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NO. 66695-9-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

ROBERTO DIAZ-LUONG
and
LAN THI NGUYEN, husband and wife, and the marital community comprised thereof,

Appellants

vs.

LE & ASSOCIATES, P.S., a professional services corporation,

Respondent.

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STATE OF WASHINGTON
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APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Andrea Darvis, Judge

APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 1

III. STATEMENT OF THE CASE 3

IV. ARGUMENT 32

V. CONCLUSION 48

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 2

III. STATEMENT OF THE CASE 3

A. BACKGROUND OF THE ORIGINAL DISPUTE..... 3

B. ENTRY OF THE PRELIMINARY INJUNCTION..... 8

C. DEFENDANTS ARE HELD IN CONTEMPT FOR VIOLATING THE PRELIM. INJ. (CONTEMPT I).... 8

1. Diaz's Destruction of Evidence..... 8
2. Plaintiffs' and Their Expert's Misrepresentations... 10
a. Accessing files by the "Roberto" User Profile After Defendants Were Terminated..... 11
b. Downloading of Personal Information..... 13
3. The Contempt I Order..... 14

D. EVENTS LEADING TO CONTEMPT II..... 17

E. THE CONTEMPT II MOTION..... 20

1. The Evolution of Michael Andrew's Opinions Regarding An Undisclosed Computer..... 21
a. The Revision I Theory..... 22
i. The Modified Date Anomaly..... 23
ii. The Face Date Anomaly..... 26
iii. The Demonstration..... 28
b. The Seven Miscellaneous Files..... 30
2. The Contempt II Ruling..... 30

IV. ARGUMENT..... 32

A. STANDARD OF REVIEW..... 34

B. DIAZ AND NGUYEN LACK THE PRESENT ABILITY

TO PURGE THEIR CONTEMPT..... 34

C. THE COURT FAILED TO MAKE REQUIRED FINDINGS REGARDING DEFENDANTS' RESOURCES AND THE LIKELY EFFECTIVENESS OF THE SANCTIONS, AND TO WEIGH THE MAGNITUDE OF THE SANCTIONS AGAINST THE ENDS TO BE SERVED..... 40

D. THE SANCTIONS HAVE CROSSED THE LINE INTO PUNITIVE..... 44

E. ARGUMENT RE: INDIVIDUAL SPECIFICATIONS OF CONTEMPT..... 45

F. THE SANCTIONS AGAINST DIAZ & NGUYEN SHOULD BE VACATED..... 48

G. THE AWARD OF ATTORNEY FEES TO PLAINTIFFS SHOULD BE VACATED..... 48

V. CONCLUSION 48

TABLE OF AUTHORITIES

Washington Cases

Page

Britannia Holdings Ltd. v Greer, 127 Wn. App. 926, 933-34, 113 P.3d 1041 (2005) 36, 38

Cunningham v. Weston, 180 Fed. Appx. 644, 2006 WL 1236675 (9th Cir 2006) 48

Dole Fresh Fruit Co. v. United Banana Co., Inc., 821 F.2d 106 (2nd Cir. 1987) 42

Donovan v. Mazzola, 761 F.2d 1411, 1418 (9th Cir.1985) 38

Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770 (9th Cir. 1983) 36, 48

Hipple v. McFadden, 161 Wn. App. 550, 255 P.3d 730, 736 (2011) 36

In re Dependency of A.K., 162 wn.2d 632, 644, 174 P.3d 11 (2007) 34

In re Estate of Elliott, 993 P.2d 474 (Colo. 2000) 38

In re M.B., 101 Wn. App. 425, 454, 3 P.3d 78 (2000) 43

In re Silva, 166 Wn.2d 133, 141-42, 206 P.3d 1240 (2009) 34. 38

International Union, United Mine Workers of America, 512 U.S. 821, 831, 114 S.Ct. 2552 (1994) 35

Johnston v. Beneficial Management Corp. of America, 96 Wn.2d 708, 709, 712-13, 638 P.2d 1201 (1982) 46

King v. DSHS, 110 Wn.2d 793, 800, 756 P.2d 1303 (1988) 35

Parisi v. Broward County, 769 So.2d 359 (Fla. 2000) 41

Smith v. Whatcom County District Court, 147 Wn.2d 98, 52 P.3d 485 (2002) 36

Shuffler v. Heritage Bank, 720 F.2d 1141 (9th Cir. 1983) 42

Statutes

RCW 7.21.010(3) 34

I. INTRODUCTION

The contempt power is necessary to uphold the effectiveness and dignity of the Courts. However, given that the parties most offended by alleged contemptuous acts prosecute, convict and punish the offender, it is a power that must be wielded with caution and restraint.

In hindsight, it is perhaps understandable how matters devolved as they did. This is a case where early imprudent acts by the defendants made it difficult for the trial court to provide them with a fair process. In the end, the trial court imposed sanctions wholly out of proportion to the resources of the contemnors and the matters at issue, without any valid opportunity for defendants to purge. Even in the face of defendants' past behavior, such a misapplication of the contempt power cannot stand. The sanctions imposed below should be vacated.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in making the findings in the following paragraphs of its September 13, 2010 Findings of Fact, Conclusions of Law and Order of Contempt and Sanctions ("Contempt II Order") (2522-38): 8, 10, 11(a), (b) and (c), 12, 13, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 42, 43, 44, 46, 47, 48, 49, 50, 51, 52, and 53.

2. The trial court erred in making the following Conclusions of Law contained in the following paragraphs of its September 13, 2010 Findings of Fact, Conclusions of Law and Order of Contempt and Sanctions (CP 2522-38): 4, 5, 6, 7, 8, and 9.

