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CLERK OF COURT
STATE OF WASHINGTON
JULIA M. HARRIS

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

LEVIN & STEIN,

Appellant,

v.

MEADOW VALLEY
CONDOMINIUM OWNERS ASSOCIATION,

Respondent.

BRIEF OF RESPONDENT

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ORIGINAL

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I. INTRODUCTION

Levin & Stein (“L&S”) would have this court believe its lien claim against Meadow Valley Owners Association (“MVOA”) is, was and always will be for the same \$1.6 million the trial court awarded MVOA in the underlying construction defect lawsuit. Contrary to its position on appeal, from October 2006 when L&S sought to summarily foreclose its lien, through trial of this matter in October 2007, L&S consistently claimed \$2.123 million. Until shortly before trial, L&S also claimed pre-judgment interest. L&S’s argument that MVOA is judicially, equitably and collaterally estopped to challenge the \$1.6 million figure cannot be reconciled with its historic position it is entitled to \$2.123 million.

L&S barely mentions in its brief that the \$1.6 million underlying attorney fee award is comprised of two distinct elements, a \$1.1 million lodestar calculation based on 4,000 hours logged by L&S attorneys at the “blended rate” of \$275 per hour, plus a \$500,000 1.45 contingency multiplier. L&S treats these two components as Siamese twins that are inseparable, when the criteria applicable to calculating a lodestar are completely different than the criteria applicable to whether to award a multiplier. L&S argues the novel theory that the trial court was not only authorized

but obliged to award L&S a multiplier as *quantum meruit* compensation.

In its brief, L&S is also very selective in defending the violations of fiduciary duty it committed, as found by the trial court. Remarkably, L&S overlooks entirely some of the most egregious conduct upon which the trial court reduced L&S's *quantum meruit* compensation by \$400,000. The omitted conduct includes:

- L&S refusal to ever adopt MVOA's litigation goals.
- Constant pressure on MVOA to settle the case for less than its value.
- Regular covert contact with the defense, insurance coverage counsel, and the mediator.
- Withholding significant insurance coverage and settlement information from MVOA.
- Refusing to abide MVOA's instructions, written or verbal.

The arguments L&S does devote to defending its conduct amount to "there was conflicting evidence whether the conduct occurred," "the conduct did not proximately cause damage," "the trial court did not adequately quantify how much damage each specific breach caused," and "the trial court punished us twice for the same conduct." Since the trial court would have been well within its discretion to forfeit 100% of L&S's compensation, its arguments avail it nothing.

Finally, L&S challenges the trial court's award of the \$492,000 attorney fees MVOA incurred defending L&S's attorney lien foreclosure. L&S claims it, not MVOA, is the prevailing party. L&S's relative "success" must be measured not only against the \$2.213 million it claimed throughout the litigation, but also against its refusal to acknowledge the nature and extent of its fiduciary violations, and against the amount MVOA was willing to pay to resolve this dispute short of litigation. As the trial court found, MVOA was the prevailing party "by any measure of how that might be determined" (CP 2382). The trial court summarized the salient issues of the case in its order fixing the amount of attorney fees awarded to MVOA (CP 2834):

This extraordinarily expensive and sad case that has left MVOA without the necessary funds to repair their homes, and the accumulation of hefty legal fees did not have to happen. Instead of pursuing the client's litigation goal, Levin and Stein instead pursued their own agenda and a disposition that was woefully short of achieving the necessary repair funding. Simultaneously, Levin and Stein ran up an outlandish number of attorney hours (5,000 as Mr. Levin testified) at inflated rates and filed an attorney lien reaching \$2.1 million for a case that never went to trial and concluded with covenant judgment that denied MVOA their litigation objective.

In proceeding as they did during their representation of MVOA, Levin and Stein violated a number of Rules of Professional Conduct leading to serious breaches

of fiduciary duties. The nature and extent of those fiduciary failures that earned Levin and Stein a \$400,000 forfeiture of fees is well documented in the trial evidence and the detailed Findings of Fact and Conclusions of Law previously entered. Had Levin and Stein tailored their practices to accomplish the client's goal rather than often working against them, the fiduciary violations might never have occurred, the buildings would have been repaired years ago and these large fees accrued by MVOA would have been avoided (CP 2839-40).

II. COUNTER-STATEMENT OF THE CASE

In its brief, L&S omits mention of many of the following facts as found by the trial court¹ and supported by substantial evidence. A finding of fact that is supported by substantial evidence is accepted as a verity on appeal. *Schmidt v. Cornerstone Investments, Inc.*, 115 Wn.2d 148, 169, 795 P.2d 1143 (1990).

A. General background of L&S's law practice.

L&S specializes in condominium defect litigation (FF 4). Such claims are governed by the Washington Condominium Act ("WCA"). Under the WCA, the developer is all but strictly liable for construction defects, and is also subject to payment of the condominium association's attorney fees incurred to pursue recovery for damages recoverable (RP 10/3, 1060; FF 10).

¹ The trial court's findings of fact and conclusions of law are CP 2212-93. In this brief, citation to a specific finding uses the convention "FF" and the numbered paragraph(s).

RCW 64.34.455. L&S's strategy for managing such cases is to suspend ordinary discovery techniques in favor of an exchange of information by experts from both sides, who develop a joint scope of repair that is priced by contractors under the auspices of an ER 408 Agreement. The repair cost estimates developed by the experts and contractors form the basis of a mediated settlement of the dispute (RP 9/27, 601-02; FF 8). Using this strategy, L&S has settled nearly all of the defect cases it has handled, and its attorneys have only limited trial experience (10/3 RP, 1060; FF 10). Because the cases almost always settle, there is little risk in accepting such cases on a contingent fee basis, and L&S usually earns more than its normal hourly rates (10/9 RP, 1883; FF 11).

B. The MVOA construction defect lawsuit.

In July 2003, MVOA retained L&S to pursue a construction defect lawsuit under a contingent fee agreement (FF 5). The lawsuit commenced in September 2003 (FF 12). MVOA's sole litigation objective was to recover enough to pay for repairs of the all the condominium defects (RP 10/1, 770; FF 42). John Siegel was the L&S attorney with primary responsibility for MVOA's lawsuit until June 2004, when he was removed from the case (FF 12). Mr. Siegel did almost nothing on the case for almost a year, and

then entered into an ER 408 Agreement with the defense to conduct L&S's standard joint expert investigation (FF 13, 19). However, Mr. Siegel did so without first obtaining consent from MVOA's board (Ex. 1007) and without disclosing the Agreement could substantially limit MVOA's opportunity to conduct a thorough investigation (FF 14, 18).² At a meeting to explain the Agreement to the board, Mr. Siegel did not disclose he had already signed it (9/27 RP, 491-93; FF 20), which the trial court found was an attempt to deliberately mislead the board (FF 23). When the board discovered Mr. Siegel's deceit, it voted to discharge him from the case (10/10 RP, 35). L&S replaced him with Justin Sudweeks, another L&S associate (10/8 RP, 1687; FF 24).

Following Mr. Siegel's misconduct, MVOA sought to amend the contingent fee agreement, to provide that any violation of the Rules of Professional Conduct constituted "good cause" for termination, should ethical misconduct repeat in the future (Exs. 95,

² Judge McCarthy found L&S's insistence on using the ER 408 mediation/settlement technique clashed with MVOA's litigation goal of recovering enough to make all repairs, and was the root cause of ongoing discord that ultimately led to the discharge of L&S in February 2006 (FF 27, 116). Judge McCarthy also found the curtailed investigation conducted in reliance on the ER 408 Agreement ended up limiting the property damage MVOA was ultimately able to prove in the subsequent insurance coverage trial (FF 25).

104; FF 37). Beyond a recitation in the agreement itself, L&S never advised MVOA of the advisability of independent counsel to negotiate the terms of the amended agreement. The amended agreement, signed in July 2004 (Ex. 104), contains terms more advantageous to L&S than the original agreement (FF 37-38). For example, the amended agreement purports to waive MVOA's claims based on Mr. Siegel's misconduct in signing the ER 408 Agreement without authorization (FF 203). The amended agreement also violates the Rules of Professional Conduct in several respects, including:

- authorizing fee splitting among different firms, disproportionate to work performed, without obtaining MVOA's consent (FF 202);
- asserting L&S's entitlement to its contingent fee even if L&S voluntarily withdrew (FF 204);
- asserting L&S's entitlement to its contingent fee for 90 days following termination even if termination occurred before substantial performance (FF 205); and
- asserting entitlement to immediate repayment of costs if termination was "without cause" but deferring repayment of costs if termination was "with cause" (FF 206).

By May 2004, before the defense investigation had even commenced, L&S represented to MVOA that the amount necessary to repair the construction defects was \$3 million, and that the defendants had \$9 million of available insurance to cover the repair

cost (10/11 RP, 16-17; FF 28-30, 48). As the lawsuit progressed, additional damage was discovered, which increased the estimated repair cost by at least \$1 million (10/15 RP, 2402; FF 32). L&S consistently recommended to MVOA settlement at \$3 million, despite escalating repair estimates (10/10 RP, 58-59; FF 33, 35-36, 86, 105, 119, 121, 122, 148, 216), even after L&S knew MVOA's litigation goal was to recover enough to pay for all necessary repairs (10/15 RP, 2446; FF 42-44, 122).

Despite assuring MVOA in May 2004 the available insurance was \$9 million (10/10 RP, 16; FF 48), L&S had not undertaken any analysis of the coverage, and in fact had not even obtained the insurance policies in discovery (10/8 RP, 1726; FF 49). When L&S finally undertook a coverage analysis in March 2005, 18 months after the lawsuit was filed, it concluded the insurance coverage was not adequate (Ex. 1246; FF 111). However, L&S never conveyed this analysis to MVOA (10/15 RP, 2515-16; FF 110).

