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**CONSOLIDATED NO. 65001-7**

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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DAVID C. THOMPSON,

Respondent/Cross-Appellant,

v.

DATAMARINE INTERNATIONAL, INC., a Washington corporation;  
NARROWBAND NETWORK SYSTEMS, INC., a Washington  
corporation and SEA INC. OF DELAWARE, a foreign corporation,

Defendants

and

DOLORES DRAINA, an individual, MARCUS DUFF, an individual, and  
JAMES SYLVIA, an individual,

Appellants/Cross-Respondents.

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**BRIEF OF RESPONDENT/CROSS-APPELLANT**

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COURT OF APPEALS  
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## I. INTRODUCTION

Respondent/cross-appellant David Thompson devoted the last 20 years of his professional life as the chief executive officer of SEA Inc. of Delaware (“SEA”) and its related companies, Datamarine International, Inc. (“Datamarine”) and Narrowband Network Systems, Inc. (“NNS”).<sup>1</sup> When the companies faced difficult times during the later part of his tenure as chief executive officer, he lent the companies approximately \$1,000,000 of his own money to help keep them afloat. *CP 61,64,65.*<sup>2</sup> In order to do so, he took out mortgages and lines of credit against his personal residence and borrowed money from his daughter that she had inherited from Mr. Thompson’s mother. *10/5/09 p.m., RP, p. 49.*<sup>3</sup> He also stopped receiving the wages that were owed to him. *CP 68.*

When Mr. Thompson resigned his positions with the companies in March, 2003 he was owed well over \$1,000,000. *CP. 69.* He subsequently voluntarily forgave over \$800,000 of that indebtedness. *CP 70.*

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<sup>1</sup> Where appropriate, Datamarine, SEA, and NNS are referred to collectively as “the Datamarine Companies” or “the companies.”

<sup>2</sup> As noted by Shareholders, this appeal is a consolidation of Shareholders’ appeal and Mr. Thompson’s cross appeal. Prior to consolidation, Shareholders and Mr. Thompson each prepared a Designation of Clerk’s Papers. Those designations have not been consolidated. For the benefit of consistency, citations to the Shareholders’ April 9, 2010 Designation of Clerk’s Papers and the September 28, 2010 Supplemental Designation of Clerk’s Papers are in the form “CP.” Citations to respondent Mr. Thompson’s April 21, 2010 Designation of Clerk’s Papers are in the form “RCP.”

<sup>3</sup> The transcript volumes are not consecutively paginated. Most begin with page 1. Thus, citations to the transcript are by “[date, a.m. or p.m. if appropriate] RP [page number]”.

The shareholder/interveners (“Shareholders”)<sup>4</sup> now bring this appeal, an appeal that, when reduced to its essence, is a complaint that Judge Heller viewed the evidence differently than they wish he had. They do so, however, without assigning any error to any of Judge Heller’s findings of fact or conclusions of law.

In January, 2010 Judge Heller also entered judgment in favor of Mr. Thompson against the Datamarine Companies in the amount of \$761,969.75. In doing so, Judge Heller rejected Mr. Thompson’s argument that the Shareholders should be held personally liable for a portion of that judgment amount relating to attorneys’ fees incurred in defending against the Shareholders’ claims. On cross-appeal Mr. Thompson seeks review of that discreet issue.

## **II. RESTATEMENT OF ISSUES**

A. Was there substantial evidence to support Judge Heller’s findings and conclusions that Mr. Thompson did not breach his fiduciary duties and acted in good faith regarding the Shareholders’ claim related to the 2003 sale of the rights in management agreements relating to three radio licenses in Southern California?

B. Was there substantial evidence to support Judge Heller’s findings and conclusions that Mr. Thompson did not breach his fiduciary

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<sup>4</sup> For ease of reference appellants are referred to as the “Shareholders,” the term used in appellants’ brief.

duties and acted in good faith regarding the Shareholders' claim relating to certain purported "preference" payments?

C. Was there substantial evidence to support Judge Heller's findings and conclusions that Mr. Thompson did not breach his fiduciary duties and acted in good faith regarding the Shareholders' claim relating to payment of certain expenses?

D. Did Judge Heller correctly rule that Mr. Thompson was entitled an award of attorneys' fees against the companies because all of the claims asserted by the Shareholders were asserted as defenses and set-offs to Mr. Thompson's claims, thus implicating the attorneys' fee provision of the promissory notes?

### **III. RESTATEMENT OF FACTS**

#### ***A. Introduction.***

Perhaps not surprisingly given the factual nature of the Shareholders' appeal, Shareholders offer a one-sided version of the evidence presented at trial, including virtually no mention of Mr. Thompson's loans of over \$1,000,000 to the companies. In doing so, they also completely ignore Judge Heller's findings of fact.

In order to provide a complete picture of the evidence considered by Judge Heller, Mr. Thompson offers the following restatement of facts.

This restatement is based entirely on Judge Heller's findings of fact, none of which has been challenged by Shareholders.<sup>5</sup>

***B. Background of the Datamarine Companies.***

Datamarine is a Washington corporation in the business of manufacturing marine equipment and instruments for the recreational consumer markets. Datamarine was originally a Massachusetts corporation. SEA is Datamarine's wholly-owned subsidiary and is incorporated in Delaware. NNS is also a Datamarine subsidiary and is incorporated in Washington. The principal place of business for all three companies during the relevant time period has been Mountlake Terrace, Washington. Datamarine's stock is publicly traded. *CP 57.*<sup>6</sup>

SEA was founded as Stephens Engineering Associates, Inc. ("Stephens Engineering"). Stephens Engineering engineered and manufactured marine radio/communications equipment. Sometime in the early 1980s, Stephens Engineering changed its name to SEA Inc. of Delaware. *CP 57.*

In 1986, SEA merged with Datamarine. After the merger, SEA became a wholly owned subsidiary of Datamarine and was operated as a

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<sup>5</sup> Those portions of Judge Heller's findings not pertinent to the Shareholders' appeal are not discussed.

<sup>6</sup> Because the factual background is based on unchallenged findings of fact, citations to Judge Heller's findings are made every paragraph, instead of every sentence, for ease of reading.

division of Datamarine. NNS was formed in 1995 for the purpose of participating in the business of owning and managing specialized mobile radio licenses. NNS was incorporated in the State of Washington as a subsidiary of SEA. *CP 57-58.*

***C. Mr. Thompson's and Jan Kallshian's Roles in the Datamarine Companies.***

Mr. Thompson became involved with SEA in 1979 when it was known as Stephens Engineering Associates, Inc. In the early 1980s, he accepted the position of Chief Executive Officer for Stephens Engineering Associates, which became SEA. From that time until September 2002, Thompson served as the president and chief executive officer of the Datamarine Companies. *CP 58.*

In September 2002, Thompson was relieved of his duties as chief executive officer of Datamarine by Datamarine's board of directors. Beginning in late October or early November 2002, Thompson again fulfilled the duties of chief executive officer of the Datamarine Companies. On March 12, 2003, Thompson resigned from all of his positions with the Datamarine Companies. *CP 58-59.*

In approximately 1995, Jan Kallshian began performing various financial duties for the Datamarine Companies. In October, 1997 he was elected the chief financial officer of Datamarine. Mr. Kallshian served as

the chief financial officer for the companies almost continuously from 1997 until his departure in October 2003. *CP 59.*

***D. The Expansion into Land-Based Communications.***

In the late 1980s, the Datamarine Companies made a business decision to expand into land-based communications. The expansion focused on the emerging 220 MHz market for radio systems such as two-way radios used by taxi companies and other companies with fleets of vehicles. The market consisted of licenses issued by the Federal Communication Commission (“FCC”), initially by lottery and subsequently by auction. The licenses were for a defined and limited geographical area. The value of the license largely depended on the location. *CP 59-60.*