3. The trial court erred in making Orders A, B, C, D, E and F of its September 13, 2010 Findings of Fact, Conclusions of Law and Order of Contempt and Sanctions (CP 2522-38)

4. The trial court erred in denying defendants' Motion for Reconsideration, CP 2542-78.

5. The trial court erred in making the findings in the following paragraphs of its March 3, 1011 Findings of Fact, Conclusions of Law Re Order and Judgment Granting Plaintiff's Motion for Additional Award of Attorney's Fees on Contempt (CP 2617-30): I, L, M, O, R, S, V, W, Y, Z, AA, and BB.

6. The trial court erred in making the following Conclusions of Law contained in the following paragraphs of its March 3, 1011 Findings of Fact, Conclusions of Law Re Order and Judgment Granting Plaintiff's Motion for Additional Award of Attorney's Fees on Contempt (CP 2617-30): C, D, E, F, H, I, J, K, and M.

7. The trial court erred in finding defendants had the present ability to comply with its orders and thus erred in imposing coercive sanctions against defendants in its Contempt II Order.

8. The Court erred in imposing coercive fines upon defendants in its Contempt II Order where there was not substantial evidence supporting, and the Court failed to enter findings regarding whether the fines were appropriate in light of defendants' resources, whether they were likely to serve a coercive purpose, and whether they were appropriate in light of the ends to be served.

9. The trial court erred in imposing punitive fines upon defendants without providing defendants with the full due process afforded criminal defendants.

10. The trial court erred in awarding attorney fees to plaintiffs and to Mr. Andrews.

III. STATEMENT OF THE CASE

A. BACKGROUND OF THE ORIGINAL DISPUTE

Defendants in this case are Lan Nguyen and Roberto Diaz-Luong ("Diaz"). Both defendants previously worked for plaintiff Le & Associates. The principles of Le & Associates are Edward and Vienna Le.

Ms. Nguyen began working for Le & Associates in the summer 2003 as a legal assistant. (CP 6-7) She made her way through law school, and in 2005 passed the bar exam. *Id.* Le & Associates hired Ms. Nguyen as a full-time associate in August 2004, paying her a salary. *Id.* Ms. Nguyen worked for Le & Associates for three years before the falling out that led to the current lawsuit.

Defendant Roberto Diaz-Luong began working with Le & Associates in the winter of 2006. (CP 6)

In May 2007, Nguyen and Diaz proposed that they be paid on commission (via a fee splitting agreement) rather than salary. (CP 7-8) Ms. Nguyen began working on this basis in May 2007. *Id.* Le& Associates entered into a similar agreement with Diaz in August 2007. *Id.*

In October 2007, a falling out occurred between Vienna Le and

Lan Nguyen's sister, in connection with an unrelated escrow business. (CP 8-9) Ms. Le claims to have been so upset about the falling out that she felt she could no longer work with Ms. Nguyen. The Les therefore informed Nguyen and Diaz they would be terminating their relationship, pursuant to a separation agreement.(CP 33-36) It was understood from the outset that some of the existing Le & Associates clients would terminate their relationship with Le & Associates and sign new fee agreements with Diaz and Nguyen. (CP 9)[1]

The purpose of the Separation Agreement was, in part, to assist Le & Associates in expeditiously handling a number of cases that were already being worked on by Nguyen and Diaz. (CP 18) The Agreement listed approximately 60 clients/cases, and separated those into several categories. For "Category 1" clients (approximately 2/3 of the clients covered by the agreement), Diaz & Nguyen would make their best efforts to settle the cases within 4.5 months. If they did settle within that time frame, Le & Associates would get 70% of the fees collected and Diaz & Nguyen would take the remaining 30%. *Id.* If the cases did not settle, Diaz and Nguyen "will execute a new attorney-fee agreement" and the percentage fee that would go to Le & Associates would depend upon

[1] For example, on October 29, 2007, six days after the Separation Agreement was signed, Mr. Diaz-Luong wrote to Vienna Le informing her that a former Le & Associates client, Patty Powers, had decided to leave Le & Associates and go with Diaz and Nguyen. (CP 539) Ms. Le wrote back that she did "not have a problem with this at all. It would have been yours if you had listed it in the Separation Agreement." *Id.* Ms. Le only suggested that they get Ms. Powers to sign a new fee agreement. She also suggested they obtain a business license for their practice. *Id.*

whether Diaz & Nguyen litigated the case or returned it to Le & Associates for litigation. The Agreement contemplated that for the remaining 1/3 of the cases (the "100% cases") Le & Associates would take no fees and Diaz and Nguyen would immediately take over representation of those clients. *Id.* Thus, for virtually all of the clients covered in the Separation Agreement, there was an understanding that Diaz & Nguyen either immediately would take over full representation, or be permitted to do so later, subject to Le & Associates' lien. *Id.*

Unfortunately, relations between the Les and defendants quickly deteriorated. All parties caused bar complaints to be filed against each other. (CP 347) There were heated exchanges of correspondence. *See, e.g.,* CP 55.[2] Finally, on November 3, 2007, Mr. Le faxed to Diaz a letter accusing Diaz and Nguyen of attempting to pilfer clients not listed on the Separation Agreement; allegedly badmouthing Mr. Le to existing clients and third party providers;[3] and of allegedly sending unauthorized correspondence to third party insurance companies.[4] (CP 46-48) Mr. Le

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[2] In which Mr. Le stated "Frankly, I am just going to ignore you from henceforth. Your letters to me continue to be as inconsequential and meaningless just as your work product at the time you work at this firm."