MVOA made clear it wanted to be informed of and copied on all communications L&S had with anyone involved in the case, particularly communications related to settlement developments (10/15 RP, 2430; FF 80). L&S repeatedly failed to provide this information to MVOA, and in some cases deliberately withheld it.

There were three mediation sessions during the construction defect lawsuit (FF 35). Prior to the first mediation in October 2004, L&S met with attorneys for the defense to coordinate a “mediation strategy” at which settlement dollar amounts were discussed. However, L&S did not obtain or even seek MVOA’s consent before meeting with the defense, and afterwards did not advise MVOA the meeting had occurred (10/1 RP, 773-80; FF 63).

Prior to the second mediation in January 2005, L&S retained insurance attorney Rick Beal to consult on the case without informing MVOA it intended to do so (9/26 RP, 400; FF 81-82, 84). At L&S’s request, Mr. Beal attended a portion of the second mediation, which was MVOA’s first and only knowledge of his involvement (10/15 RP, 2479-81; FF 83-84). L&S did not tell MVOA Mr. Beal continued to consult with L&S for several months after the second mediation, and did not share correspondence exchanged between L&S and Mr. Beal with MVOA (Ex. 275; 10/15 RP, 2483-84; FF 84, 86). L&S also failed to share with MVOA several substantive letters exchanged with attorneys for the defendants and their insurers (Exs. 282, 1237, 1239; 10/15 RP, 2503, 2512; FF 100).

In March 2005, L&S cooperated with the defense to schedule the third mediation, without informing MVOA it had done so. MVOA rejected the idea of a third mediation, since the first two had failed to produce any settlement offer from the defense (Ex. 287; 10/15 RP, 2505; FF 107). After repeated efforts to pressure MVOA to accept another mediation failed (Exs. 287-88, 295; FF 107), L&S informed the defense, causing one of the defendants to file a motion to compel another mediation. L&S agreed to the mediation date requested in the motion ten days prior to the trial court's order (Exs. 328, 1100). Other circumstances suggest L&S conspired with the defense to force MVOA to participate in the third mediation (10/15 RP, 2520; FF 108).

In February 2005, L&S wrote to the mediator suggesting the settlement value of the case was \$3-4 million if the insurance was adequate, but acknowledged it probably was not (Ex. 1235). L&S admitted it did not copy MVOA on the correspondence to the mediator (9/26 RP, 439). L&S knew by this time MVOA's recovery goal was \$4.3 million for repairs (10/15 RP, 2246). To achieve that amount, net of L&S's contingency fee, settlement had to exceed \$6 million. By communicating a lower settlement figure to the

mediator, L&S knowingly undercut its client's litigation goal (FF 105).

In the week preceding the third mediation, Richard Levin of L&S sent four memos to the MVOA board urging settlement at \$3 million (Exs. 336-37, 343-34). Concerned that Mr. Levin would sabotage the mediation, the board voted on April 4, 2005 to exclude Mr. Levin from the mediation and to discharge him from further participation in the case (Ex. 341; 10/15 RP, 2535). However, on numerous subsequent occasions Mr. Levin flagrantly violated this unambiguous instruction (Exs. 425, 426, 428, 432, 446, 1118, 1261, 1265, 1299; FF 134, 139-144).

L&S's purpose in hiring Mr. Beal was to develop a settlement strategy whereby either the insurance carriers would pay \$3 million to settle, or MVOA would accept a "covenant judgment" against the defendants (Ex. 275; FF 86).³ Although L&S began formulating this

³ Covenant judgment is the shorthand term for an agreement whereby a defendant stipulates to entry of judgment for a specific amount in exchange for an assignment to the plaintiff of the defendant's right to pursue claims against his liability insurer(s), plus the plaintiff's covenant not to execute the judgment against any of the defendant's assets besides the assigned insurance rights. If the amount of the stipulated judgment is determined to be reasonable, it becomes the presumptive measure of damage for any bad faith committed by the defendant's insurer(s). See, *Red Oaks Condo. Owners Ass'n v. Sundquist Holdings*, 128 Wn. App. 317, 322, 116 P.3d 404 (2005).

strategy in February 2005 (9/26 RP, 433-34; FF 87, 92), L&S did not discuss it with MVOA. The topic was first presented to MVOA by the mediator during the third mediation in April 2005 (10/15 RP, 2487, 2537-38; FF 95, 99). Mr. Beal had advised L&S the case was not suited to a covenant judgment (10/17 RP, 2915-16; FF 93), and recommended L&S not enter into a covenant judgment without engaging an expert coverage attorney (10/17 RP, 2918-19; FF 94). L&S did not disclose this advice to MVOA (10/15 RP, 2481-82; FF 102-103).

During the third mediation, the mediator communicated his belief the insurance carriers for the defendants were not going to offer adequate cash to satisfy MVOA's settlement goals. Based on L&S's advice, MVOA agreed to accept a covenant judgment for \$7.2 million, which was memorialized by a CR 2A agreement (Ex. 346; 10/15 RP, 2547; FF 124-125). During the week following mediation, Ms. Gillman asked Mr. Sudweeks why L&S was delaying conversion of the CR 2A agreement into a more formal settlement document. Mr. Sudweeks advised her L&S was still trying to negotiate a cash settlement. MVOA had not authorized such negotiations (10/15 RP, 2553-54). MVOA instructed L&S to stop all communications with insurance companies, their attorneys,

or the mediator (Ex. 351; FF 126). L&S later disregarded these written instructions when, without MVOA's consent, it negotiated with insurers for subcontractors to settle their liability under "additional insured" endorsements (10/16 RP, 2596; FF 136).

C. The covenant judgment and reasonableness hearing.

In May 2005, L&S sought a reasonableness determination of the covenant judgment as contemplated under RCW 4.22.060 and the relevant factors of *Chaussee v. Maryland Casualty Co.*, 60 Wn. App. 504, 803 P.2d 1339 (1991). L&S allocated the total \$7.2 million settlement between \$4.8 million for damages and \$2.4 million for attorney fees. L&S never consulted with MVOA on the allocation, which amounted to a 50% attorney fee award (10/15 RP, 2557-60; FF 128). At a hearing in June 2005, Judge White approved the \$4.8 million damage award as reasonable, but reduced the attorney fee award to \$1.6 million (Ex. 1137, pp. 124, 131; FF 129). L&S's allocation potentially cost MVOA \$800,000 of the judgment total (10/15 RP, 2560; FF 130).

St. Paul Insurance Company ("St. Paul"), which along with Admiral Insurance Co. ("Admiral") had intervened to challenge the reasonableness of the settlement, appealed Judge White's ruling on the basis the court lacked authority under RCW 4.22.060 to

approve a settlement in an amount different from the parties' agreement. In a partially published opinion, this court affirmed Judge White's reasonableness determination. *Meadow Valley Owners Assoc. v. St. Paul Fire & Marine Ins. Co.*, 137 Wn. App. 810, 156 P.3d 240 (2007).

In arriving at \$1.6 million as a reasonable settlement of the defendant's liability for attorney fees, Judge White reviewed the billing records maintained by L&S (Ex. 161), which MVOA had requested but L&S admitted it had declined to provide to MVOA (Ex. 74, FF 131).⁴ L&S recorded 4,223 hours of attorney time on the case, which it voluntarily reduced to 4,000 hours at the "blended rate" of \$275 per hour for all attorneys, for a lodestar fee of \$1.1 million (CP 2940-41). Judge White then applied a 1.45 multiplier to obtain a total fee of \$1.6 million (CP 2943; FF 131-1320). During the reasonableness hearing, L&S represented the blended rate generated a lodestar total less than the sum of variable hourly rates applied to each attorney (Ex. 1137, p. 41, FF 183). However, since nearly 75% of the hours were billed by junior associates, whose

⁴ Even after its billing records were filed with the court, L&S continued to conceal them from MVOA by providing Ms. Gillman a copy of the legal brief and declaration referring to the attorney fees, but not the records themselves (10/15 RP, 2564). Judge McCarthy found L&S intentionally concealed its time records from MVOA (FF 131).

reasonable billing rate was \$165-200 per hour, this representation was false (FF 183-186, 188-189).

As part of the overall reasonableness determination, Judge White considered the factors under *Chaussee*, including whether any of the defendants had the financial means beyond available insurance coverage to pay the covenant judgment (CP 2936-39). In preparing the reasonableness motion, L&S learned one defendant had \$1.9 million in assets its principals did not want to disclose. Mr. Stein admitted in deposition testimony designated for trial he personally altered the defendant's declaration to state in conclusory terms they did not have the financial means to pay the judgment (Exs. 479, 1271-72; Stein Dep. Designation, pp. 216-20).⁵ When Judge White asked a direct question during the hearing regarding the lack of specificity of the defendant's representation, Mr. Stein had an opportunity to correct the misconception, but instead pointed out the significance that the representation was in a sworn statement as opposed to a verbal representation made in mediation (Ex. 1137, pp. 82-85, 110; FF 187). Although L&S made

⁵ MVOA overlooked that this testimony was designated pursuant to CR 32(a)(2) and not elicited live during trial. In accordance with RAP 9.6(a), MVOA is filing with this brief a supplemental designation of clerk's papers to have the deposition transcript and the deposition designation transmitted to this court

no investigation of the defendants' assets during discovery (10/16 RP, 2613; FF 187), L&S represented to MVOA that the individual defendants had significant personal assets to pay a judgment (FF 79), the exact opposite of the false representation L&S made to Judge White.⁶

D. The insurance coverage litigation.

In April 2005, St. Paul filed an action for declaratory relief regarding the extent of insurance coverage available. On behalf of MVOA, L&S associated with Stafford Frey Cooper ("SFC") to handle the insurance litigation, and agreed to pay SFC on an hourly basis as L&S's sole responsibility and not as a cost MVOA would be obligated to reimburse under the contingent fee agreement (RP

⁶ Judge McCarthy's finding of fact on the interplay between L&S's representations regarding insurance coverage and personal assets of the defendants is telling:

[D]espite frequent and protracted ruminations on the subject of the insurance policies, their exclusions and limitations, and the physical damages versus defects principle, the Court finds that L&S never provided MVOA with a definitive analysis of exactly what insurance coverage existed, and what it would pay for. The Court finds that L&S consistently ameliorated warnings of inadequate insurance coverage to MVOA with contentions that there was separate coverage for attorney's fees; that the individual LLC members were financially flush and would be held liable to pay for damages; that the owned property exclusion did not apply to HCI; and, that the bad faith claim would backfill holes in coverage (FF 79).