Using a license issued by the FCC required significant infusions of capital to purchase equipment and manage the license. Because many license holders were individuals with limited or no experience in the industry, a license holder would typically enter into management agreements and equipment agreements with companies like SEA. In return the license holder would receive a percentage, typically 10%, of the net proceeds from the operation of the license. In turn a company such as SEA may enter into operating agreements with individuals or companies

who would market and operate the license in return for a share of the net proceeds, a share that could be as high as 80%. *CP 60.*

***E. Mr. Thompson's Initial Loans to The Datamarine Companies.***

In 1997, Kallshian asked Thompson if he would be willing to lend money to the companies because the companies were experiencing financial difficulties. Thompson agreed to take out a loan in the approximate amount of \$350,000 secured by a mortgage on his residence in San Francisco. The proceeds of that loan were used by the Datamarine Companies to fund its ongoing operations, including meeting payroll. *CP 61.*

In return for this loan the companies agreed to make the monthly payment on Thompson's home loan and made such payments. Also, the companies agreed to pay any loan fees associated with Thompson's home loan. *CP 61.*

Thompson's initial loan was for approximately \$345,000. The loan was made by Silicon Valley Bank ("SVB"). In 1999, Thompson and the companies re-financed the loan in order to obtain a better interest rate. The re-financing was done with Greenpoint Mortgage. The companies agreed to pay any loan fees associated with Thompson's home loan and made regular payments to Greenpoint. *CP 61.*

In 2000, Thompson agreed to lend additional amounts to the companies. In August 2000, Datamarine's board of directors accepted a loan of \$500,000 from Thompson, evidenced by a promissory note in that amount. \$344,000 of the \$500,000 was used to pay off a promissory note that had been issued in July 1997 for the original loan amount. The remaining \$156,000 was used for working capital. *CP 61.*

***F. Mr. Thompson's Additional Loan to Payoff Silicon Valley Bank.***

In 2000 SVB was the companies' primary lender. The companies were in default of their obligations to SVB because of the companies' financial difficulties. As a result of that default, SVB called its indebtedness due and owing. Had SVB foreclosed, the companies would have been unable to raise additional capital and would have been forced to cease operations. *CP 63.*

In response to SVB's threat to foreclose, Mr. Thompson agreed to lend the companies the funds necessary to pay off the SVB indebtedness as well as provide some additional working capital to the companies. The amount of the loan was \$312,000. *CP 63-64.*

***G. Additional Loans by Mr. Thompson and His Acquaintances Allow SEA to Meet Its Payroll.***

In 2001 Thompson lent additional amounts to the companies that were used to meet payroll and other obligations of the companies. During

this same time period, Thompson was foregoing his wages. *CP 65.*

Two of Thompson's acquaintances, Jerry DiVecchio and Danielle Steele, agreed to lend money to the companies. These loans were also used to meet SEA's payroll. Thompson subsequently purchased these notes, which were then assigned to him. *CP 65.*

That the companies were able to continue operations was due in large part to the loans extended by Thompson and his acquaintances. Between August 2000 and August 2001, Mr. Thompson, Ms. DiVecchio, and Ms. Steele lent \$591,000 to the companies. *CP 65.*

The companies continued to operate because Thompson and the board of directors believed that there was a future for the 220 MHz market and that the companies would play a critical role in that market because of their engineering expertise and unique ability to provide radios to the market. Raising additional capital was always critical to the companies' future. Raising such capital would not have been possible if the companies ceased operating. *CP 65.*

#### ***H. Reimbursement of Thompson's Business Expenses.***

Throughout his tenure at the Datamarine Companies, including his tenure as chief executive officer of Stephens Engineering, Thompson was reimbursed for his business expenses. From the beginning of his tenure at Stephens Engineering and then the Datamarine Companies, the companies

agreed to reimburse Thompson for his expenses in flying between Seattle and San Francisco, where his personal residence was located. *CP 67.*

Mr. Thompson's business expenses, including the expenses of his flights to and from San Francisco, as well as expenses of other employees, were typically charged on credit cards in Thompson's name on behalf of SEA. When the monthly credit card statement was received, there would be an accounting and business expenses were allocated to the appropriate internal company account. Thompson would reimburse the companies for any personal expenses. *CP 67-68.*

***I. Thompson and Kallshian Forego Significant Portions of Their Compensation.***

In 2001, Mr. Kallshian was foregoing receiving significant portions of his compensation in order to alleviate the companies' cash flow problems. In December, 2001 Kallshian told Thompson and the board of directors that he could no longer work for the companies without being paid. For several days Kallshian stopped coming to work. *CP 68.*

Thompson believed that retaining Kallshian was critical to the companies' continued viability. Kallshian had established important relationships with the companies' vendors that was critical to allowing the companies to continue operating. In Thompson's view Kallshian also played a critical role in negotiating with the companies' lenders and major

investors and helping the companies raise additional capital. In order to retain Kallshian's services, Thompson agreed to start paying Kallshian his regular compensation and a regular payment of \$1,250 a week to be applied to the back compensation he was owed. *CP 68.*

In this same time period Thompson was also foregoing significant portions of his compensation to alleviate the companies' cash flow problems. During this time period the companies made regular payments on the loan Thompson had taken out in 1997 and refinanced in 1999 for the benefit of the companies that was secured by a mortgage against his personal residence in San Francisco. Had the companies stopped making those payments, Thompson would not have been able to continue working for the companies, as he could not have afforded to work for little or no compensation and also not have the payments made on the loan which was secured by his personal residence. *CP 68.*

***J. The 2003 Clothier Agreements Relating to FCC Licenses WPCP-591, WPCR-220, and WPBQ-871.***

In 2003, SEA entered into agreements to sell equipment and the rights under management agreements for the three FCC licenses operated by an entity owned by Gene Clothier. The management agreements were subject to an April 19, 1995 Operating Agreement between Incom, a telecommunications company, and SEA. Mr. Clothier was a principal in

Incom. Any purchaser of the management agreements would be subject to the provisions of the Operating Agreement. *CP 69.*

Under the terms of the Operating Agreement, Incom received 70% of the gross revenues. Under the terms of the management agreements, the license holder received 10% of the gross revenues. The revenues that these three licenses generated between 1997 and the middle of 2002 totaled \$71,923.50. Under the management agreements and Operating Agreement, SEA was entitled to 20% of that amount. *CP 69.*

Mr. Clothier and Thompson negotiated the purchase price for the equipment and the rights under management agreements. The Datamarine Companies received \$75,000 for these agreements and the equipment owned. *CP 69.*

At the time of the Clothier Sales, the Datamarine Companies were having a severe cash problem. Datamarine's board of directors, including Mr. Stephens and Mr. Stasik, was fully aware of this transaction and supported it. *CP 69.*

***K. Mr. Thompson and Mr. Kallshian's Departure from the Datamarine Companies.***

In March, 2003 Mr. Thompson resigned all of his positions with the companies. At the time of his resignation Mr. Thompson was owed over \$1,000,000 from the Datamarine Companies. *CP 69-70.*

***L. Thompson's Forgiveness of Over \$800,000 Owed to Him.***

In October, 2004, Thompson voluntarily forgave over \$800,000 of the amount owed to him. This forgiveness included the entire principal and accrued interest on the \$500,000 promissory note discussed above.