[3] Defendants also claim plaintiffs were badmouthing them. For example, by telling a doctor Diaz and Nguyen had embezzled $50,000 from them. (CP 329)

[4] Diaz himself alerted Le that he'd sent letters to insurers in cases involving the 100% clients. (CP 44) Diaz also sent letters to third party insurers in cases involving the category 1 clients, in which he stated there was a dispute as to who had authority to settle those cases (CP 61-78) Although perhaps ill-advised in hindsight, Diaz did have a legitimate contention at the time that he and Nguyen were entitled under the Settlement Agreement to represent those clients. *See* CP 33-34 and discussion *supra.*

therefore purported to terminate the Separation Agreement. *Id.* He provided a list of clients for whom he demanded defendants cease representation. *Id.*[5]

Mr. Le made no request that any electronic files be returned, despite the fact that Diaz reminded Le via several emails the day before that Diaz had all of the electronic and hard files of the 100% clients. *Id.* (CP 42-44) Several days later, Le acknowledged in a fax to defendants' attorney that he was aware Diaz and Nguyen had both electronic and hard copy files for at least 45 clients, including all of the clients in the Separation Agreement. (CP 57)[6] Mr. Le asked only that Diaz & Nguyen return the hard files of clients "who did not retain Diaz & Nguyen to be their attorneys." (CP 58)

However, shortly after hiring counsel, plaintiffs filed a complaint, on December 11, 2007. (CP 1-16) They set out five causes of action. The first four requested a declaration of plaintiffs' entitlement to fees on cases that had gone to Diaz & Nguyen; sued Diaz & Nguyen for tortious interference with their relationships with their clients; and sought an injunction to prevent Diaz & Nguyen from making further attempts to take Le & Associates' clients. The fifth cause of action demanded return of electronic files plaintiffs claimed were being used to Diaz and Nguyen to

[5] All of these were Category 1 clients under the Separation Agreement. None of the 100% clients were listed. *Id.*

[6] Mr. Le later acknowledged being present when Diaz-Luong downloaded some of the files onto a USB drive. (CP 294-96)

attempt to steal clients.

Defendants filed an answer and counterclaims on February 21, 2008. (CP 383-423) It was, in many ways, a mirror of plaintiff's complaint. Defendants claimed they were owed wages and compensation under the Separation Agreement, under previous fee splitting agreements, and pursuant to *quantum meruit.* (CP 395-99) Defendants contended plaintiffs were defaming them and tortiously interfering with their client relationships. (CP 399-401) Defendants also demanded that Le & Associates turn over all files of clients who had made the choice to be represented by defendants rather than plaintiffs. (CP 401-02)

Relations between counsel quickly became as contentious as those between the parties. Plaintiffs' counsel called defendants' counsel's motion for a continuance a "stunt;" refused to communicate with him other than by email; and refused to accept service of any documents via email. (CP 333) Defense counsel told plaintiff's counsel to "stop being a jerk." (CP 332)

Both Mr. Diaz and his counsel acknowledged that defendants had downloaded Le & Associates client files. (CP 216, 327, 279-321) Diaz's counsel, however, instructed Diaz and Nguyen not to turn over those files because, he felt, they contained evidence pertinent to the parties' dispute. (CP 216, 327, 251, 280) Later, both Diaz and his counsel offered to delete all Le & Associates files other than those for clients who had chosen to be represented by Diaz & Nguyen—as long as a copy of all files was preserved. *Id.*; CP 284-85.

B. ENTRY OF THE PRELIMINARY INJUNCTION

On February 11, 2008, the Court entered a preliminary injunction. (CP 357-65) The injunction enjoined defendants from "further possession of the electronic data base of plaintiff . . . ." *Id.* Defendants were instructed to "not . . . use, copy, modify, add or delete any information . . . of the . . . data base." *Id.* Defendants were instructed to "identify . . . all computers that now contain or once contained the misappropriated Le Firm client database, or any part thereof." *Id.* An IT professional was to make two copies of all downloaded files, then destroy all files on defendants' computers. *Id.* Defendants were instructed to provide an undertaking under penalty of perjury "whereby each states s/he has fully complied with [this order] <u>with respect to the destruction of these electronic file materials</u> and that each shall comply with all provisions of [this order]." *Id.* (emphasis added) Defendants were to bear the cost of the IT professional's reasonable charges "for examining all computers and hard drives, copying the same to the storage devices, and destroying the same files on the defendants' computers." *Id.* Defendants were to return hard copies of client files obtained from plaintiff's law firm. Defendants were enjoined from using identity information obtained from Le & Associates for "contacting any current or past clients of Plaintiff law firm."

C. DEFENDANTS ARE HELD IN CONTEMPT FOR VIOLATING THE PRELIMINARY INJUNCTION ("CONTEMPT I").

1. Diaz's Destruction of Evidence

Defendants filed several declarations in connection with the

Injunction's undertaking requirement. (CP 735-39; 742-46; 436-38) They identified two laptop computers they owned, but claimed they had not downloaded Le & Associates files onto them. (CP 438) They disclosed that they had downloaded Le & Associates client files onto a USB hard drive. (CP 736, 438) On March 14, 2008, Nguyen and Diaz turned over a USB hard drive to an expert hired by plaintiffs named Mike Andrew for examination.

On April 1, 2008, plaintiffs filed a motion to hold defendants in contempt. It was supported by a declaration by Mr. Andrew which contained clear indications that the USB drive defendants had turned over to Mr. Andrew was not, in fact, the USB drive upon which the Le & Associates files was originally downloaded. (Sub No. 115)[7] Shortly thereafter, Diaz filed a declaration in which he admitted he used a different USB drive ("USB1") to download the Le & Associates files. (CP 498-512) He claimed he did so with permission and knowledge of the Les. (CP 499). He testified he became increasingly "desperate" as the litigation progressed that if he turned over the Le's files, they would be deleted or altered and vital evidence lost. (CP 500-01)[8] So he attempted to copy the

[7] Appellants have filed, together with this brief, a supplemental designation of clerk's papers. Since the designated items have not yet been numbered in the clerk's papers, they are referenced herein by sub number and docket number.