9/26, 469; FF 127). In November 2005, seven months after the covenant settlement, L&S continued to pressure MVOA to participate in yet another mediation (10/16 RP, 2604). Convinced L&S would never adopt its litigation strategy, MVOA approached SFC to represent it on a contingent fee basis (FF 147). Once SFC was on board, MVOA notified L&S in February 2006 of their discharge from the case (Ex. 623; 10/16 RP, 2605-09). L&S promptly filed and served a notice of attorney's lien pursuant to RCW 60.40.030 for \$1.632 million (CP 1-2). By this time, L&S had recovered a total of \$285,000 (CP 23; FF 138, 161, 174).

Shortly prior to L&S's discharge, its attorneys participated in a meeting with SFC attorneys and attorneys for St. Paul and Admiral to discuss settlement, as required by the federal court's case scheduling order. After the attorneys for the insurers left the meeting, L&S expressed optimism regarding the insurers' seeming willingness to compromise, but warned SFC not to tell MVOA about this softening position because it would only raise MVOA's expectations and make settlement more difficult.⁷ SFC reported

⁷ It is undisputed the participants to this conversation were L&S attorneys Justin Sudweeks and Leonard Flanagan and SFC attorney Kenneth Hobbs. At trial, Mr. Sudweeks vehemently denied making this statement (RP 10/22, 3290-91). The trial court made a specific credibility finding

L&S's proposed conspiracy to MVOA, which added to the reasons for MVOA's decision to discharge L&S (10/9 RP, 1937-39; FF 146).

The insurance litigation was ultimately resolved in several increments. In July 2006, Admiral paid MVOA \$2.2 million in settlement. SFC held \$1.6 million of this settlement in its trust account against L&S's attorney lien (10/9 RP, 1914, 1943; FF 152). In a published decision, the federal trial court ruled \$1.6 million representing the attorney fee portion of the covenant judgment constituted "costs taxed" covered under the "supplemental payments" provision of St. Paul's policy (Ex. 648; FF153). *St. Paul Fire and Marine Ins. Co. v. Hebert Constr., Inc.* 450 F.Supp.2d 1214 (W.D. Wa. 2006). During trial of the lawsuit in September 2006, an insurance broker who was not a party to the lawsuit paid \$500,000 (10/10 RP, 2007-08; FF 155). At the conclusion of trial, the jury rendered a verdict that \$322,000 of covered property damage occurred during the time St. Paul's policy was in effect (Ex. 652; FF 154). The court also awarded MVOA \$394,000 in attorney fees pursuant to *Olympic Steamship Company Inc. v. Centennial*

Mr. Hobbs' testimony was credible whereas Mr. Sudweeks' testimony was not. The trial court also noted the failure of L&S to call Mr. Flanagan as a witness who could have corroborated Mr. Sudweeks' version of events (FF 146).

Insurance Company, 117 Wn.2d 37, 53, 811 P.2d 673 (1991), plus pre-judgment interest (Ex. 692; FF 156). MVOA's total recovery during SFC's representation was approximately \$5.7 million (FF 160). MVOA paid SFC approximately \$700,000 as attorney fees pursuant to its contingent fee agreement, which represented approximately \$45,000 premium over SFC's hourly billing rates (10/9 RP, 1912; FF 158). MVOA also reimbursed SFC approximately \$87,000 in expert fees and other litigation expenses SFC advanced during the litigation (10/9 RP, 1910; Ex. 656) for a total of approximately \$787,000.

Although both MVOA and St. Paul appealed the federal court judgment, St Paul paid the judgment in May 2007 to avoid accrual of post-judgment interest. As a condition to paying the judgment, St. Paul wanted release of L&S's attorney lien. L&S used the release to leverage MVOA into increasing the amount held in SFC's trust account by \$523,000, to \$2.123 million (10/9 RP, 1913; FF 159).

E. The L&S attorney lien foreclosure.

In October 2006, L&S moved to summarily foreclose its attorney's lien, arguing MVOA was judicially estopped to challenge the \$1.6 million Judge White awarded as attorney fees in the

reasonableness determination. (CP 62-75).⁸ Judge White, who still had jurisdiction over the action, denied L&S's request. He determined L&S had not substantially performed its contingency before being discharged, leaving the remedy of *quantum meruit* as the appropriate method to value L&S's services to MVOA (FF 161, CP 3016-20).

The case was subsequently re-assigned to Judge Harry McCarthy. Shortly before trial, MVOA paid L&S the remainder of the costs L&S had advanced during the construction defect lawsuit, approximately \$86,000 (FF 180). Judge McCarthy conducted a five week trial commencing September 24 and concluding October 24, 2007. Trial was limited to two issues: (1) What is the reasonable value of the services provided by L&S to MVOA on a *quantum meruit* basis? (2) Did L&S breach any of its fiduciary duties to MVOA, and if so, should L&S forfeit any of their fees? (FF 162).⁹

⁸ However, L&S simultaneously filed a petition to enforce its attorney's lien (CP 17-26) where it took the inconsistent position it was entitled to \$2.123 million, representing additional hours L&S had logged after the reasonableness determination, plus a multiplier on those hours, plus pre-judgment interest (CP 22).

⁹ Of the 223 findings of fact Judge McCarthy made, L&S has assigned error to 183 (87%). One of the few findings L&S did not challenge was Judge McCarthy's articulation of the issues to be tried. However, throughout the litigation L&S conducted discovery, filed motions, designated exhibits and proffered testimony on a host of extraneous issues (FF P-S and Z regarding attorney fee award, CP 2846-48, 2855-56).

Judge McCarthy awarded L&S quantum meruit compensation of \$996,350, which he reduced by \$400,000 based on numerous serious breaches of fiduciary duty (FF 223).

After trial and entry of findings and conclusions, Judge McCarthy ruled MVOA was entitled to recover its reasonable attorney fees (CP 2834-41). Judge McCarthy entered findings and conclusions regarding the amount of MVOA's prevailing party attorney fees (CP 2842-75), awarding \$492,074.75 (CP 2870, 2874). L&S timely filed a notice of appeal of the final judgment and Judge McCarthy's findings and conclusions on the merits and regarding attorney fees (CP 2895-2902).

F. Credibility of witnesses.

At the outset of his oral decision, Judge McCarthy outlined the exceptional reconsideration he had devoted to the record following trial, reviewing the testimony of all witnesses at least once, and reading the transcripts of Mr. Levin, Ms. Gillman, both experts, and others, as well as a large number of exhibits, particularly those bearing directly on the two issues of the case (12/12 RP, 4-5). Noting that credibility of witnesses plays an important role in the evaluation of evidence, Judge McCarthy found the testimony of Ms. Gillman, the homeowners, Mr. Hobbs, and

Mr. Beal to be credible (FF 218-219). He found that the L&S attorneys, Mr. Levin, Mr. Stein, Mr. Sudweeks, and Mr. Siegel, were not credible, their testimony being evasive, exaggerated, or frequently following a shifting course that sequentially contradicted both themselves and each other on many of the factual issues (FF 31, 33, 43, 52, 57, 63, 68, 74, 82, 84, 89, 106, 141, 144).

The Court finds that Mr. Levin's testimony was colored by obvious anger, deep acrimony, wounded pride, and a significant financial expectation in the outcome, all of which prompted emotional testimony. Levin's testimony expressed his misguided view that L&S acted ethically throughout their representation of MVOA and are entitled to a fee Levin calculates at more than \$2 million. The Court finds that the credible trial evidence refutes Levin's view convincingly (FF 220).

III. ARGUMENT

A. The principles of judicial, equitable or collateral estoppel have no application to determination of L&S's entitlement to *quantum meruit* compensation.

1. The issue decided in the first proceeding is not the same as the issue decided in the second proceeding.

To invoke either judicial or equitable estoppel, the legal position of a party must be **clearly** inconsistent with the legal position the same party took in an earlier proceeding. *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006)

(judicial estoppel); *In re Marriage of Barber*, 106 Wn. App. 390, 396, 23 P.3d 1106 (2001) (equitable estoppel).¹⁰ Before two positions can be inconsistent, it is axiomatic the legal issue presented must be the **same** in both proceedings. The similarity must be even stronger to invoke collateral estoppel, which requires the two issues must be **identical**. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957 (2004). The three estoppel defenses relied upon by L&S do not apply, because MVOA's entitlement to attorney fees from the construction defect defendants under the WCA is not the same issue as L&S's entitlement to *quantum meruit* compensation from MVOA.

a. The attorney fees Judge White awarded belong to MVOA, not L&S.