*CP 70.*

***M. The Continued Operations of the Datamarine Companies.***

From March 2003 to the present, the Datamarine Companies have continued to operate. At no time during that period did any of the Datamarine Companies file for bankruptcy protection, nor was a receiver appointed for the benefit of creditors of the Datamarine Companies. *CP*

*70.*

***N. Procedural Background.***

Thompson filed this action on June 28, 2006. Mr. Thompson brought claims in his complaint based on the August 4, 2000 Promissory Note (\$312,000), the Addendum to that note (\$93,000), the DiVecchio Note (\$10,000), the Steele Note (\$20,000), and credit card debt arising from the companies' use of credit cards in Mr. Thompson's name. The Datamarine Companies first asserted counterclaims in this action on August 28, 2006.<sup>7</sup> *CP 14.*

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<sup>7</sup> Judge Heller's finding states the year as 2003, which clearly is a typographical error.

On October 29, 2007, the Datamarine Companies voluntarily dismissed their counterclaims without prejudice. The Shareholders then filed their motion to intervene in February 2008, which included counterclaims asserting claims of fraud, breach of fiduciary duty, and tortious interference with a business relationship, which was granted. Those counterclaims asserted claims that are the same or similar to the claims asserted by the Shareholders. *CP 71*.

Judge Heller conducted trial from September 29, 2009 to October 10, 2009. At trial the Shareholders presented a claim that Mr. Thompson had tortuously interfered with the companies, relationship with one of its banks and five claims alleging that Mr. Thompson had breached his fiduciary duties to the companies in various ways.

Judge Heller heard testimony from 10 witnesses, including Mr. Thompson, Jan Kallshian, former and current members of Datamarine's board of directors (Joseph Stephens and Herman "Buddy" Morgan), Gene Clothier, the companies accounting manager (Debbie Vandermyn), and the Shareholders' experts, Fred Palidor and David Andrade. Numerous exhibits were offered at trial.

On November 30, 2009, Judge Heller issued his Amended Findings of Fact and Conclusions of Law. *CP 56-78*. Judge Heller found for Mr. Thompson on five of the six claims.

On January 14, 2010 Judge Heller entered judgment in favor of Mr. Thompson against the Datamarine Companies in the amount of \$761,969.75 and an additional judgment in the amount of \$35,194.67 against SEA. *CP 50-54*.<sup>8</sup> In a December 31, 2009 letter ruling Judge Heller had rejected Mr. Thompson's argument that the Shareholders should be held personally liable for a portion of that judgment amount relating to attorneys' fees incurred in defending against the Shareholders' claims. *CP 80*.

Shareholders then moved for reconsideration. *RCP 531-544*. That motion was denied on February 3, 2010. *RCP 545-546*.

These appeals followed.

#### IV. ARGUMENT

##### A. Standard of Review.

Where a trial court has weighed the evidence, appellate review is limited to determining whether findings of fact are supported by substantial evidence and, if so, whether the findings support the conclusions of law. *Murray Pub. Co., Inc. v. Malmquist*, 66 Wn. App. 318, 324, 832 P. 2d 493, *rev. denied*, 120 Wn. 2d 1010, 841 P.2d 48 (1992). Substantial evidence is defined as a quantum of evidence

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<sup>8</sup> This judgment stemmed from Judge Bruce Hilyer's September, 2007 ruling in favor of Mr. Thompson on the basis of the promissory notes that were the basis of his claims and included interest and attorneys' fees pursuant to an attorneys' fees provision in the promissory note.

sufficient to persuade a rational fair minded person the premise is true. *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn. 2d 873, 879, 73 P.3d 369 (2003).

The trial court's weighing of the evidence is entitled to "great deference." *Ford Motor Co. v. City of Seattle*, 160 Wn. 2d 32, 56, 156 P. 3d 185, *cert. denied*, 128 S. Ct. 1224 (2007). If the substantial evidence standard is satisfied, the appellate court will not substitute its judgment for that of the trial court even though the appellate court might have resolved the facts differently. *Green v. Normandy Park Comm. Club*, 137 Wn. App., 665, 689, 151 P. 3d 1038 (2007).

The evidence is to be viewed in the light most favorable to the party prevailing below. *Marriage of Boisen*, 87 Wn. App. 912, 918, 943 Wn. App. 682 (1997). Also, there is a presumption in favor of the trial court's findings that they are supported by substantial evidence. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wn. 2d 364, 369, 798 P.2d 799 (1990). Findings of fact to which no error is assigned are treated as verities on appeal. *Perry v. Costco Wholesale, Inc.*, 123 Wn. App. 783, 792, 98 P.3d 1264 (2004).

**B. Mr. Thompson's Conduct Is To Be Judged Under the "Business Judgment Rule."**

Shareholders seek to carve this case into bits and pieces. In reviewing their appeal issues, it is important for this Court not to lose sight of the nature of this case. The Shareholders brought six claims against Mr. Thompson – five claims asserting that as chief executive officer he had breached his fiduciary duties to the Datamarine Companies and a claim for tortious interference with a business relationship. Judge Heller found for Mr. Thompson on five of the six claims. The Shareholders seek to reverse his rulings on three of those claims – 1) the claim that Mr. Thompson breached his fiduciary duties regarding the 2003 sale to Clothier, 2) the claim that Mr. Thompson breached his fiduciary duties regarding certain purported "preference" payments, and 3) the claim that Mr. Thompson breached his fiduciary duties regarding payment of certain expenses.

Each of these claims is discussed below. Overarching all of the claims, however, is the law that applies to them as concluded by Judge Heller. Shareholders have not challenged any of those conclusions. Consequently, they are the law of the case. *King Aircraft Sales, Inc. v. Lane*, 68 Wn. App. 706, 716-717, 846 P.2d 550 (1993).

What that law states is that officers of a corporation, such as Mr. Thompson, are immunized from liability where there is a reasonable basis to indicate that the transaction was made in good faith. *Nursing Home Building Corp. v. DeHart*, 13 Wn. App. 489, 535 P.2d 137 (1975). As this court stated in *DeHart*, quoting *Fletcher, Private Corporations*:

[D]irectors of a commercial corporation may take chances, the same kind of chances that a man would take in his own business. Because they are given this wide latitude, the law will not hold directors liable for honest errors, for mistakes of judgment, when they act without corrupt motive and in good faith, that is, for mistakes which may properly be classified under the head of honest mistakes. And that is true even though the errors may be so gross that they may demonstrate the unfitness of the directors to manage the corporate affairs. This rule is commonly referred to as the business judgment rule.

*Nursing Home Bldg. Corp. v. DeHart*, 13 Wn. App. 489, 498-499, 535 P.2d 137 (1975), quoting *W. Fletcher, Private Corporations*, §1039 at pp. 621-25 (perm. ed. 1974).

It was in the context of the “business judgment rule” that Judge Heller judged the Shareholders’ claims.

**C. Judge Heller Did Not Err in Concluding that Mr. Thompson Acted in Good Faith and that Datamarine Received Fair Value for Selling the Rights to Management Agreements Relating to the Three Southern California Licenses.**

The Shareholders devote the bulk of the argument portion of their brief to the argument that Judge Heller did not understand the evidence at

trial regarding the 2003 sale of the rights in three management agreements to Mr. Clothier for \$75,000. *Appellants' Brf.*, pp. 15-28. Judge Heller heard and considered extensive evidence, both in the form of testimony and exhibits, regarding that sale. The testimony included testimony from the two individuals most knowledgeable about that sale – David Thompson and Gene Clothier. Shareholders also put on expert testimony regarding the value of those licenses. It was, of course, for Judge Heller to decide how much weight to give to that testimony. *Forbes v. Am. Bldg. Main. Co.*, 148 Wn. App. 273, 287, 198 P.3d 1042 (2009) (appellate court defers to trial court's evaluation of the credibility of witnesses).

Initially, it is important to understand what was sold in this sale. The Shareholders consistently and erroneously refer to the sale as the sale of 220 MHz licenses. *See, e.g., Appellants' Brf.*, p. 22. In fact what was sold were the rights under three management agreements and certain equipment related to licenses associated with those agreements. *Ex. 441*. This distinction is important, because, as discussed below, what Mr. Clothier bought was only 20% of a revenue stream and used equipment. *RP, 10/8/09, pp. 17-18*.