[8] As an example, Diaz attached a letter from Vienna Le to a client in which she blamed inappropriately-charged cost items on "errors caused by Lan Nguyen, our former Associate Attorney, in preparing your disbursement." (CP 504). The letter was copied to Leland Ripley, the attorney who represented the Les in a previous disciplinary proceeding brought against them for mishandling of client funds. *Id.; See* CP 306-21. Defendants consistently contended the client files contained evidence (a) supporting

entire database from USB1 to the USB drive he ultimately turned over to Mr. Andrews ("USB2"). *Id.* He admitted he set back the date on his laptop when he effected the transfer, in an attempt to make it appear the files were transferred on October 23, 2007, the same date the files were originally downloaded onto USB 1. *Id.* He then admitted to destroying USB1. (CP 501-02). Diaz clearly stated that he used his laptop to effectuate the transfer. *Id.*

At the hearing relating to plaintiffs' pending first motion for contempt (Contempt I) Diaz's counsel disclosed that Diaz had removed and destroyed the hard drives of his and Lan's laptop computers. Diaz confirmed this in his April 29, 2008 deposition.[9]

2. Plaintiffs' and Their Expert's Misrepresentations

Andrew, with plaintiff's tacit association, engaged in some significantly misleading conduct in their own right in this litigation.[10]

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defendants' claims for *quantum meruit* compensation; and (b) supporting defendants' allegations that Le & Associates were engaging in a pattern of submitting fraudulent costs bills to clients. (CP 288)

[9] Diaz stated he did so primarily because he felt plaintiffs were using the court ordered forensic examinations as a means to put financial pressure on him and Nguyen, and they could not afford another $10,000 plus bill from Andrew.

[10] The following is not meant as a collateral attack on the Contempt I order. Rather, it tends, along with a number of other circumstances discussed *infra,* to demonstrate how biased and ruthless Andrew and plaintiff became in their pursuit of contempt findings against defendants.

a. Accessing of Files by the "Roberto" User Profile After Defendants Were Terminated.

Andrew also included in his March 31, 2008 declaration the following:

> Preliminary analysis of [Le & Assoc.] Wkrstn25 shows over 100 client data files accessed from this system using the 'roberto' account profile, between October 22, 2007 and November 5, 2007. A number of these files relate to clients named in the data files that are present on Defendant's USB drive. The 'roberto' profile was deleted from the system prior to my analysis and deeper examination may reveal further relevant evidence on this drive.[[11]]

Asked at his April 29, 2008 deposition whether he could confirm if it was Diaz himself who accessed the records between October 22 and November 5, 2007, Andrew responded "I cannot state that emphatically." (Sub. 781D at 6, ¶ 23)[12]

What only came to light much later was the fact that on March 11, 2008, Frank Denman, the Le & Associates employee in charge of IT, had emailed Mr. Andrew informing him the "roberto" user profile had been disabled on "1/24/07" (sic) and re-enabled with Vienna Le's password on November 1, 2007 at the request of Vienna Le herself. *Id.* at 6-7, ¶ 26 and Ex. J thereto. In his second deposition in January 2010, Andrew denied

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[11] The report earlier established that Roberto Diaz had used the "roberto" user account while working at Le & Associates.

[12] Appellants are filing a Supplemental Designation of Clerk's Papers concurrent with this Brief. Where reference is made to the supplemental filings herein, it is by Sub Number and document page.

ever having seen this email. *Id.* However, another email from Denman to Andrew dated March 13, 2008 corrected the date the roberto profile was disabled to October 24, 2007, noting it was Andrew who pointed out this error to him in a telephone call. *Id.* at 7, ¶ 27 and Ex. K thereto. Not only did Andrew know, when he wrote his March 31 declaration (and when he was deposed the first time in April 2007), that the roberto profile had been disabled the day after Diaz left Le & Associates, he also knew there was no subsequent activity on the profile until it was re-enabled with Vienna Le's password. *Id.* at 17-18, ¶ 78.

Notably, Mr. Andrew did not produce either of these emails in response to his deposition subpoena, although he produced many others. *Id.* at 7, ¶ 28. The emails were only discovered by defendants through requests for production to plaintiffs.

Plaintiff and Mr. Andrew knew that neither Diaz nor Nguyen used the "Roberto profile" after Vienna Le "re-activated" the "Roberto profile." Yet plaintiff and Mr. Andrew strongly advanced and sought entry of a finding of fact regarding the "Roberto profile." That finding of fact was misleading and falsely suggests and accuses Diaz and Nguyen of criminal trespass in using the "Roberto profile" after Vienna Le re-activated the profile with her own password. Thus, the trial court supported its finding of contempt in its Contempt I order with the following finding of fact:

> Records indicate that the 'Roberto' user profile was accessing records in various locations on the Le & Associates network from Workstation 25 through November 5, 2007, two weeks after Defendants were

terminated by the Le firm. [CP 517]

b. Downloading of Personal Financial Information.

In his March 31, 2008 declaration (Sub. No. 115), filed in support of Plaintiffs' Contempt I motion, Mr. Andrews stated: "Records were recovered [from Workstation 15 at Le & Associates] that indicate [on October 23, 2007] personal files were accessed that contain financial information about Edward Le and Vienna Le." *Id.* at 16, ¶ 23 (emphasis added). Notably, no evidence was ever presented by plaintiffs that defendants downloaded any such personal financial information. In fact, in his October 23, 2009 report (following entry of the Contempt I order, after Andrew was permitted to examine additional computer media) Andrew concluded there was no data on any of defendants' drives related to private information of the plaintiffs. (CP 635) Allegations in this regard were ultimately dropped and were not included in either the Permanent Injunction nor the Contempt II findings.