The fundamental flaw of L&S's position is its assertion that in the earlier reasonableness proceeding "Judge White awarded **L&S** \$1.6 million in attorney fees." *Opening Brief of Appellant*, p. 32. Instead, Judge White awarded **MVOA** \$1.6 million in attorney fees pursuant to the fee shifting provisions of the WCA. There is no necessary correlation between a **party's** entitlement to attorney

¹⁰ Courts do not favor equitable estoppel, and the party asserting it must prove every element by clear, cogent, and convincing evidence. *In re Marriage of Sanborn*, 55 Wn. App. 124, 129, 777 P.2d 4 (1989).

fees from the adverse party under a fee shifting statute and an **attorney's** entitlement to attorney fees from his client.¹¹

Unless a fee agreement provides otherwise, the right to recover attorney fees from an adverse party belongs to the client, not the attorney. *Luna v. Gillingham*, 57 Wn. App. 575, 581, 789 P.2d 801 (1990). The contingent fee agreement between MVOA and L&S expressly distinguishes between attorney fees the court may award to MVOA (which are included in the definition of "any recovery" to which the contingency percentage applies) and attorney fees payable to L&S.

The Association acknowledges that attorney's fees may be recoverable from Declarant or other defendant, by statute or agreement in connection with this matter. Those fees may be determined by a Court at trial, without regard to the amount of recovery the Association is entitled as damages, and without regard to the amount of attorney's fees payable by the Association to Attorneys pursuant to this Agreement.

Ex. 104, ¶ 5. Because the \$1.6 million attorney fee award belongs to MVOA, not L&S, no principle of estoppel limits the evidence to

¹¹ To illustrate this fact, assume there had never been a dispute between MVOA and L&S, and instead the litigation had been fully resolved by collecting the entire \$6.4 million judgment. Under the parties' contingent fee agreement (Ex. 104), L&S would have been entitled to \$2.133 million (33% of \$6.4 million). If instead, the litigation had been fully resolved by collecting only the \$1.6 million attorney fee portion of the judgment, L&S would have been entitled to \$528,000 (33% of \$1.6 million).

be considered in determining L&S's entitlement to *quantum meruit* compensation.

b. The criteria for awarding a party attorney fees under a fee shifting statute differ from the criteria for awarding an attorney *quantum meruit* compensation.

L&S segregated attorney fee liability from damages liability in requesting a covenant judgment reasonableness determination. Judge White considered the circumstances as they existed at that time. Those circumstances included the fact L&S was working under a contingent fee billing arrangement and had not been terminated. Judge White did not consider L&S's hypothetical entitlement to *quantum meruit* compensation following termination but before fulfillment of its contingent fee contract.

In the later proceeding, L&S sought summary adjudication of its attorney lien. Judge White denied L&S's request to apply judicial estoppel because he recognized several circumstances distinguished the two proceedings.¹² First, he noted:

[T]he amount at stake and the result obtained are critical factors in any determination of the reasonableness of attorney's fees to be charged, whether determined under the attorney's lien statute,

¹² L&S relied exclusively on judicial estoppel and did not advance its alternative theories of equitable estoppel and collateral estoppel before either Judge White or Judge McCarthy. CP 70-73, 687-98, 1671-73

RCW 60.40.030 [incorporating RPC 1.5(a)], or whether determined under RCW 4.24.005.

(CP 3018). Applying this standard, Judge White observed there were unresolved issues in the insurance coverage litigation impacting the amount MVOA might recover (CP 3018-19). Additionally, Judge White noted L&S, as part of its representation, had agreed to pay SFC on an hourly fee basis to represent MVOA in the insurance coverage litigation. SFC's fees, which continued to accrue, constituted an offset against what might otherwise be the reasonable value of L&S's services (CP 3019). Finally, Judge White observed MVOA asserted L&S had breached its fiduciary duties. If proved, those breaches could result in forfeiture or disgorgement of fees otherwise reasonable and earned. Since Judge White had not considered those issues at the time of his earlier reasonableness determination (indeed, many of the issues did not yet exist), judicial estoppel could not apply to foreclose full litigation of those issues.

The only common elements between the earlier covenant judgment reasonableness proceeding and the later *quantum meruit* compensation proceeding were the actual lodestar calculation and application of factors under RPC 1.5(a). However, even those

elements must be considered from the differing legal analysis applicable to the two circumstances.

Where one party is entitled to recover attorney fees from another pursuant to a contract, a statute, or a recognized ground in equity, the requesting party has the burden to segregate between successful and unsuccessful claims, and between those for which there is a right to recover attorney fees and other claims for which there is no such right. The amount awarded must be limited to attorney fees incurred to pursue or defend successful claims for which a right to recover attorney fees exists. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 66, 738 P.2d 665 (1987) (requiring segregation of fees incurred on trade secret claims for which attorney fees were recoverable, from antitrust claims for which attorney fees were not).

Conversely, the reasonableness of what an attorney charges his client does not depend on whether the client is entitled to recover attorney fees from his adversary under some, or all, or none of the legal theories asserted in the litigation. Similarly, litigation expenses routinely advanced by an attorney would obviously be included in an attorney's reasonable compensation, but are often excluded from amounts a party is awarded under fee

shifting statutes. *Nordstrom v. Tampourlos*, 107 Wn.2d 735, 743, 733 P.2d 208 (1987) (disallowing recovery under the CPA of litigation expenses except those meeting the definition of “statutory costs” under RCW 4.84.010).

Even if the trial court had accepted L&S’s judicial estoppel argument for either the \$1.1 million lodestar amount or the \$1.6 million total attorney fee amount Judge White calculated during the covenant judgment reasonableness proceeding, Judge McCarthy would have been within his discretion to reduce that amount by at least \$742,000 representing the \$655,000 time value of SFC’s attorney fees plus \$87,000 in other litigation expenses MVOA incurred (and L&S would have been obligated to pay) to pursue the insurance coverage litigation (10/9 RP, 1910, 1912; Ex. 656; FF 198).¹³ Judicial estoppel also could not apply to breaches of fiduciary duty known to L&S but not disclosed to Judge White during the covenant judgment reasonableness proceeding (FF 183-

¹³ Judge McCarthy employed a more generous (to L&S) methodology where he used Judge White’s \$1.1 million lodestar calculation as a starting point (FF 184), and then made adjustments for unproductive time and duplication of services totaling only \$13,375 (FF 185), plus \$100,000 to reduce L&S’s excessive \$275 “blended rate” (FF 190) to a rate better reflecting the reasonable rates of the timekeepers who performed the vast majority of the work (FF 183, 189), to arrive at a total lodestar award of \$996,350 (FF 189).

189), much less to breaches that had not yet occurred as of the date of Judge White's determination (see, e.g., FF 135, 144, 146).¹⁴ Since judicial and equitable estoppel do not apply, Judge McCarthy properly considered other circumstances either not disclosed to Judge White or not extant during the earlier proceeding.

2. MVOA has not taken any inconsistent position and no court has been misled.

a. **Any positions taken during L&S's representation are not imputable to MVOA.**

L&S cannot impute to MVOA any "inconsistent" positions L&S itself advocated on MVOA's behalf during its representation. L&S, not MVOA, represented to Judge White its fees were reasonable. The relationship between MVOA and L&S was not yet adversarial, and MVOA did not have independent counsel to advise it regarding the reasonableness of L&S's claimed fees. Indeed, L&S refused to provide its billing records to MVOA, despite MVOA's requests to review them (Ex. 74). L&S disclosed its billing records for the first time during the reasonableness process. However, they were not attached to an L&S pleading, but a St. Paul pleading.

¹⁴ At trial, L&S conceded its judicial estoppel argument applied only to calculation of the lodestar and multiplier and not to MVOA's claims for reduction or disgorgement of L&S's compensation based on breach of fiduciary duty, which it characterized as "like a separate case." CP 1663.

L&S provided MVOA the pleading, but not the attached billing records. MVOA never saw the billing records until discovery in this fee dispute (10/15 RP, 2564; FF 131).

In *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 160 P.3d 13 (2007), upon which L&S relies, Carter failed to list as an asset in his bankruptcy proceeding his personal injury claim against Ethan Allen. After the bankruptcy court granted Carter a discharge and closed the case, Carter filed a lawsuit against Ethan Allen. When Carter's bankruptcy trustee, Arkison, learned of the lawsuit, he reopened the bankruptcy and filed a motion in the lawsuit to substitute as the real party in interest. The trial court granted substitution, but also granted Ethan Allen's motion for summary judgment based on judicial estoppel. The Supreme Court reversed, holding that although judicial estoppel would generally apply to bar a claim by the **bankruptcy debtor** who had failed to disclose the existence of the claim in the bankruptcy; judicial estoppel should not apply against the **bankruptcy trustee**, who has a separate identity from the debtor. *Arkison*, 160 Wn.2d at 541.

Like Carter, L&S misrepresented facts upon which Judge White based his reasonableness determination. Like Arkison, L&S's conduct cannot be imputed to MVOA, particularly in a

dispute directly between MVOA and L&S. Applying judicial estoppel would “create a windfall for the party seeking to invoke judicial estoppel.” *Id.* at 540.

b. Positions MVOA took after L&S’s representation ended were consistent.

During the federal insurance coverage litigation, whether L&S’s fees were “reasonable” was never in question. That factual issue had been resolved on its merits by Judge White during a proceeding in which St. Paul had intervened and fully participated. The attorney fee award had been reduced to a final judgment. Accordingly, St. Paul was *collaterally* estopped to deny the reasonableness of L&S’s fees. St. Paul did not seek to re-litigate that issue.¹⁵ The federal court was not misled because the issue of L&S’s claim for *quantum meruit* compensation was simply not an issue in that litigation.