**1. There Was Substantial Evidence of the Fair Value of the Management Rights to Support Judge Heller's Ruling.**

There is substantial evidence to support Judge Heller's ruling on this claim. Two examples of testimony at trial should suffice. David Andrade, the Shareholders' own expert, testified in response to questions from Judge Heller as follows:

THE COURT: Is the concept of fair market value a subjective or an objective concept?

A. Fair market value is supposed to be an objective concept that relies upon an actual transaction price that everybody can see and observe. It's not subjective value.

Q. In redirect you stated fair market value is a transaction price that two parties agree to voluntarily.

A. Right.

Q. So, as long as they think it's a fair price, that makes it fair market value?

A. If they both agree under no compulsion that it's a price they can exchange at, the, yes, that would be, by definition, fair market value.

*10/1/09 RP, p. 216*

Gene Clothier, the purchaser of the management rights, testified as follows:

Q. Now, the \$75,000, do you believe that you underpaid for those management rights?

A. Oh, no. I didn't want to pay that much.

Q. Do you think the \$75,000 represented fair value?

A. Yes, more or less.

Q. Let's turn to the equipment issue.

THE COURT: Before we go there, could you inquire as to what went into his thinking, why he thinks it was on the high end?

Q. [by Mr. Hall] I understand you to say you think you may have overpaid. Would that be a fair statement?

A. Yes.

*10/8/09 RP, p. 24.*

This testimony alone is more than enough to satisfy the substantial evidence test. Indeed, as stated in *In re: West Waterway Lumber Co.*, 59 Wn. 2d 310, 367 P.2d 807 (1962), a case Shareholders rely on, a determination of fair value “contemplates a consideration of all the facts and circumstances . . . which may be lacking in mathematical exactness or certitude.” 59 Wn. 2d at 321, *quoting In re Northwest Greyhound Lines*, 41 Wn. 2d 672, 251 P.2d 607 (1952).

That is precisely what Judge Heller did.

**a. Judge Heller Was Entitled to Interpret Trial Exhibit 41 in the Manner in Which He Did.**

The Shareholders devote no less than five and a half pages to a complicated interpretation of one trial exhibit, Exhibit 41. *Appellants’ Brf.*, pp. 14-20. The Shareholders erroneously contend that Judge Heller focused “exclusively” on this exhibit in reaching his conclusion that the companies received fair value. *Appellants’ Br.*, p. 15.

Judge Heller did no such thing. While he did “note” a revenue figure that may well have come from Exhibit 41, nothing in his findings and conclusions states that he relied exclusively on that exhibit to the exclusion of all other evidence. *CP 74*.

Shareholders offer an interpretation of Exhibit 41 that they were free to explore at trial. They chose not to. Indeed, they did not offer the interpretation offered in their brief until they filed a motion for reconsideration eight weeks after Judge Heller issued his Amended Findings of Fact and Conclusions of Law and 10 days after Judge Heller entered the judgment.<sup>9</sup> Having made that calculated decision, they cannot now be heard to complain that Judge Heller misinterpreted the exhibit. *Teratron v. Instit. Inv. Trust*, 18 Wn. App. 481, 489-490, 569 P.2d 1198 (1997) (issue raised over a month after trial court’s decision could not be raised on appeal).

The Shareholders also argue that the standard of review regarding Exhibit 41 is *de novo*. *Appellants’ Brf.*, p. 16. But in their interpretation of Ex. 41, they admit that “the author” of Exhibit 41 when attempting to calculate gross revenues “ignore[ed] a few issues discussed below.” *Appellants’ Brf.*, p. 18. To understand and accept the Shareholders’

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<sup>9</sup> Consideration of any new evidence offered by the Shareholders in that motion was within Judge Heller’s discretion. *CR 59(g); Powell v. Schultz*, 4 Wn. App. 213, 216, 481 P.2d 12 (1971).

interpretation, then, requires one to believe that the “author” of the exhibit got it wrong.<sup>10</sup> Where competing documentary evidence has to be weighed and conflicts resolved, the substantial evidence standard of review applies. *In re Marriage of Rideout*, 150 Wn. 2d 337, 351, 77 P.3d 1174 (2003).

As Shareholders concede, Exhibit 41 came from the companies’ own files. *Appellants’ Brf.*, p. 17. As a company document it constitutes an admission of the companies binding on the Shareholders. ER 801(d)(2); *LaHue v. Keystone Investment Co.*, 6 Wash. App. 765, 779, 496 P. 2d 343 (1972) (interveners stand in the shoes of the companies and are subject to the same defenses.)

Exhibit 41 gives a revenue figure of \$71,923.50 and states “we received 20%.” *Ex. 41*. Judge Heller no doubt interpreted that to mean exactly what it states: “the Court notes that between 1997 and 2002, the three licenses generated a total of \$71,923.50, of which SEA was entitled to 20%.” *CP 99*. The Shareholders’ own expert, Mr. Palidor, agreed with this analysis. *10/1/09 RP*, pp. 166-168.

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<sup>10</sup> The Shareholders conceded as much when they offered an exhibit in their motion for reconsideration that they did not offer at trial. *RCP 534*.

**b. Judge Heller Was Entitled to Weigh the Evidence Regarding Comparable Sales.**

Shareholders also argue that Judge Heller “erred” by ignoring evidence of comparable sales, arguing again that Judge Heller “relied exclusively on Ex. 41.” *Appellants’ Brf.*, p. 20. In making this argument, however, Shareholders ignore the testimony that each license is unique and their value is completely dependent on a whole host of variables. Judge Heller was entitled to accept that testimony.

That the value of a license is unique to each license was perhaps best stated by one of the Shareholders, Marcus Duff:

- Q. [By Mr. Hall:] Based on your experience as the president of Cornerstone SMR, you’re familiar with the notions of licenses, would you agree?
- A. Yes, I am.
- Q. And would you agree that valuation is a very difficult question to answer?
- A. Valuation can be difficult. There are circumstances that need to be evaluated in order to come to a value for a license.
- Q. And you – would you agree that valuation is a difficult question to answer because there are facts and circumstances around licenses, around the market, that each license is, in fact, unique?
- A. There are unique aspects to licenses, such as location, the altitude of an antenna, the authorized power output of the transmitter, the population density, the coverage area, all of these things go to valuation.

*RP, 10/6/09, pp. 63-64.*

The Shareholders' own expert, Fred Palidor, testified to the same effect. *RP*, 10/1/09, pp. 137-139.

Based on such testimony, Judge Heller may well have concluded that the value of other sales was of minimal importance to the value of the 2003 sale and instead focused on the particulars of the 2003 sale itself.

**c. Judge Heller Correctly Interpreted the Incom/SEA Operating Agreement and Management Agreements.**

Judge Heller heard extensive testimony regarding an Operating Agreement between Incom and SEA, *Ex. 437*, and the management agreements relating to the three Southern California licenses. *Exs. 431, 433.*<sup>11</sup> Shareholders contend that Judge Heller misinterpreted these agreements, despite hearing testimony from the two individuals most knowledgeable about what the agreements meant - David Thompson and Gene Clothier. *Appellants' Brf.*, pp. 25-27; *see, e.g., Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990) (extrinsic evidence admissible as an aid in ascertaining the parties' intent.)