Nevertheless, in the statement of facts drafted by plaintiff's counsel for Contempt I, which was adopted by the trial court, there was a finding that the files downloaded by defendants included "personal and confidential banking, investment and other files from the Le computer system." (CP 520)

While it is not possible at this juncture to undo any findings of the Contempt I proceedings—nor to determine the extent to which these particular misrepresentations affected the trial court—it is important to take note of the aggressiveness with which the plaintiffs and their expert

have pursued their contempt allegations against defendants—particularly given the seminal role Andrew's testimony played in the Contempt II findings at issue in this appeal.

3. The Contempt I Order.

On June 11, 2008, the trial court entered its findings of fact, conclusions of law, and orders finding Nguyen and Diaz in contempt ("Contempt I Order"). (CP 513-528) The order is 16 pages long and contains numerous findings. Defendants were found to be in contempt with respect to the section entitled "Defendants' Contempt With Regard to the Disclosure and Production of Le & Associates Data and Files", which consists of 10 pages of factual findings. (CP 514-23) A close examination of the order indicates it can be distilled to the following findings of contempt:

- The preliminary injunction requires that defendants identify "all computers that now contain or once contained the misappropriated Le Firm client database . . . ." (CP 514)
- Defendants' declarations do not comply with this provision. *Id.*
- The defendants' declarations identify only the USB drive they produced. However, only a computer can access that drive, and any computer that accessed it "at some point had, and may still have," remnants of data on it. (CP 515)
- "<u>Defendants' continued failure to comply with the Court's order to disclose and certify computers having Le data is contempt</u>." (CP 515)

- Defendants falsely certified that the USB drive they provided to Andrew was the one used to download Le & Associates' data.
- "Defendants' refusal to identify computers in addition to the USB hard drive as having had Le data is contempt . . . ." (CP 518)
- There were 165 file folders moved off of USB2 and not returned before USB2 was turned over to Andrew. (CP 520)
- Defendants accessed and downloaded personal and confidential banking, investment and other files from the Le computer system. (CP 520)
- Defendants' "misrepresentations concerning the files they claim they accessed and copied form the Le computer system, and their concealment of that data by not including all of the misappropriated files on the hard drive they produced in response to the injunction, is contempt . . . ." (CP 520)
- "Both the creation of [USB2] and the subsequent claimed destruction of [USB1] violate the terms of the [preliminary injunction] and constitute contempt." (CP 522)
- Diaz's "claimed destruction of the hard drives [of his and Nguyen's laptops] is a violation of the [preliminary injunction] and constitutes contempt."

Of these findings, all are completed acts, with no possibility of purging, other than the finding that Diaz and Nguyen still had not disclosed all media that contained Le & Associates' data.

The Court found Diaz and Nguyen had the present ability to

comply with its order, "including the certification and identification of additional computers, hard drives and/or other electronic media containing, or having at one time contained Le client and personal data." (CP 523). It also found they had the present ability to comply with the Court's order that they pay Mr. Andrews' invoice for his examination of USB2 and the computers at Le & Associates. *Id.*

The Court held plaintiffs had not proven the following allegations of contempt:

(a) Prohibited use or misuse of Le & Associates data, particularly use of client identity information to contact current or former clients of Le & Associates. (CP 523-24).

(b) Prohibited contact with Le & Associates' clients. (CP 524)

(c) Prohibited making of disparaging remarks to former Le & Associates' clients or to third party providers or vendors. *Id.*

In other words, the Court declined to find Plaintiffs had proven Diaz or Nguyen were continuing to engage in any of the harmful behaviors that originally prompted their lawsuit. The only alleged, ongoing violation was Diaz and Nguyen's now inexplicable refusal to identify the mystery media containing some unknown fragment of Le & Associates' electronic client database.

The Court ordered that Defendant pay $1,000 per day per defendant "until the Defendants fully comply with the Injunction and this Order." (CP 526) The order goes on to specify what is meant by this: (1) by June 12, defendants must file amended declarations "to fully comply

with the Court's February 9, 2008 order." (CP 527) (2) Within 36 hours of designation, defendants must turn over to Michael Andrew all electronic media he specifies for analysis, whether or not identified by defendants. *Id.* (3) Defendants must pay the invoices of plaintiff's expert Andrew for his IT services. (CP 528) Defendants were ordered to execute an assignment of their fees on deposit with the court in the matter of Powers v. Rabanco to meet their financial obligations from this order. *Id.*

D. EVENTS LEADING TO CONTEMPT II.

On June 11, 2008, Diaz and Nguyen filed new declarations in an attempt to comply with the Court's requirement that they identify all electronic media that might have contained Le & Associates data. (CP 757-71) They both began by stating "Except for documents and files pertaining to clients of Diaz & Nguyen (which I understand fall outside the strictures of the February 9, 2008 Order), I no longer have any Le & Associates client files." (CP 758, 766) (emphasis added) They went on to list every piece of electronic storage media they had possessed over the relevant time period. (CP 757-71) With respect to the obligation to pay Andrew's IT fees, they pled an inability to pay. However, they requested that their fees being held in the court registry in the *Powers* case be used to pay those fees. (CP 771)[13]

A flurry of motions followed. Defendants moved for

[13] Defendants have repeatedly offered to have Andrews' IT fees be paid out of that fund. (CP 532, 771; RP 6/18: 239) It is unclear why this has never occurred.

reconsideration and filed a notice of appeal.[14] The Court denied reconsideration, but did require that the parties agree to a protective order to protect disclosure of confidential client files on Diaz's and Nguyen's computers pursuant to their examination by plaintiffs' IT expert. (Sub No. 211) Unsatisfied with the declarations defendants filed, on August 14, 2008, plaintiffs filed a motion to impose contempt sanctions. (Sub No. 225) On August 20, 2008, Diaz filed a new declaration specifying that his prior declaration named every computer and storage device to which he and Nguyen had had access from October 2007 to the date of the declaration. (CP 529-32) He specified that he was not leaving open the possibility of an accomplice—the declaration included all devices. *Id.* He requested again that the IT invoices be paid out of the *Powers* court registry.

