day of May, 2015.

Marcia A. Ripley, Legal Assistant