Despite Shareholders' attempt to obfuscate the meaning and operation of the agreements, they are in fact quite straightforward. Any particular 220 MHz license has three components – 1) the owner of the

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<sup>11</sup> Only two of the management agreements have been designated as part of the Clerk's Papers. The third agreement, Exhibit 435 at trial, is identical to the other two agreements in all material terms. *9/29/09 RP*, p. 41.

license itself, 2) the operator of the license, and 3) the manager of the license. Initially, the license holder is entitled to 100% of the revenue generated by the license. Because, however, the license holder typically does not have the expertise the license, the license holder will enter into a management agreement whereby the license holder retains 10% of the revenue. *CP 60*. The manager in turn may enter into an operating agreement with another party to perform certain functions relating to the operation of the license. *CP 60*.

As Judge Heller found, the Operating Agreement at issue in this case gave Incom the right to 70% of the gross revenues from a license. *CP 9; Ex. 437, pp. 11-12*. As explained by Mr. Clothier, Incom was entitled to such a larger percentage of the revenues because Incom provided the marketing services for the area served by a license. *10/8/09 RP, p. 11*.

Thus, after the Operating Agreement had been entered into, the owner of the rights under the management agreement, in this case NNS, was left with 20% of the gross revenues. *CP 99; 10/8/09 RP, p. 11*.

When SEA sold the rights under the three management agreements to Mr. Clothier in 2003, it was selling the rights to 20% of the revenue, nothing more. The Shareholders interpretation of the management agreements – that somehow the management agreements entitled the

purchaser to virtually all the revenue - was an interpretation explicitly rejected by both Mr. Clothier and Mr. Thompson. *10/8/09 RP, pp. 20-22; 10/1/09 p.m. RP, pp. 255-256.*

But, even if the Shareholders' interpretation of the agreements were correct, which it is not, it is what the parties believed it meant which for purposes of valuation is what is important. Here, that was what Mr. Clothier and Mr. Thompson believed. That is precisely what the Shareholders' expert, David Andrade, said in his testimony. *10/1/09 RP, p. 216.*

Judge Heller was entitled to believe Mr. Clothier and Mr. Thompson's testimony.

**2. Judge Heller Was Entitled to Give Great Weight to Mr. Thompson, Mr. Kallshian, and Mr. Clothier's Testimony Regarding the Value of the Three Southern California Licenses.**

The evidence at trial was clear that at the time of the sale of the management agreements, the companies were in desperate need of cash. *CP 69.* Shareholders' own expert, Dr. Andrade, testified that in determining what is fair value one party's economic condition can be an important factor in determining what is fair value. *10/1/09 RP, p. 216.* Finally, Mr. Clothier testified that he believed that he overpaid. *10/8/09*

*RP*, p. 24. A party's own opinion as to value is admissible. *Ingersol v. Seattle-First Nat'l Bank*, 63 Wn. 2d 354, 358, 387 P.2d 538 (1963).

It is axiomatic that assessing credibility is the province of the trial court. *Forbes v. Am. Bldg. Main. Co.*, 148 Wn. App. 273, 287, 198 P.3d 1042 (2009) Judge Heller was entitled to believe – or not believe – the witnesses that appeared before him. His rulings on the Shareholders' claim regarding the 2003 sale of the management agreements was correct and should be affirmed.

**D. Judge Heller Did Not Err in Concluding that the Shareholders Had Failed to Meet Their Burden of Proof that Mr. Thompson Breached His Fiduciary Duties to the Datamarine Companies by Allowing the Companies to Make Payments on the Loans He Had Made to the Companies and for Services Rendered.**

The Shareholders argue that Judge Heller erred in ruling against them on their claim that Mr. Thompson breached his fiduciary duties to the companies regarding certain payments made to Mr. Thompson in repayment of his loans and wages that they characterized as “preferences.” *Appellants' Brf.*, pp. 28-33. This claim again is a claim that needs to be put in its proper context.

This is not a bankruptcy case. It is not a case involving the appointment of a receiver for the benefits of creditors. Rather, the

Shareholders' legal theory was that Mr. Thompson breached his fiduciary duties to the companies.

The trial of this claim occurred more than six years after Mr. Thompson had departed from the companies. As Judge Heller found:

From March 2003 to the present, the Datamarine Companies have continued to operate. At no time during that period did any of the Datamarine Companies file for bankruptcy protection, nor was a receiver appointed for the benefit of creditors of the Datamarine Companies.

*CP 100.*

As Joe Stephens, a Datamarine board member who on the board of directors from 2000 to 2005 testified:

Q. [by Mr. Hall] So from this day [October 4, 2002], well into early 2006, which is three years after David Thompson has left, in your mind, as a board member, a priority, if not the key priority, was keeping the companies operational?

A. It was a priority.

Q. Okay. And it was an important priority?

A. It was an important priority.

Q. And it was an important priority because if you closed the companies, it would have a devastating effect on your ability to raise money, wouldn't it?

A. It would have an impact. Whether it was devastating or not, I don't know.

[Court colloquy]

Q. It would certainly have an impact and make it more difficult for the companies to raise money; correct?

A. In most instances, I would think so.

Q. And throughout this time period, you believed that these companies –there was a future for the 220 market, didn't you?

A. Yes.

Q. And the reason to keep operational throughout this time period was for that very reason, that there is a future here, and the Datamarine companies have a role to play in that future; correct?

A. Yes.

*10/05/09 a.m. RP, pp. 62-63.*

In closing argument we pointed out that during that same time period that the Shareholders argued Mr. Thompson was receiving “preferences” Mr. Thompson lent the companies \$591,000, an amount that was almost three times what the Shareholders claimed Mr. Thompson was paid in the form of “preferences.” *10/9/09 RP, pp. 48-49.* This was not the stuff of a breach of fiduciary claim, and Judge Heller agreed. As discussed below, Judge Heller’s ruling on this claim was correct and should not be reversed.

**1. Judge Heller Correctly Placed the Burden of Proof on the Shareholders on Their Breach of Fiduciary Duty Claim.**

The Shareholders argue that Judge Heller erred “by placing the burden of proof for establishing affirmative defenses on the Shareholders rather than Mr. Thompson.” *Appellants’ Brf., p. 28.* The Shareholders cite no authority that the issues they discuss were affirmative defenses, and for this reason alone their argument may be rejected. *King Aircraft Sales, Inc. v. Lane*, 68 Wn. App. 706, 717-718, 846 P.2d 550 (1993).

Even if considered, the Shareholders have the burden of proof on their claims wrong. Judge Heller correctly concluded that the burden of proof that Mr. Thompson breached his fiduciary duties and the breach was the proximate cause of any losses was on the Shareholders. *CP 73; Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 517, 728 P.2d 597 (1986). Mr. Thompson had the burden of showing that his actions were in good faith, a burden he met. *CP 73; Saviano. v. Westport Amusements, Inc.*, 144 Wn. App 72, 79, 180 P.3d 874 (2008).

**2. Judge Heller Was Entitled to Look to Federal Bankruptcy Law for Guidance.**

The Shareholders also argue that Judge Heller erred in “applying” federal bankruptcy law in the context of this claim. *Appellants’ Brf., pp. 28-30*. Yet, Judge Heller did no such thing. What he did do was look to federal bankruptcy law for *guidance*. That was completely appropriate given the paucity of authority under Washington law in this area. *See, e.g., St. John Medical Center v. Department of Social & Health Services*, 110 Wn. App. 51, 60, 38 P.3d 383 (2002).

In looking to federal bankruptcy law, and in particular the concepts of “new value” and payments made in the “ordinary course of business,” Judge Heller was entitled to view those concepts in the context of a breach of fiduciary duty claim for guidance but was not required to apply those

concepts strictly. *See, e.g., Tift v. Prof. Nursing Servs., Inc*, 76 Wn. App. 577, 583, 886 P.2d 1158 (1995) (federal authorities are persuasive but not controlling).