On January 27, 2008, the Court signed, with some handwritten modifications, plaintiff's proposed Findings of Fact, Conclusions of Law and Order Imposing Sanctions for Contempt. (CP 726-32)) ("Sanctions Order") "The Court finds that the declarations [filed by Defendants on June 12, 2008] do not comply with the terms of its orders in that they contain qualifications, limitations, and omissions not permitted by the Orders." *Id.* The Court declined, however, to find this was contempt. *Id.* The Court did not specify what the impermissible qualifications,

[14] This Court filed an unpublished opinion resolving this appeal on August 23, 2010, Nos. 61912-8-I, 63011-3-I, 63012-1-I. The trial court was affirmed in all respects.

limitations or omissions were. Secondly, the order found plaintiffs' failure to pay Andrew's IT bills was contempt, given that defendants did not proffer documentation of an inability to pay. *Id.* The Court did not address defendants' repeated request that the fees be paid out of the *Powers* court registry. The order required that defendants "immediately comply with the terms and requirements of the prior orders of this Court, specifically the identification of computers or other media that contain or once contained data belonging to the Plaintiff, and the production of computers and other media for examination by Michael Andrew . . . ." *Id.* In the event defendants did not "come into complete compliance with the orders entered today by February 6, 2009, Defendants shall pay to the Court $1,000 per day per Defendant" until they came into complete compliance. *Id.* That same day, the Court entered an order specifying confidentiality processes and conditions for all computer equipment provided for analysis by plaintiffs. (CP 795-98)

On February 6, 2009, Diaz and Nguyen once again filed undertakings attempting to identify every possible electronic storage device they had come into contact with since October 2007. (CP 570-75) On February 11, 2009, a Commissioner of this Court entered an order temporarily staying enforcement of the Court's January 27, 2009 order to allow the Commissioner time to examine defendants' claims of privilege. The order specified that "the status quo shall be maintained in all respects" and thus, that defendants insure "no one copies, deletes, destroys or in any way alters any . . . storage device . . . ." (CP 801-03)

On March 27, 2009, defendants filed yet another undertaking attempting to list every electronic storage media they'd had contact with since October 2007. (CP 781-85) Shortly thereafter, they provided to Andrew for examination their two laptops, along with two thumb drives.

On January 5, 2010, plaintiffs filed a Supplemental Designation of Computers for Examination, which demonstrated just how far the contempt pursuit had gone. (Sub. No. 657) It demanded production of "any and all 'computers' used by the defendants since 23 October, 2007" including computers "located at the homes or businesses of relatives and the offices of Alpine Escrow." It also demanded that defendants provide passwords and other log in information for any and all email accounts they had utilized, without specification of time limit. *Id.*

E. THE CONTEMPT II MOTION.

On February 25, 2010—over two years after entry of the preliminary injunction, and long after the cessation of any of the noxious activities originally alleged by plaintiffs—plaintiffs filed their second motion for contempt ("Contempt II Motion"). (CP 576-99) Notably, the motion did not contain a single allegation, nor specification of contempt, alleging defendants were in any way misusing the allegedly secreted electronic documents; e.g., by using identification information to contact and attempt to steal Le & Associates' clients, or making improper contact with third party insurers. Furthermore, most of the allegations were of completed contempt, which could not be purged by defendants.

Ultimately, the only significant ongoing, purgeable contempt alleged was a bizarre, purported unwillingness by defendants to identify an undisclosed electronic storage device that continued to contain secreted electronic Le & Associates documents.[15] Because these allegations hung upon the evolving and hotly contested opinions of plaintiff's forensic expert Michael Andrew, those forensic opinions are examined in detail.

1. The Evolution of Michael Andrew's Opinion Regarding an Undisclosed Computer.

On October 23, 2009—two years to the day after Diaz and Nguyen downloaded electronic files from Le & Associates' office—Andrew signed a report summarizing his findings from his examination of the electronic media produced to him by Diaz and Nguyen. (CP 628-79) Those media consisted of (1) Diaz's Dell laptop;[16] (2) Lan Nguyen's HP laptop;[17] (3) a thumb drive purchased in April 2008; and (4) a second thumb drive purchased in April 2008. (CP 628)

The primary issue Andrew was asked to address was whether there was evidence of any undisclosed electronic media which might continue to contain Le & Associates' data. He concluded there was such an

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[15] There were also allegations that defendants were unauthorized to continue to possess hard copies of client files for clients defendants represented. And that defendants still had not paid Andrews' IT fees. These are discussed in section IV *infra*.

[16] This is the laptop which Diaz had used to copy the contents of USB1 onto USB2. (CP 502; RP 6/18: 226-27) However, in April 2008, Diaz removed and destroyed the hard drive to that computer. (RP 6/18: 253) That same month, he replaced it with a new hard drive.