Similarly, the reasonableness of the attorney fees Judge White awarded to MVOA was not an issue considered by this court when St. Paul and Admiral appealed Judge White’s reasonableness determination. The insurers argued the court

¹⁵ Instead, St. Paul litigated the legal issue of whether the attorney fee portion of the judgment was covered under the supplemental payment language of the policy. See, *St. Paul Fire and Marine Ins. Co. v. Hebert Constr., Inc.* 450 F.Supp.2d 1214 (W.D. Wa. 2006).

lacked authority under *Chaussee* and RCW 4.22.060 to approve a settlement in an amount different from the parties' agreement. Neither the parties' briefs nor the court's decision addresses whatsoever Judge White's calculation of attorney fees. *Meadow Valley Owners Assoc. v. St. Paul Fire & Marine Ins. Co.*, 137 Wn. App. 810, 156 P.3d 240 (2007).

Finally, Judge McCarthy was not misled by any position taken before Judge White. The entire record was before Judge McCarthy, including all the briefing, supporting declarations and exhibits, and the transcript of the hearing (Exs. 406, 461, 464, 469-72, 476-77, 481-83, 1137). Judge McCarthy concluded L&S had intentionally misled Judge White regarding the calculation of its lodestar fees, in violation of RPC 3.3 and 8.4 (FF 186). The only jurist misled was Judge White – by L&S, not MVOA.

3. L&S cannot rely on equitable defenses because it has "unclean hands."

L&S concedes judicial estoppel is an equitable doctrine. *Appellant's Brief*, p. 32. As its name implies, equitable estoppel also rests on equitable principles. *Barber*, 106 Wn. App. at 395. At least one element of collateral estoppel establishes its underpinnings in equity – its application must not work an injustice

on the party against whom it is asserted. *Christensen*, 152 Wn.2d at 307. Since the estoppel theories upon which L&S rely are all equitable defenses, other equitable principles surrounding claims and defenses in equity also apply.

It is a basic maxim “he who seeks equity must do equity.”

Vanasse v. Esterman, 147 Wn. 300, 301, 265 P. 738 (1928).

It is a well-known maxim that a person who comes into an equity court must come with clean hands.

* * *

Equity will not interfere on behalf of a party whose conduct in connection with the subject-matter or transaction in litigation has been unconscientious, unjust, or marked by the want of good faith, and will not afford him any remedy.

Income Investors, Inc. v. Shelton, 3 Wn.2d 599, 602, 101 P.2d 973 (1940) “[C]oming into a court of equity and asking relief after willfully concealing, withholding, and falsifying books and records, is certainly not coming in with clean hands. *Id.*

L&S’s multiple and serious breaches of fiduciary duty and its misrepresentations before Judge White constitute “unclean hands” that should bar L&S’s right to invoke the three estoppel defenses it asserts. Judge McCarthy reached this conclusion.

For the reasons set forth above, and given the Court’s findings that L&S has engaged in a longstanding and egregious pattern of inequitable conduct toward its client, MVOA, in the exercise of its discretion, the

court has declined to apply judicial estoppel, as part of its equity powers.

(Conclusion of Law J, CP 2285).

B. Judge McCarthy did not abuse his discretion in making his lodestar calculation.

1. Judge McCarthy's adjustments to Judge White's lodestar calculation.

a. **The blended rate adjustment.**

During the covenant judgment reasonableness hearing, L&S represented to Judge White its blended rate generated a lower lodestar total than the sum of variable hourly rates applied to each attorney (Ex. 1137 at pp. 39-41; FF 183). However, since 75% of the hours were worked by junior associates, whose reasonable rate was between \$165 and \$200 per hour, compared to a reasonable rate of \$350 per hour for Mr. Levin and Mr. Stein, Judge McCarthy determined this representation was false and intentionally misleading (FF 183-184, 186). Instead of recalculating the lodestar entirely, Judge McCarthy chose to use Judge White's \$1.1 million blended rate calculation as a starting point, and reduced that amount by \$100,000 to adjust for the inflated impact of the blended rate calculation (FF 190).¹⁶

¹⁶ Judge McCarthy's methodology was more generous to L&S than a straight math calculation. The 3,000 hours (75% of 4,000) logged by

b. The unproductive time and duplication of services adjustments.

Judge McCarthy further reduced the lodestar calculation by \$10,025 for work done by L&S associates he classified as paralegal in nature. He also reduced the lodestar by \$3,350 for duplication of services (FF 185). Although these reductions amount to only approximately 40-65 hours (depending on the hourly rate applied), Judge McCarthy described literally hundreds of hours billed by L&S he characterized as inefficient, unnecessary, or questionable:

- 198 hours assembling the ER 904 submission;
- 240 hours monitoring the defense investigation, a function Ms. Gillman was also performing;
- Three lawyers attending each of three mediations plus the reasonableness hearing;
- 25 hours for unidentified "document review" between the time the terms of the covenant judgment had been agreed and the time it was approved for entry;
- 76 hours during August 2005 when the only substantive activity was revising the findings and conclusions;
- Multiple instances of billing errors including a single entry by Mr. Levin for 50 hours;
- Suspicion whether L&S's three other associates could staff 15-20 cases pending at the same time while Ms. Ein and Mr. Sudweeks worked virtually full time on the Meadow

junior associates at \$165-200 per hour equals \$495,000-600,000. The remaining 1,000 hours at \$350 per hour equals \$350,000, for a total lodestar between \$\$845,000-950,000, compared to \$1 million under Judge McCarthy's methodology.

Valley case, calling into question whether the 4,000-5,000 hours L&S billed were actually worked (FF 170).

For (1) the blended rate adjustment, and (2) the unproductive time and duplication of services adjustment, Judge McCarthy largely gave L&S the benefit of the doubt. This had the effect of reducing Judge White's \$1.1 million lodestar calculation by only \$113,375, when a reduction of double or triple that amount would have been well within Judge McCarthy's discretion. Judge McCarthy's leniency could be attributed to his deference to the judicial resources already invested by Judge White. As to L&S's compensation request for work performed between Judge White's reasonableness determination and L&S's discharge ("Phase Two"), Judge McCarthy was free to paint on a blank canvas.

2. Judge McCarthy's calculation of L&S's Phase Two lodestar.

Judge McCarthy awarded L&S \$10,000 for approximately 880 hours L&S logged between filing the motion for reasonableness determination in May 2005 and L&S's discharge in February 2006 (FF 200).¹⁷ Judge McCarthy's findings contain

¹⁷ L&S cites FF 200 for the proposition "Judge McCarthy concluded L&S *properly spent* 845 hours in Phase 2." *Appellant's Brief*, p. 38. L&S mischaracterizes this finding. Most of the finding is devoted to simply calculating the total logged hours and assigning them to the timekeepers.

ample support for his decision. He examined all of the billing records (FF 193), as well as the transcript of the reasonableness hearing, finding that there was no mention whatever of a May 31, 2005 “cutoff” date for calculating the lodestar (FF 195). Of 845 total hours L&S logged, approximately 700 were spent on finalizing the reasonableness motion (FF 194).

Finally, Judge McCarthy noted the Phase Two calculation “must take into account the persistent, egregious violations of fiduciary duties committed by Levin & Stein over the course of their representation of MVOA” (FF 200). While L&S characterizes Judge McCarthy’s rationale as punishing the same fiduciary violations twice, Judge McCarthy was within his discretion to decide L&S had forfeited any compensation whatsoever based on its ethical and fiduciary violations. *Erik v. Denver*, 118 Wn.2d 451, 462, 824 P.2d 1207 (1992) (affirming denial of any compensation to attorney who breached fiduciary duty to clients). He chose instead to make a specific \$400,000 reduction from the Phase One calculation and to make only a modest award of compensation for work performed during Phase Two.¹⁸

¹⁸ See also, Conclusion of Law BB (CP 2291):

Judge McCarthy's calculation of the Phase Two lodestar must also be considered in the context of other findings that apply to activities that overlapped during both Phase One and Two. This includes his suspicion L&S billed for work it did not actually perform (FF 170k). As the Supreme Court cautioned in *Nordstrom*:

[T]he determination of what constitutes reasonable attorney fees should not be accomplished solely by reference to the number of hours which the law firm representing the successful plaintiff can bill. In a case such as this one, in which settled case law indicated that an unfair trade name infringement constitutes a Consumer Protection Act violation, there is a great hazard that the lawyers involved will spend undue amounts of time and unnecessary effort to present the case. Therefore, the trial court, instead of merely relying on the billing records of the plaintiff's attorney, should make an independent decision as to what represents a reasonable amount for attorney fees.

Nordstrom, 107 Wn. 2d at 744. Like the *Nordstrom* court, Judge McCarthy found the issues in the construction defect case were well settled (FF 166), with little risk to L&S, since the defendants are strictly liable under the WCA (FF 180). Additionally, from June 2004, L&S openly refused to provide MVOA its billing records because the fee arrangement was contingent (Ex. 74, FF 131).

[T]he Court determines that the provision of untruthful testimony in support of claims for excessive fees was neither unknowing nor negligent. This further supports the Court's determinations in reducing the lodestar and in forfeiting substantial attorney's fees for breach of fiduciary duty.

Under these circumstances, the temptation was great for L&S to record hours in excess of what is reasonable for *quantum meruit* purposes.