**3. The Entire Value of a New Agreement Constitutes New Value.**

The Shareholders misconstrue the concept of new value in the context of the payments to Mr. Kallshian. *See Appellants' Brf., pp. 30-32.* The Shareholders argue that a portion of what was paid to Mr. Kallshian was not "new value" and thus that portion is a "preference." *Appellants' Brf., pp. 31-32.* But this argument ignores the realities of Mr. Kallshian's agreement.

As Judge Heller found, in order to retain Mr. Kallshian's services, he had to be paid the entire amount agreed upon. *CP 68.* Under §547(c)(1) of the federal bankruptcy code "new value" given to a debtor contemporaneously is not a preference. *11 U.S.C. §547(c)(1).* "New value" is defined to include "services." *11 U.S.C. §547(a)(2).*

Here, but for the agreement to pay Mr. Kallshian the entire agreed-upon amount, the companies would not have received any of Mr. Kallshian's services. That the negotiated amount recognized what he was owed is immaterial, and the cases cited by the Shareholders are distinguishable on this basis.

Similarly, the loan payments made by the companies on behalf of Mr. Thompson constituted new value. As Judge Heller found, had those payments not been made, Mr. Thompson would not have continued to work for the companies. *CP 76*.

**4. Regular Payments on a Loan Do Not Constitute Preferences.**

The evidence presented at trial was clear that the payments made on Mr. Thompson's loans were the regular monthly loan payments that were paid in the ordinary course of business as the payments came due. *10/5/09 p.m. RP, pp. 34-35*. Judge Heller so concluded. *CP 76*.

Nevertheless, the Shareholders argue that Judge Heller failed to make findings of fact on this point and there was no evidence of "industry practices," and thus the payments did not constitute payments in the "ordinary course of business" as contemplated by the federal bankruptcy code. *Appellants' Brf., pp. 32-33*.<sup>12</sup>

As discussed above, the loan payments constituted "new value." Thus, this Court need not even consider this issue, as Judge Heller's ruling

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<sup>12</sup> At several other places in their brief, the Shareholders complain without citing any authority that Judge Heller failed to make specific findings of fact. *See, e.g., Appellants' Brf. p. 21*. In considering Judge Heller's findings this Court should view those findings as a whole, particularly where there is no evidence that the absence of any particular finding was intentional. *Douglas Northwest, Inc. v. O'Brien & Sons Construction, Inc.*, 64 Wn. App. 661, 682, 828 P.2d 565 (1992).

regarding payments in the “ordinary course of business” was an additional basis for his ruling.

Furthermore, as noted above, Judge Heller was not bound to follow federal bankruptcy law to the letter. Clearly, he viewed the payments on Mr. Thompson’s loan as payments made in the ordinary course of the companies’ business. *See 10/5/09 p.m. RP, pp. 34-35.* He then concluded that by allowing the payments on his loan to be made, Mr. Thompson did not breach his fiduciary duties to the companies and acted in good faith.

**5. Judge Heller’s Findings of Fact and Conclusions of Law Regarding the Preferences Claim Can Be Affirmed on Other Grounds.**

A trial court judgment may be affirmed on any grounds supported by the proof, even if the trial court’s specific reason for granting the judgment was in error. *Niven v. E.J. Bartells Co.*, 97 Wn. App. 507, 513, 983 P. 2d 1193 (1999). As discussed above, Judge Heller’s ruling on this claim was correct. Even if it were not, however, there are ample grounds on which his ruling can be affirmed.

**a. Shareholders Lacked Standing to Assert Preference Claims.**

Preference claims are claims brought for the benefit of creditors. *See generally, Tacoma Assn. Credit Men v. Lester*, 72 Wn.2d 453, 433 P.2d 901 (1967). Typically, the claims are asserted in a bankruptcy

proceeding by a bankruptcy trustee or in a receivership proceeding brought for the benefit of creditors. *Id.*

The Shareholders cite to *Block v. Olympic Health Spa, Inc.*, 24 Wn. App. 938, 604 P.2d 1317 (1979) to support their assertion that preferences may be “voided” as a breach of fiduciary duty. *Appellants’ Brf.*, pp. 29-30. In *Block* plaintiff creditor sought to pierce the corporate veil of the debtor in order to attach personal liability to a major shareholder of the debtor. The creditor argued that the issuance of a preference to the shareholder was sufficient evidence to pierce the corporate veil. *Id.* at 946. The Court of Appeals rejected that argument. *Id.* at 950.

In doing so, the Court of Appeals discussed a loan by an officer or director to a corporation. The Court of Appeals stated:

As a general rule, the officers and directors of a solvent corporation may loan it money, take security therefor and be repaid without violating any fiduciary duty and without incurring liability to other creditors. 15A W. Fletcher, *Cyclopedia Private Corporations* § 7467 (rev. ed. 1969). On the other hand, the prevailing rule – 31 jurisdictions according to Fletcher – is that such transfers are prohibited during insolvency and subject to being set aside *for the benefit of all corporate creditors*. 15A W. Fletcher, *supra* § 7468; 19 Am. Jur. 2d *Corporations* § 1574 (1965).

*Id.* at 948 [emphasis added].

The Court of Appeals went on to state:

Here, Lane completely controlled and directed Olympic's business affairs; he was aware the corporation was insolvent and he intended to secure a personal advantage over other creditors. In these circumstances *the preference would appear to be recoverable by Olympic's receiver* as a fraudulent conveyance under *Tacoma Ass'n of Credit Men v. Lester, supra*; it would clearly be recoverable by the receiver under the majority rule alluded to by Fletcher.

*Id.* at 949-950 [emphasis added].

Thus, in the context of this case, *Block* stands for the proposition that a preference claim is one only to be asserted for the benefit of all creditors, such as by a trustee in bankruptcy or a receiver, and cannot serve as the basis for a breach of fiduciary duty claim. The Shareholders were not pursuing their claim "for the benefit of all corporate creditors."

*Id.* at 948. Rather, they sought recovery for their *own* benefit.

The interveners cite no cases – and our research has revealed none – where a debtor outside of a bankruptcy or receivership proceeding has been able to assert a preference claim on its own behalf. Judge Heller correctly ruled that the Shareholders' claim fails.

**b. The Datamarine Companies Were a "Going Concern" and Thus Not Insolvent for Purposes of Assessing Shareholders' Claim.**

The Shareholders make much of the fact that the companies were "insolvent" during the time that Mr. Thompson served as chief executive officer, emphasizing the amount of the companies' liabilities. *Appellants'*

*Brf.*, 10-12. Yet, whether the companies' liabilities exceeded their assets is not the test that applies to the Shareholders' claim.

In *Spokane Concrete Products, Inc. v. U.S. Bank of Wash.*, 126 Wn. 2d 269, 892 P. 2d 98 (1995), the Washington Supreme Court considered whether it was fraudulent for a leveraged corporation – Spokane Concrete – to pledge its assets to guarantee repayment of a loan. In discussing whether Spokane Concrete was “insolvent,” the Supreme Court held:

The mere fact that Spokane Concrete's liabilities exceeded its assets immediately following the transaction is not dispositive, because Spokane Concrete was *a going concern with prospects for the future*. Indeed, following its buyout by REEC, Spokane Concrete continued operating for 12 years before going bankrupt, the same length of time it operated before REEC acquired it.

*Id.* at 280 [citations omitted] [emphasis added].

Like Spokane Concrete, the evidence at trial was that despite severe financial problems, the Datamarine Companies continued to operate and did so because, as Mr. Stephens testified, the Datamarine companies had a role to play in the future of the 220 MHz market.

*10/05/09 a.m. RP*, pp. 62-63. Indeed, more than six years after Mr. Thompson's departure, the Datamarine Companies continue to operate, have not filed for bankruptcy protection, nor has a receiver been appointed, as Judge Heller found. *CP 70*.