[17] This was purchased in the first two weeks of April, 2008. (RP 6/18: 253)

undisclosed media. He based his opinion on the following:

(1) Five "Revision 1" documents each of which had the following characteristics: (a) a metadata user name of "tito1972"; (b) a metadata "company" name of HP (CP 637-38, 670-79) and

(2) Seven documents associated with the names of clients that Diaz and Nguyen represented but whom the Le's also claimed to have once represented, which Andrew opined could not have made their way onto the Dell/HP except as electronic documents transferred from another, undisclosed media. (CP 634-37); *see also,* CP 2570 (table created by Diaz summarizing the seven documents).

a. The Revision 1 Theory

At the hearing on plaintiff's Contempt II motion, it became clear Andrew's theory of the undisclosed computer was primarily based upon his discovery and interpretation of the five Revision 1 documents he found on the defendants' laptops. (RP 6/16: 62-63; 6/16: 90-91)[18]

"Revision 1" is a category of document metadata in Microsoft Word. Metadata is "data about data;" a computer system creates it whenever a document is created or updated. (RP 6/15: 25-27) A revision 1 document is created when a new document is created and saved. (RP 6/15: 30-31) Each time a user makes changes to a document then saves it, the

[18] The Report of Proceedings (RP) in this case is broken down into transcripts for June 14, June 15, June 16-17, and June 18, 2010, starting at page 1 for each transcript. Citation in this brief to the RP therefore begin with the date, followed, after a colon, by the page numbers. "6/16" refers to the transcript for June 16 and 17.

revision number increases. (RP 6/15 32-34) In other words, modifying a document in any way increases the revision number. *Id.*

Andrew found five revision 1 documents on the media provided to him by defendants, with a "creator" name of "tito1972" and a "company" name of "HP". (CP 638, 670-74) "Creator" indicates the user name on the computer where the document was originally created; it doesn't change no matter how many revisions and saves are made to a document. (RP 6/15: 36) "Company" is the name of the company in the registry of the computer on which the document was created. (RP 6/15: 51) Diaz's Dell had a user name of tito1972, but the company registry was blank. Nguyen's HP had a company name of HP, but did not have a username of tito1972. (CP 638) Andrew concluded the existence of these five revision 1 documents on defendants' media proved there was an undisclosed computer.[19] *Id.*

i. The Modified Date Anomaly.

A problem was soon discovered with this theory, however, by Allison Goodman, the computer forensics expert hired by defendants. The "modified date" on each of the five documents was <u>later</u> than the "created" date. (Sub No. 781D at 13-14) However, the Revision number of these documents remained at "1." (RP 6/15: 38-39)[20] The "modified" metadata

[19] There are hundreds of thousands of documents in a typical hard drive.

[20] For all other revision numbers, the "created" date reflects when the new revision number was created. (RP 6/15: 38-39)

field indicates the date a document was last modified. (RP 6/15: 39) Since modifying a document would necessarily increase its revision number, there was clear conflict between these fields: both could not be correct.

From the time he was first confronted with this modified date anomaly at his deposition in April 2008, to the afternoon of the second day of testimony at the Contempt II hearing on June 16, 2010, Andrew went through six major iterations of opinion attempting to explain how it could occur:

(1) At his deposition, April 2008: the documents were converted into a PDF format, which changed the modification date, but not the revision number. (RP 6/15: 118-23) (Outcome: at the June, 2010 hearing, Andrew admitted converting a file to a PDF format would not normally change the modified date).

(2) In his March 4, 2010 Declaration: Copying the file to a new location changes the modified date but doesn't change the revision number. (CP 888-89; RP 6/15: 126-27) (Outcome: at the hearing, Andrew admitted this simply wasn't true (RP 126-27).

(3) First Day of Testimony at Contempt II, under Direct Examination: Due to the "modular" design of a .docx document[21] one can change certain attributes of a document, such as "font table", causing the modified date to change but not the revision date. (RP 6/15: 45-49)

[21] .Docx is the type of document created by Word 2007. Earlier versions of word created .doc documents.

(Outcome: Andrew admits his theory would not work with a .doc document, which is "binary" in nature. (RP 62-63) One of the five revision 1 documents he relies upon, which shows this anomaly, was a .doc document. ("Settlement Demand (Giang Lang).doc") (CP 678) This vitiates his theory)

(4) Also at the First Day of Testimony at Contempt II, under Direct Examination: There can be a "symbolic relationship" between two documents such that when one is copied into a folder, it either changes the modified date but not the revision number of the other "symbolic" partner, or it's own modified date but not revision number is changed to that of the pre-existing "symbolic" partner. (RP 6/15: 69-80) (Outcome: This theory appeared to be extremely short lived. After unsuccessfully attempting to explain it to the Court (RP 69-71), Andrew admitted he could not comment on the configuration of a system he's never seen; then Andrew realized that the option switch that would need to be turned on in the documents at issue to make the symbolic relationship happen was not turned on in those documents (RP 74-76).

(5) At the Second Day of Testimony, Under Questioning By the Court: The modified date anomaly is simply a "mystery." But the issue is "moot," because the "consistency" in the anomaly provides independent evidence that the revision 1 data is reliable. (RP 6/16: 74-76) (Outcome: Andrew quickly retracted his "mystery" comment after the lunch break, on redirect ("Well, it is a mystery as I was talking about it . . . How it happened is not a mystery at all.") (RP 88).

(6) After the Lunch Break, on the Second Day of Testimony, on Re-Direct: Andrew returns to the "modular" document theory. (RP 88)

ii. The Face Date Anomaly.

At the Contempt II hearing, Andrew was confronted for the first time with another major inconsistency in the metadata: for three of the five revision 1 documents, the actual text of the document clearly demonstrated it was created later than the metadata "created" date. (RP 6/15: 135-43)[22] Over the next three days of testimony, Andrew underwent three major iterations of theory to try to explain this "face date anomaly" (*Id.*; 6/16: 55-61, 76, 93-94, 199-204, 208, 211-13):[23]

(1) On the First Day of Testimony, on Cross Examination: When first confronted with this anomaly in his cross examination, Andrew simply had "no explanation" for how it could happen. (RP 6/15: 135-43):

> So if you ask me, "Is this contrary to the revision one statements I made," on its face it is, I will agree with you a hundred percent. (RP 6/15: 138)
>
> There are contradictions between the dates in the metadata and some text in the documents, I will grant you that, there is no question about that. (RP 6/15: 139)

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[22] Only two of these documents are discussed in the testimony. The third document that displays this anomaly is the "Sun Kim Subsequent Demand[1] (Autosaved).docx" document (CP 2561)