C. Judge McCarthy did not abuse his discretion by declining to apply a multiplier.

Judge McCarthy found the net combined Phase One and Two lodestar of \$996,350 “more than adequately compensates L&S for the reasonable value of *all* services provided by their termination” (FF 199, emphasis in original). Judge McCarthy considered whether to permit a multiplier to the lodestar calculation, and allowed both expert testimony and briefing regarding the issue (CP 1686-1718). He concluded as a matter of law he had no authority to award a multiplier in a *quantum meruit* determination (Conclusion of Law P, CP 2287). He also concluded in the alternative, that a multiplier would be inappropriate under the circumstances, where the effect would be to award more than L&S would have earned had it substantially performed its contingency (Conclusion of Law Q, CP 2288).

The primary use of multipliers is in considering an award of attorney fees to a party under a fee shifting statute where the compensation of the plaintiff's attorney is contingent on a

successful outcome and there is a high risk the attorney will receive no compensation. The fundamental reason multipliers are not appropriate in determining *quantum meruit* compensation is the compensation to be paid is not contingent. It is the duty of the court to determine the amount of reasonable compensation the attorney is due. The amount determined is reduced to a judgment the client is obligated to pay.

1. Multipliers in fee shifting cases are awarded in only limited circumstances.

In fee shifting cases, adjustments to the lodestar are considered under two broad categories: the contingent nature of success, and the quality of work performed. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 598, 675 P.2d 193 (1983). As to the quality of work category, the court observed:

This is an extremely limited basis for adjustment, because in virtually every case the quality of work will be reflected in the reasonable hourly rate. A quality adjustment is appropriate only when the representation is unusually good or bad, *taking into account the level of skill normally expected* of an attorney commanding the hourly rate used to compute the "lodestar." [Emphasis in original; citations omitted.]

Bowers, 100 Wn.2d at 599. Based on Judge McCarthy's findings, L&S cannot possibly claim a multiplier based on the quality of its work.

In *Travis v. Wa. Horse Breeders Ass'n., Inc.*, 47 Wn. App. 361, 734 P.2d 956 (1987), *affirmed*, 111 Wn.2d 396, 759 P.2d 418 (1988), the Court of Appeals reversed the trial court's award of a 50% multiplier to reflect the contingent nature of recovery. The Supreme Court quoted with approval the following language from the Court of Appeals' opinion:

The contingency adjustment is designed solely to compensate for the risk that no fee would be recovered. * * *

Not long after undertaking representation of Travis on a contingency basis, Gaines brought Mair in to act as lead trial counsel. Mair's representation was not contingent; Travis agreed to pay him a fixed contract rate of \$100 per hour, \$1,000 per day of trial and costs. To obligate Travis to such a large fixed liability is inconsistent with the claim that the case had little chance of success. As things turned out, Mair's pre-verdict attorney fees and costs amounted to \$63,130.92, a sum Travis would have had to pay if the "enormously risky" case had been decided adversely. Although this court may not decide facts from the evidence presented at trial, it can decide that as a matter of law under these circumstances, the multiplier was unreasonable.

Travis, 111 Wn.2d at 412, *quoting*, *Travis*, 47 Wn. App. at 369.

And in *Pham v. City of Seattle*, 159 Wn.2d 527, 151 P.3d 976 (2007), defendants urged the court, as a matter of public policy, to abandon contingency multipliers altogether, under the reasoning of the U.S. Supreme Court in *City of Burlington v. Dague*, 505 U.S. 557, 559, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992), because in many instances the factors courts weigh in evaluating a multiplier duplicate those already considered in arriving at the lodestar. *Pham*, 159 Wn.2d at 541. The court declined to abandon contingency multipliers altogether, but recognized they should be the exception and not the rule.

While we presume that the lodestar represents a reasonable fee, ***occasionally*** a risk multiplier will be warranted because the lodestar figure does not adequately account for the high risk nature of a case. [Emphasis added.]

Id. at 542.

The foregoing authorities demonstrate multipliers for exceptional quality of work are almost never appropriate (because the presumed quality is already reflected in the hourly rate). Contingency multipliers are only appropriate when there is a high risk ***at the outset of the litigation*** the attorney will receive no

compensation.¹⁹ See, *Banuelos v. TSA Washington, Inc.*, 134 Wn. App. 607, 141 P.3d 652 (2006) (affirming a 50% contingency multiplier limited to the portion of attorney fees incurred prior to a favorable summary judgment ruling). None of those factors applies generally in *quantum meruit* compensation determinations, and they certainly do not apply under the specific facts of this case.

2. Multipliers are not appropriate in calculating *quantum meruit* compensation.

L&S cites no Washington authorities that have awarded a multiplier to a terminated attorney seeking *quantum meruit* compensation. L&S relies on reference in *Bowers* to the guidelines governing award of attorney fees under the Model Rules of Professional Conduct. However, the *Bowers* court noted use of the Model Rule guidelines has been criticized as providing no more than illusory guidance to trial judges in setting reasonable fees.

The fundamental problem with an approach that does no more than assure that the lower courts will consider a plethora of conflicting and at least partially redundant factors is that it provides no analytical framework for their application. It offers no guidance

¹⁹ Even if the criteria applicable to a fee shifting case were applied here, L&S assumed very little risk when it accepted the Meadow Valley case, because the developer is strictly liable under the WCA, attorney fees are recoverable, and the cases almost always settle. L&S usually earns more under its contingent fee agreements than the value of the hours it bills (FF 10-11, 180).

on the relative importance of each factor, whether they are to be applied differently in different contexts, or, indeed, how they are to be applied at all.

Bowers, 100 Wn.2d at 596, quoting, *Copeland v. Marshall*, 641 F.2d 880, 890 (D.C.Cir.1980). The *Bowers* court instead adopted the framework announced in *Lindy Bros. Builders., Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir.1973) that has been discussed above (lodestar calculation followed by any applicable adjustments).

The cases from other jurisdictions cited by L&S do not support its position. *Appellant's Brief*, p. 41.²⁰ In *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 103 F.3d 602 (9th Cir. 1997), the court affirmed an award to a discharged attorney based on a lodestar calculation, reduced by amounts the attorney had already been paid during the course of representation. The court also affirmed denial of a multiplier for

²⁰ L&S did not bring one of the cases cited in its brief, *Petroleum Products*, to the attention of Judge McCarthy (CP 1701-18). The other case, *Hurtunian*, is an unpublished decision. Judge McCarthy concluded it was improper for L&S's expert witness to rely on *Hurtunian* (Conclusions of Law N and O, CP 2286-87). Under GR 14.1(b) it is improper for L&S to cite the case in its brief, since it would be improper to cite under the rules applicable to the issuing court. Ninth Circuit Rule 36-3(c) prohibits citation to unpublished opinions decided prior to January 1, 2007 except under circumstances not applicable here. *Hurtunian* was decided in 2005.

contingent risk of nonpayment, since the attorney had already been paid more than \$800,000 over the course of eight years of representation.

In *Haurtunian v. Racusin*, 120 Fed. Appx. 698 (9th Cir. 2005), the court affirmed denial of a requested multiplier based on the trial court's finding the discharged law firm was billing "on the high end of the scale, suggesting a *de facto* multiplier." *Id.* at 703.

Additionally, the court observed that under Illinois law it applied:

[T]o justify a fee enhancement, the risks assumed by the attorney must be greater than those normally assumed in contingent fee matters and the benefits derived by the client as a result of the efforts of the attorney must be greater than could normally have been expected under the circumstances.

Id.

At best, both cases stand for the proposition that, under the laws those courts applied (federal "common fund" litigation law in *Petroleum Products* and Illinois law under *Haurtunian*), a court has discretion under particular circumstances to award a discharged attorney a multiplier as part of *quantum meruit* compensation. However, even if Washington were to adopt such a rule, those cases demonstrate Judge McCarthy did not abuse his discretion in denying a multiplier.

L&S had the burden at trial to establish its entitlement to a multiplier. *Bowers*, 100 Wn.2d at 598. Judge McCarthy was within his discretion to deny L&S's request.

D. L&S's violations of RPCs and breaches of fiduciary duty warranted further reduction of its compensation.

Judge McCarthy was well within his discretion when he reduced L&S's *quantum meruit* compensation by \$400,000 based on L&S's numerous and serious breaches of fiduciary duty.

1. Mr. Siegal's misrepresentation he had entered into the ER 408 Agreement.

Judge McCarthy properly found Mr. Siegal violated his duty to provide MVOA with candid advice under RPC 2.1 when he misled MVOA's board by not disclosing he had already signed the ER 408 Agreement (FF 23). L&S attempts to defend Mr. Siegal's conduct on the basis he answered truthfully that no **Board member** had signed the Agreement, sidestepping Judge McCarthy's finding Mr. Siegal behaved defensively and evasively when questioned further about whether the Agreement was already *in effect* before the Board had an opportunity to evaluate its impact (Ex. 1007; 9/27

RP, 491-93; FF 18-22). Mr. Siegal knew the information MVOA was looking for and he deliberately misled his client.²¹

Finally, L&S asserts MVOA suffered no damage from the conduct because the ER 408 Agreement authorized any party to withdraw. In fact, MVOA withdrew, and then subsequently authorized a new ER 408 Agreement on its behalf. *Appellant's Brief*, p. 45. Causation and damages are not necessary for a court to deny compensation or order disgorgement of attorney fees for breach of fiduciary duty. *Erik v. Denver*, 118 Wn.2d at 462.

2. Renegotiation of the fee agreement.

L&S's asserts MVOA did not need independent counsel to renegotiate the fee agreement because the changes benefited MVOA. *Appellant's Brief*, p. 45. Judge McCarthy made express findings to the contrary, that at least three paragraphs benefited L&S compared to the terms of the original fee agreement (FF 203-206). It is immaterial if **some** of the other modifications benefited MVOA instead of L&S. It is also immaterial whether the client

²¹ L&S also mischaracterizes the stipulations MVOA made during trial regarding Mr. Siegal's conduct. *Appellant's Brief*, p. 46. In objecting to the form of a hypothetical question put to MVOA's expert during cross-examination, MVOA stipulated Mr. Siegal's **execution** of the Agreement was not the basis of its breach of fiduciary claim, but **lying or misleading the client about whether it had been signed** was. 10/4 RP, 1382.

instigated the renegotiation. The need for independent counsel arises from the lawyer's inherent conflict of interest in entering into a business transaction with the client, and the lawyer's negotiating advantage in possessing legal training the client may lack.