It is axiomatic under Washington law that a debtor has the right to prefer one creditor over another, even to the exhaustion of his assets. *Workman v. Bryce*, 50 Wn. 2d 185, 190, 310 P. 2d 228 (1957). The payments on the loans Mr. Thompson had made to the companies were proper, and by allowing those payments to be made Mr. Thompson did not breach his fiduciary duties to the companies.

**E. Judge Heller Did Not Err in Concluding that the Interveners Had Failed to Meet Their Burden of Proof that Mr. Thompson Had Breached His Fiduciary Duties Regarding Reimbursement of Personal Expenses.**

Perhaps no issue best demonstrates the factual nature of the Shareholders' appeal than the issue of Mr. Thompson's reimbursement of business expenses. *Appellants' Brf.*, pp. 33-37. At page 35 of their brief, Shareholders assert:

Thompson claimed to have repaid all personal expenses, but provided no evidence to support that, beyond his and Vandermyn's bare assertions.

Those "bare assertions" were the testimony at trial of Mr. Thompson and Ms. Vandermyn, who was the accounting department supervisor for the companies beginning in the 1980's and was the individual responsible for overseeing payment of expenses. *10/5/09 p.m. RP*, p. 8. Ms. Vandermyn testified as follow:

Q. I'm going to give you – the intervenors in this case claim that there are the following credit card

amounts, (indicating) and \$12,243.09. When you total this amount, it totals \$173,718.07. They submit that Mr. Thompson submitted in the period of 1999, January 1999 through March 2003, \$9,289.99. From this the intervenors conclude that Mr. Thompson had \$164,428.08 in personal expenses of his that were reimbursed by the company. Do you believe that?

A. No.

Q. Why not?

A. Because the company credit cards were used by everybody.

*10/5/09 p.m. RP, p. 39.*

Mr. Thompson testified as follows:

Q. Okay. I want to – I don't think I have asked you about the credit cards, all right? Now, there is an issue in this case about credit cards that were in your name. Were those credit cards used for – to pay for company expenses?

A. Yes.

...

Q. And someone like Debbie Vandermyn or somebody who worked for Debbie Vandermyn, would go through the credit card statement and made the various allocations as to what was a business expense and what might be a personal experience [sic]?

A. I don't think – there were virtually no personal expenses of substance over 20 years, but essentially I always – on any business trip, or any time that there was a substantial expense over a couple of days for one thing or another, um, I always submitted an expense report.

Q. Okay.

A. And there were, you know, at least two file folders, two inches thick of those expense reports.

Q. And was that true when you left in March of 2003, you believe there were two thick file folders?

- A. Oh, no question about it.
- Q. When you did have personal expenses on the credit card, what would you do?
- A. I just would – I would give the accounting department a check.
- Q. A personal check?
- A. Yes.
- Q. Did other employees, were they authorized to make purchases for the company using the credit card?
- A. Yes.

10/5/09 a.m. RP, pp. 103-105.<sup>13</sup>

Judge Heller was entitled to believe this testimony. This testimony alone is sufficient to support his ruling regarding this claim.

**1. This Court Is Not Required to Search through Voluminous Trial Exhibits to Locate Relevant Evidence.**

The Shareholders argue that certain expenses charged on credit cards that Mr. Thompson had used by the companies. On page 36 of their brief the Shareholders give a “sampling” of what they contend are “unsupported expenses. *Appellants Brf.*, pp. 35-36. They cite to three trial exhibits, Exs. 470A, 470B, and 470D. Those exhibits total 191 pages. Yet the Shareholders offer no help to this Court in finding their “sampling.” Instead, they expect this Court to do that itself.

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<sup>13</sup> The Shareholders seem to make much of the fact that the expense reports submitted by Mr. Thompson that they were able to find only totaled \$9,289.99. *Appellants’ Brf.*, p. 35. What Shareholders ignore, however, is that they stipulated at trial that it was possible that the companies could not account for all the expense reports. 10/6/09 RP, pp. 54-55.

This Court does not have to comb through voluminous parts of the record in search of the Shareholders' sampling. *Cowiche Canyon Conserv. v. Bosley*, 118 Wn.2d 801, 819, 828 P.2d 549 (1992) (it is not the function of the appellate court to search through an entire deposition to locate relevant testimony). On this basis alone, the Shareholders' argument regarding the personal expenses claim can be rejected.

**2. Ample Evidence Exists to Support Judge Heller's Findings and Conclusions on the Expense Reimbursement Claim.**

Shareholders again argue that the burden was on Mr. Thompson to prove that each and every expense on the 191 pages of Exhibits Exs. 470A, 470B, and 470D was not a personal expense. As discussed, above, the Shareholders are wrong. It was their burden to prove that Mr. Thompson breached his fiduciary duty to the companies, which was the legal theory the Shareholders were pursuing. *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 517, 728 P.2d 597 (1986)

But even if the burden was on Mr. Thompson, he met that burden. As Ms. Vandermyn explained, the credit cards at issue, while in Mr. Thompson's name, were available to all the employees to charge company expenses. *10/5/09 p.m. RP, p. 39*. The credit card statements had numbers from the companies' accounting system that were placed next to each expenditure. *10/05/09 p.m. RP, pp. 26-29*.

Those accounting numbers represented the category that the expense related to. Thus, if a company employee travelled to a trade show and the expenses were incurred on the credit card in Mr. Thompson's name, those expenses were an expense of the company that was accounted for, as Judge Heller found. *CP 67-68.*

**F. Judge Heller Did Not Err in Awarding Mr. Thompson His Attorneys' Fees for Defending against the Shareholders' Claims.**

The Shareholders' last issue relates to Judge Heller's award of attorneys' fees against the companies for the fees incurred by Mr. Thompson in defending against the Shareholders' claims. *Appellants' Brf., 37-41.* As discussed below, Judge Heller's award was proper and the amount of the award was soundly within his discretion, which he did not abuse.

**1. Because the Shareholders' Claims Were Asserted as Defenses and Set-offs to Mr. Thompson's Claims Judge Heller Correctly Awarded Attorneys' Fees under the Attorneys' Fees' Provision of the Promissory Notes.**

The promissory notes evidencing Mr. Thompson's loans to the companies and the basis for his complaint that initiated this action at issue here all contain the following provision:

If any payment obligation under this Note is not paid when due, the Borrower promises to pay all costs of collection,

including reasonable attorney fees, whether or not a lawsuit is commenced as part of the collection process.

*See, e.g., Ex. 4, p. 1.*

One of the issues at trial was the application of the statute of limitations to the Shareholder claims. Judge Heller, citing *Ennis v. Ring*, 56 Wn. 2d 465, 341 P.2d 885 (1959), held that the statute of limitations did not run against a defense arising out of the transactions sued upon. *CP* 73. He also concluded:

[a]ll of the claims asserted by the interveners arise out of Thompson's claims inasmuch as they are being asserted as defenses and set-offs to Thompson's claims.

*CP* 73.

It necessarily follows from that conclusion that the attorneys' fees and costs incurred by Mr. Thompson in defending against the interveners' claims are recoverable under the attorneys' fee provision of the promissory notes. Judge Heller rightly concluded that the only way in which Mr. Thompson could enforce his notes was to defeat the interveners' claims.

The Shareholders argue that "[f]ew of the fees incurred [after September 7, 2007] can be attributed to collection of the Note."

*Appellants' Brf., p. 39.* But the Shareholders cannot have it both ways.

They cannot argue, as they did at trial, that the statute of limitations does

not apply to them because all of their claims are related to the promissory notes but then argue that they are not bound by the terms of the notes. The attorneys' fees and costs incurred by Mr. Thompson in defending against the Shareholders' claims are recoverable under the attorneys' fee provision of the promissory notes.