A lawyer must do more than merely mention in a draft fee agreement the hypothetical right to independent counsel. The lawyer must ensure, 1) the client understands why independent counsel is important; 2) make clear the lawyer's own conflict of interest in making changes to the original agreement that favor the firm; and, 3) insist that the client has a meaningful opportunity to get the necessary independent legal advice. L&S did nothing to ensure that its client was fully informed before signing the Amended Fee Agreement (FF 208).

3. Misrepresentations to Judge White.

L&S asserts Judge McCarthy took Mr. Stein's remarks about L&S's blended rate during the reasonableness hearing "out of context." *Appellant's Brief*, p. 58. During the hearing, Judge White expressed concern L&S's blended rate billing practice did not distinguish between L&S lawyers "regardless of whether you have three years' experience or 40 years' experience" (Ex. 1137, p. 39). Instead of defending the reasonableness of the \$275 blended rate as applied to L&S associates with limited experience who performed 75% of the work, Mr. Stein misled Judge White by comparing that blended rate to the higher rates charged by

Mr. Beal and attorneys at SFC, whose experience is more on par with the experience of Mr. Levin and Mr. Stein (Ex. 1137, p. 41).

L&S fails utterly to address Judge McCarthy's separate finding that L&S misled Judge White in the reasonableness hearing by revising the declaration of one of the defendants to conceal the existence of \$1.9 million of assets and to instead state in conclusory terms the defendants lacked the ability to pay a judgment (Exs. 479, 1271-72; Stein Dep. Designation, pp. 216-20; FF 187). When Judge White asked a specific question regarding this statement (Ex. 1137, pp. 82-85), Mr. Stein did not correct Judge White's misconception, and instead pointed to the significance the defendant had made the representation in a sworn statement (Ex. 1137, p. 110).

4. Failure to communicate.

L&S points to numerous trial exhibits and testimony to assert Ms. Gillman was micromanaging the work of L&S lawyers and knew everything. *Appellant's Brief*, p. 62. However, Judge McCarthy's findings regarding the billing information L&S withheld from MVOA (FF 131), and numerous findings regarding the unauthorized and undisclosed communications L&S had with others, in disregard of MVOA's clear instruction to be copied on ***all***

correspondence, particularly related to settlement (FF 80) refute

L&S's assertion.

- Prior to the first mediation, L&S met with the defense attorneys to coordinate a "mediation strategy" that included discussion of settlement dollar amounts. L&S did not advise MVOA the meeting had occurred (10/1 RP, 773-80; FF 63).
- L&S concealed from MVOA, several substantive letters exchanged with defense attorneys and their insurers on the subject of settlement (Exs. 282, 1237, 1239; 10/15 RP, 2505; FF 87, 89, 100).
- Prior to the second mediation, L&S retained Mr. Beal to consult on the case, without informing MVOA (9/26 RP, 400; FF 81-82).
- L&S never disclosed that Mr. Beal continued to consult with L&S for several months after the second mediation, and did not share with MVOA correspondence exchanged with him (Exs. 275, 275B, 282; 10/15 RP, 2483-84; FF 84, 86-88).
- L&S's purpose in hiring Mr. Beal was to develop a settlement strategy whereby either the insurance carriers would pay \$3 million to settle, or MVOA would take a stipulated judgment against the defendants if no cash offer were made (Ex. 275; FF 86). Although L&S began formulating this strategy in February 2005 (9/26 RP, 433-34; FF 87, 92), L&S never discussed the covenant judgment concept with MVOA until the topic was raised by the mediator during the afternoon of the last mediation on April 5, 2005 (10/15 RP, 2487, 2537-38; FF 95, 99).
- L&S withheld from MVOA (10/15 RP, 2503, 2512) Mr. Beal's expert opinion MVOA's case was not suited for a covenant judgment (10/17 RP, 2915-16; FF 102), as well as Mr. Beal's advice MVOA should not enter into a covenant judgment without first retaining expert coverage counsel to draft the agreement (10/17 RP, 2918-19; FF 103).
- Prior to the third mediation, L&S wrote the mediator suggesting the settlement value of the case was \$3-4M if the insurance were adequate, simultaneously acknowledging it

probably was not (Ex. 1235), never providing MVOA with this correspondence with MVOA (9/26 RP, 439; FF 105).

- L&S never provided to MVOA its March 2005 analysis that determined insurance coverage was inadequate (Ex. 1246; 10/15 RP, 2515-16; FF 110).
- In June 2005, after the covenant judgment agreement, L&S suggested SFC schedule another mediation, but urged SFC to withhold the idea from MVOA (Ex. 444; FF 145).
- Following a meeting in February 2006 among the attorneys involved in the insurance coverage litigation, Mr. Sudweeks encouraged Mr. Hobbs to withhold from MVOA his impression the insurance companies seemed willing to compromise (10/9 RP, 1937-39; FF 146).

5. Failure to abide the client's litigation objectives.

L&S's reasons for communicating with the defense about settlement behind its client's back are obvious – L&S's objective was to settle the case for \$3 million, despite knowledge MVOA's litigation goal was to recover enough money, net of fees and costs, to effect all repairs, which would require a gross recovery of at least \$6 million (FF 105).

L&S challenges Judge McCarthy's finding that L&S put undue pressure on MVOA to settle, and argues L&S was merely fulfilling its ethical duty under RPC 1.2 to use independent professional judgment when Mr. Levin bombarded MVOA with four memos just days prior to the last mediation. *Appellant's Brief*, p. 62. One memo to the Board setting forth the pros and cons of

settlement versus trial fulfilled L&S's ethical duty. L&S fails to articulate why four memos in rapid succession were necessary (Exs. 337-38, 343-44). The rationale is typical of L&S's reasoning. L&S argues elsewhere in its brief "L&S always insisted on an amount that would pay MVOA's full costs of repair plus all attorney fees." *Appellant's Brief*, p. 20. However, repair costs alone were \$4.35 million, yet Mr. Levin was still pressuring MVOA to accept a \$3 million settlement – in not just one, but four successive memos.

Whether MVOA would have tempered its litigation objectives if L&S had shared with its client its insurance coverage analysis and Mr. Beal's expert advice regarding the risks of a covenant judgment cannot be known. If, after providing its client full disclosure of the pertinent circumstances and its independent professional judgment how to proceed, MVOA did not change its objectives, L&S had two ethical choices – to withdraw or to try the case. L&S did neither. Instead, L&S manipulated its superior knowledge of the litigation and mediation process to force its client to accept a settlement it did not want, the terms of which it had insufficient information to evaluate.

E. MVOA was properly awarded attorney fees incurred in defending L&S's lien foreclosure lawsuit.

Under Washington law, attorney fees are recoverable from the opposing party in litigation only if authorized by a contract, a statute, or a recognized ground in equity. *In re Impoundment of Chevrolet Truck*, 148 Wn.2d 145, 160, 60 P.3d 53 (2002). The contingent fee agreement provides for recovery of attorney fees by the prevailing party if litigation is instituted to enforce its terms. Judge McCarthy determined MVOA was the prevailing party “by any measure of how that might be determined” (CP 2382).

In the trial court, L&S argued the parties' contingent fee agreement was no longer operative and therefore could not provide a basis for either party to recover attorney fees (CP 2346, 2351-55). An action is “on a contract” for purposes of a contractual attorney fee provision if the action arose out of the contract and the contract is central to the dispute. *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn. App. 834, 942 P.2d 1072 (1997) (broker-buyer agreement and earnest money agreement containing attorney fee clauses created and defined duties supporting claims for negligence and breach of fiduciary duty against real estate broker). On appeal, L&S argues it, not MVOA, is the prevailing party,

thereby conceding the contract provides a basis for an award of attorney fees. *Appellant's Brief*, pp. 66-68.²²

Determining which party prevailed in litigation requires more than a simple review of the judgment docket. The court must determine which party **substantially** prevailed, which in turn requires evaluating the relief accorded to each party compared to the relief each sought.

RCW 4.84.330 defines a prevailing party as the party in whose favor final judgment is entered. That, in turn, has been interpreted to mean the party who substantially prevailed. * * * The statute does not define the prevailing party as one who prevailed on a claim which authorized attorney fees. The statute focuses rather on the relief afforded to the parties for the entire suit whether or not the underlying claim provides for fees. [Internal citations omitted.]

Hertz v. Riebe, 86 Wn. App. 102, 105, 936 P.2d 24 (1997). Where appropriate, courts have also compared the relief afforded a party at the conclusion of litigation to the amount the adverse party was willing to pay or receive to settle before the litigation ensued.

While the Rowses' complaint for forfeiture was dismissed, they nonetheless were favored with a judgment in the amount of 20 times greater than any amount tendered in any pleadings by the Floyds and

²² In the trial court, L&S also challenged the amount of attorney fees MVOA requested (CP 2630, 2778). On appeal, L&S has not assigned error or devoted any argument to contest the amount of attorney fees Judge McCarthy awarded.

\$5,000 more than the amount upon which they were willing to settle. On the other hand, the Floyds successfully resisted the forfeiture complaint, but their tendered offer of February 1, payment of \$833, was woefully inadequate.

Rowe v. Floyd, 29 Wn. App. 532, 535, 629 P.2d 925 (1981); see, also, *Richter v. Trimberger*, 50 Wn. App. 780, 784, 750 P.2d 789 (1988) ("Appellant did not achieve anything at trial that had not been offered to him prior to trial; therefore, he was not the prevailing party); *Eagle Point Condo Owners Ass'n v. Coy*, 102 Wn. App. 697, 714, 9 P.3d 898 (2000) (trial court did not abuse its discretion in asking the parties to provide information regarding their settlement attempts for purposes of deciding whether to award attorney fees)..

Marine Enterprises, Inc. v. Security Pacific Trading Corp., 50 Wn. App. 768, 750 P.2d 1290 (1988) arose from an arbitration award. MEI sought \$600,000 damages for SPTC's breach of contract. The arbitrator found that although SPTC had breached the contract by not using best efforts to deliver fish for processing, the breach was not material, because the refrigeration system aboard MEI's vessel would have prevented MIE from performing its obligations under the contract. The arbitrator awarded \$10,000 as the reasonable value MEI's uncompensated services, less an offset

of \$5,424 SPTC suffered for fish damaged due to inadequate refrigeration. The trial court confirmed the arbitration award and awarded MEI contractual attorney fees as the prevailing party. *Marine Enterprises*, 50 Wn. App. at 770-71.

The issue on appeal was the trial court's award of attorney fees. This court reversed the award of attorney fees and awarded SPTC fees on appeal. *Id.* at 774

MEI brought suit for \$600,000, lost on all major issues, materially breached the contract and was awarded a net judgment of \$5,701 for services rendered. SPTC successfully defended all claims, did not materially breach the contract, and was awarded \$5,424. MEI is not the substantially prevailing party.

Id. at 773-74.

And in *Lane v. Wahl*, 101 Wn. App. 878, 6 P.3d 621 (2000), the Lanes sued to establish the validity of their lease of the Wahls' real property after the Wahls attempted to terminate the lease. The trial court upheld the validity of the lease, but awarded the Wahls \$1,016 on their counterclaim for damages to the Wahls' property, plus other unspecified assessments and charges due under the lease. The trial court awarded the Lanes attorney fees pursuant to the attorney fee clause of the lease. On appeal, the Wahls argued

they were the prevailing party entitled to their attorney fees. The court affirmed the award of attorney fees to the Lanes.

Because the central issue of this lawsuit was the validity of the lease, and because the Lanes prevailed on this issue and consequently recovered the greater relief, the trial court did not err in awarding them reasonable attorney fees and costs incurred in this action.

Lane, 101 Wn. App. at 885.

Applying the facts of the present controversy to the foregoing authorities, it is clear MVOA was the substantially prevailing party. L&S steadfastly asserted it was entitled to \$2.123 million as its *quantum meruit* compensation, and vigorously denied it had committed any fiduciary or ethical breaches justifying any reduction of its compensation. Judge McCarthy found L&S failed to meet its burden of proof on entitlement to \$1.6 million or more (FF 162-163). Judge McCarthy went much further, finding L&S's lien was clearly in excess of what L&S knew or should have known was reasonable, and that the filing of a clearly excessive lien was itself an ethical violation that caused MVOA damage by delaying its ability to use the amount recovered in the federal coverage litigation to fund repairs (FF 211-213, Conclusion of Law CC, CP 2291-92).

By contrast, MVOA never denied L&S was entitled to *quantum meruit* compensation, but successfully established that compensation was nowhere near \$2.123 million. Additionally, MVOA carried its burden of proof by establishing numerous and serious fiduciary and ethical breaches by L&S, resulting in forfeiture of \$400,000 of the *quantum meruit* compensation awarded (FF 222). The net award to L&S of \$596,350 was approximately 28% of the amount L&S sought, and was roughly equal to the amount MVOA would have paid L&S to settle, before litigation ensued.

Judge McCarthy summarized L&S's intransigent settlement position when he declined L&S's request to exclude from attorney fees awarded to MVOA the amount incurred for the failed mediation of the fee dispute.

This L&S contention to exclude fees for the mediation is erroneous, both in fact and in law. L&S never had a realistic evaluation of their own fee claim and breach of fiduciary duty exposure in this case. L&S originally clung to their \$1.6 million figure, losing that argument three times. In May 2007, they lied another \$523,000, which this Court has deemed a breach of fiduciary duty. They never once formally responded to the earlier MVOA offer of \$500,000 (made before this litigation ever began). * * * The Court finds that mediation failed because L&S would not move off of \$2 million.

(FF DD regarding amount of attorney fee award, CP 2857-58). Under established Washington authorities, MVOA was the substantially prevailing party for purposes of awarding contractual attorney fees.

F. MVOA is entitled to recover attorney fees incurred on appeal.

Pursuant to RAP 18.1, MVOA requests attorney fees incurred on appeal. Where applicable law grants a party the right to recover attorney fees, such fees may be awarded on appeal, provided a request is included in the party's opening brief. *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 493, 200 P.2d 683 (2009). A contractual provision authorizing attorney fees is authority for granting fees incurred on appeal. *Leen v. Demopolis*, 62 Wn. App. 473, 485, 815 P.2d 269 (1991), *review denied*, 118 Wn.2d 1022, 827 P.2d 1393 (1992).

IV. CONCLUSION

The trial court awarded L&S slightly less than \$1 million as *quantum meruit* compensation for slightly less than 5,000 hours of work, an average of \$200 for hour, despite making detailed findings supported by substantial evidence that much of the work was inefficient and not in furtherance of MVOA's clearly stated litigation

goals. Although MVOA did not require “good cause” to terminate L&S, it is beyond dispute such cause existed. At the time L&S was discharged, it had recovered less than \$300,000 on behalf of MVOA for a claim L&S insisted was worth approximately \$3 million, but not more. After L&S’s discharge, MVOA ultimately recovered almost \$6 million, but incurred almost \$1 million in additional attorney fees and litigation expenses to do so. Accordingly, MVOA incurred, in total, approximately the same 33% of its total recovery it would have paid under the contingent fee agreement with L&S. The trial court did not abuse its discretion in its total calculation of *quantum meruit* compensation, nor in any of the sub-components comprising that calculation.

The trial court reduced L&S’s compensation by \$400,000 to reflect the serious and repeated fiduciary breaches L&S committed during and after its representation of MVOA. The trial court would have been within its discretion to require disgorgement of the full amount of compensation awarded. L&S does not challenge the amount of the trial court’s reduction as much as it denies breaching any fiduciary duties in the first place. However, the trial court’s findings are supported by substantial evidence that resolved credibility issues strongly against L&S, and prompting the following:

The Court finds that lawyers owe their clients the highest level of trust and ethical responsibility. That clients must be sufficiently confident to implicitly trust their lawyers with the most important aspects of their lives is absolute and inviolate. It is the degree of trust that is the highest known to the law with respect to ethical responsibility. Clients routinely turn into the hands of their lawyers, the fate of their money, their business, their property, their reputation, even their very lives. Lawyers occupy a position of significant advantage over their clients, and must act with the utmost of circumspect fiduciary intent to meet the obligations of that stewardship. The L&S record before the Court in this case, against this high standard of trust and fidelity, represents a casual disregard for these ethical values that all lawyers ought to hold dear (FF 214).

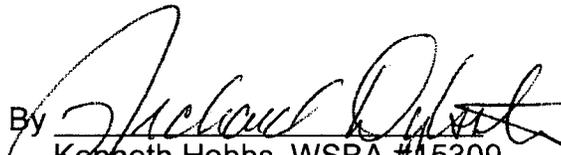
The Court finds that the trial evidence in this case is replete with many examples, already detailed, that proved L&S doggedly refused to abide and honor MVOA's litigation goals, the means by which those goals were to be achieved, and MVOA's decisions on whether to settle. Beginning with Siegel's failure to honestly acknowledge he signed the ER 408 Agreement, continuing through Levin's many undisclosed contacts with defense counsel, Beal, and the mediator, together with Levin's four memos meant to pressure the Board into a \$3 million settlement just prior to the last mediation, particularly the 'scare tactic' contained in Exhibit 343, the Court finds this law firm engaged in self-serving manipulation, calculated dishonesty, and overt betrayal of their client's goals, while these attorneys relentlessly pursued their own objectives, in abject disregard for their professional responsibility to represent their client's interests, as MVOA plainly and frequently defined them. In so doing, L&S left their client in the impossible position of not being able to trust their own lawyers, an eventuality that led to their inevitable discharge (FF 216).

Finally, the trial court awarded MVOA \$492,000 in attorney fees as the prevailing party under the contingent fee agreement that defined the parties' attorney-client relationship. L&S has no one but itself to blame for not settling this fee dispute two years earlier for approximately the same amount of net compensation, before both parties incurred massive amounts of attorney fees.

Based on the foregoing analysis and authority, MVOA request this court affirm all aspects of the trial court's decision, and award MVOA additional attorney fees incurred in defending this appeal.

DATED this 2nd day of September, 2009.

STAFFORD FREY COOPER

By 
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Attorneys for Meadow Valley
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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury according to the laws of the United States and the State of Washington that on this date I caused to be served via email and messenger, a true and correct copy of the foregoing document entitled **Brief of Respondent**:

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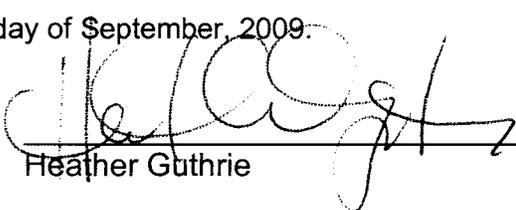
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