**2. Determining the Amount of Attorneys' Fees to be Awarded Was a Matter within Judge Heller's Discretion.**

Shareholders' final argument is that Judge Heller should have made certain deductions from the award of attorneys' fees he made. *Appellants' Brf., pp. 40-41*. In this section of their brief the Shareholders make numerous factual assertions without any citation to the record. On this basis alone, this Court should reject Shareholders' argument. *King Aircraft Sales, Inc. v. Lane*, 68 Wn. App. 706, 717-718, 846 P.2d 550 (1993).

Even if considered, however, the argument should be rejected. The amount of fees to award was clearly within Judge Heller's discretion. *Morgan v. Kingen*, 141 Wn. App. 143, 163, 169 P.3d 487 (2007).

For support the Shareholders cite *Mahler v. Szucs*, 135 Wn. 2d 398, 957 P.2d 632 (1998) for the proposition that Judge Heller should have excluded hours pertaining to unsuccessful theories or claims. Nothing in *Mahler*, however, states that a party is not entitled to fees on

unsuccessful motions or responses to motions relating to claims on which the party ultimately prevails.

**3. The Shareholders' Request for Attorneys' Fees Pursuant to RAP 18.1 Should Be Denied.**

Shareholders conclude their brief by requesting attorneys' fees under a theory that should this Court accept that the Shareholders' claims implicate the attorneys' fee provisions of the promissory and agree with there other arguments, they are entitled to attorneys' fees under R.C.W. 4.84.330. *Appellants' Brf., p. 41*. As discussed above, the Shareholders' arguments regarding their claims against Mr. Thompson be rejected. It necessarily follows, then that their request for attorneys' fees should also be rejected.

**G. Request for Attorneys' Fees Pursuant to RAP 18.1(b).**

For the same reasons that Judge Heller awarded fees against the companies at trial, should this Court affirmed Judge Heller's ruling, Mr. Thompson requests his fees and expenses incurred on appeal.

**V. CROSS-APPEAL**

**A. Assignment of Error for Cross-Appeal.**

Judge Heller erred in ruling that the shareholder/interveners were not personally liable for the attorneys' fees awarded to Mr. Thompson that

related to the fees and costs incurred in defending against the claims the shareholder/interveners asserted on behalf of Datamarine.

**B. Statement of Issues for Cross-Appeal.**

1. Are the shareholder/interveners bound by orders applicable to the company in whose shoes they stand?
2. Is R.C.W. 23B.07.400 the Exclusive Means by Which Attorneys' Fees Can Be Awarded against Shareholder/Interveners?

**C. Argument on Cross-Appeal**

**1. Standard of Review.**

Judge Heller's ruling that that the Shareholders should not be held personally liable for a portion of that judgment amount relating to attorneys' fees incurred in defending against the Shareholders' claims is a question of law. Such questions are reviewed *de novo*. *Mason v. King County*, 134 Wn. App. 806, 810, 142 P.3d 637 (2006).

**2. The Shareholder/Interveners Stand in the Shoes of Datamarine and Are Bound to Orders to the Same Extent.**

As Judge Heller concluded in his findings of fact and conclusions of law the Shareholders stand in the shoes of the Datamarine Companies and are subject to the same defenses. *CP 71; LaHue v. Keystone Investment Co.*, 6 Wash. App. 765, 779, 496 P. 2d 343 (1972). The

Shareholders are bound by any orders entered against the Datamarine Companies. *Globe Construction Co. v. Yost*, 169 Wash. 319, 325, 13 P.2d 433 (1932). Applying those principles here supports holding the Shareholders personally liable for the attorneys' fees and costs incurred by Mr. Thompson in defending against their claims.

*Globe Construction* provides clear precedent for the Court to hold the Shareholders responsible to the same extent as the companies for the fees and costs incurred since their intervention. *Globe Construction* was a quiet title action in which a plaintiff on its own motion was substituted for a defendant in a pending action.

On appeal the Washington Supreme Court held:

We are fully in accord with the trial court's ruling to the effect that the appellant, having by its own motion become substituted in the former action in the place of a defendant through whom it claims title, is bound by that judgment to the same extent that it would have been had it been originally made a party therein.

169 Wash. at 325.

Just like the plaintiff in *Globe Construction*, the Shareholders substituted for the companies. They certainly could have stayed out of this proceeding but chose not to. Having sought to carry out the companies' wishes, the Shareholders can be required to accept the burdens of that decision.

A California case is instructive. In *Brusso v. Running Springs Country Club*, 228 Cal. App. 3d 92, 278 Cal. Rptr. 758 (1991) the California court of appeals considered the issue of whether interveners who had not signed the contracts containing an attorneys' fee provision could nevertheless be held personally liable. In holding that they could, the California court held:

Here, however, the nonsignatory plaintiffs would have had a right to receive fees under the substantial benefit doctrine had they prevailed. That is, had defendants lost, they would have been liable to plaintiffs for damages and fees under the contract, thereby creating a benefit to the corporation in the form of a common fund from which plaintiffs could have recovered their fees. Therefore, under the theory of *Reynolds*, [158 Cal. Rptr. 1], 25 Cal. 3d 124, and *Leach*, [230 Cal. Rptr. 553], 185 Cal. App. 3d 1295, the trial court correctly awarded fees to the signatory defendants under the mutuality theory of Civil Code section 1717, doing so on the grounds that, had plaintiffs prevailed, they would have been entitled to attorneys' fees pursuant to the substantial benefit doctrine.

228 Cal. App. 3d at 111, 278 Cal. Rptr. at 769. [footnote omitted].

*Brusso* is analogous to this case. Had the Shareholders prevailed, they no doubt would have sought fees under the common fund theory accepted in Washington. See *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 521, 728 P.2d 597 (1986). Like California, Washington has a mutuality statute for attorneys' fees. *R.C.W. 4.84.330*. Like the

defendants in *Brusso*, Mr. Thompson is entitled to his attorneys' fees from the Shareholders.

**3. R.C.W. 23B.07.400 Is Not the Exclusive Means by Which Attorneys' Fees Can Be Awarded Against Shareholder/Interveners.**

In his December 31, 2009 letter to counsel, Judge Heller ruled that “[w]hether fees and costs may be assessed against interveners in a shareholder derivative action is governed by R.C.W. 23B.07.400(4).” *RCP 523*. In effect Judge Heller ruled that R.C.W. 23B.07.400(4) was the exclusive means by which the Shareholders could be held accountable for attorneys' fees.

R.C.W. 23B.07.400(4) provides:

On termination of the proceeding the court may require the plaintiff to pay any defendant's reasonable expenses, including counsel fees, incurred in defending the proceeding if it finds that the proceeding was commenced without reasonable cause.

Nothing in that provision, however, states that it is the only means by which attorneys' fees can be awarded. While Mr. Thompson did argue for application of R.C.W. 23B.07.400(4), he also argued, as discussed above, that the Shareholders were liable under the attorneys' fee provisions of the promissory notes. *RCP 452-455*. Mr. Thompson's argument was in the alternative. Pursuing alternative theories of recovery is permitted under

Washington law. *See, e.g., Stryken v. Panell*, 66 Wn. App. 566, 570, 832 P.2d 890 (1992) (party may seek equitable and damage theories.)

## VI. CONCLUSION

Judge Heller's findings of fact and conclusions of law are supported by substantial evidence and should be upheld. His ruling regarding the personal liability of the Shareholders for attorneys' fees was in error, and this matter should be remanded to Judge Heller for the sole purpose of entry of judgment against the Shareholders for attorneys' fees and costs in an amount to be determined by Judge Heller.

DATED this 25<sup>th</sup> day of October, 2010.

WOLFSTONE, PANCHOT & BLOCH, P.S., INC.

By: \_\_\_\_\_



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