[23] Andrew claimed he had noticed this anomaly when he first examined the data, and that "it was of great interest", but he "held it in reserve" until he looked at "all of the documents on both laptops." (RP 6/15: 137) However, he had to admit he did not mention or address it in any of his four, detailed pre-hearing declarations, nor in his original October 23, 2007 report. (RP 6/15: 149)

Q. You really have no explanation as to how this happened, you really cannot say how it happened?

A. Exactly. (RP 6/15: 143)

(2) On the Second Day of Testimony, on Redirect: "*The only real possibility*" that would explain this anomaly is if someone deliberately set the date of the undisclosed computer behind real time when the revision 1 document was copied to the new computer. (RP 6/15: 57-59) Andrew initially displayed some confusion about whether the undisclosed computer would have to be set back in time or forward in time. (RP 6/15: 57-60, 76) However, he ultimately went so far as to say, given his new explanation, the face date anomaly actually reinforced his opinion that there was an undisclosed computer (RP 6/16: 60-61)

Outcome: While attractive on its face given Diaz's admitted past act of having set the clock back on his computer while creating USB2, the theory quickly deteriorated in the face of the fact that each of the documents in question had radically different "gaps" between the "created" dates and the "face" dates: on one the gap was 2 days, on the second it was 19, and on the third it was 43 days. (CP 2558))[24]:

(3) On the Afternoon of the Last Day of Testimony, on Re-Direct: Having had the problems created by the difference in date gaps pointed out in cross examination and by defendant's expert Goodman, Andrew

[24] Andrew had repeatedly stated there was a "consistency in the inconsistency", apparently meaning that in each case the face date was later than the created date. (RP 6/16: 55, 60, 93-94) In fact, there was an inconsistency in the consistency in the inconsistency.

came back on the afternoon of the last day of testimony with a brand new "dying battery" theory. (RP 6/17: 199-204, 208, 211-13) According to this theory, the stand-alone battery that operates the clock in a computer can run low on juice, thus causing a slow degradation in the time-keeping of the clock. (RP 6/17: 200-01)

Andrew's dying battery theory was "anecdotal information," gleaned from a "very quick Google search" he conducted while listening to Goodman's testimony. (RP 6/17: 200, 212-13) Andrew did not read the web pages of the "hits" he got on his Google search; apparently his theory was based entirely upon the paragraph description in the top hit. (RP 6/17: 212) Andrew nevertheless opined "it's a likelihood that this is what is occurring based on the evidence." (RP 6/17: 200-01)

Outcome: aside from its complete lack of scientific basis and general incredibleness, Andrew's dying battery theory was soundly discredited in an expert declaration filed in connection with defendants' motion for reconsideration.[25] However, the trial court relied upon the theory in concluding there was an undisclosed computer. (CP 2530)

iii. The Demonstration

On the first day of testimony, Diaz, during cross examination of Andrew, conducted an experiment in open court with Lan Nguyen's HP.

[25] The expert established that computer real time clocks, due to the battery design, either have enough voltage to operate or they shut down. There is no slow degradation possible. (Sub No. 935, Ex. 12, Declaration of Bob Young Regarding Michael Andrew's "Dying Battery" Theory)

He created a revision 1 document, made a single change to it, saved it and closed it. According to Andrew, it should have become a revision 2 document. However, it became a revision 3 document. (RP 6/15: 89-90) Andrew could not explain why the HP displayed this anomaly. *Id.* Unwilling to back off of his insistence of the reliability of the revision metadata field, however, the following day Andrew asserted the "only two possibilities" for how that could have happened were if Diaz surreptitiously pressed "Control S" while saving the document (thus causing a double save) or if he had his computer set up with another revision 1 document of the same name in the same folder where he saved it (in either case, accusing Diaz of performing an intentionally misleading demonstration). (RP 6/16: 83-84) However, later that day, Diaz and Andrew re-performed the demonstration together, ensuring neither of the "possibilities" Andrew had identified occurred. The outcome was the same. Inexplicably, the revision 1 document became a revision 3. (RP 98-110)

Andrew had no explanation for how the metadata on Nguyen's HP could act so inconsistently with what he expected: "This is not a normal function for revision progress for revision numbers, absolutely. I'm saying I that I have no idea what you have got on this machine or how it's set up. This is not normal." (RP 6/16: 110) Ms. Goodman felt this alone "should seriously make Mr. Andrew reconsider his reliance on the infallibility of the revision one meta data field." (RP 6/16: 157-58)

b. The Seven Miscellaneous Files.

Although Andrew relied primarily upon the revision 1 documents to establish the existence of an undisclosed computer, in his report he identified the existence of seven other non-revision 1 documents that for various reasons established the existence of an undisclosed computer.[26]

However, on cross examination, Andrew was forced to admit for each and every one of these documents, he could not opine on a more probable than not basis they established the existence of an undisclosed computer. (RP 6/15: 165-71, 172-77, 178; 6/16: 6-26)

2. The Contempt II Ruling.

Three months after the Contempt II hearing, on September 13, 2010, the Court entered findings of fact, conclusions of law, and orders on plaintiffs' motion (the "Contempt II Order"). (CP 2522-38) The Contempt II Order appears to have been drafted by plaintiff's counsel, and adopted by the trial court. The Court made five findings of ongoing contempt:

Specification 1: Defendants "have never formally specified the computer that was used to produce 'USB2'" (CP 2524-26)

Specification 4: plaintiffs had proven there was an undisclosed computer controlled by defendants that continued to secretly house Le & Associates' data. (CP 2528-30)

Specification 5: defendants continued to possess electronic Le &

[26] The seven documents are listed in Appendix 1, along with the places they appear in Andrew's report.

Associates' files. (CP 2530-32)

Specification 8: Defendants continue to possess hard copies of former Le & Associates clients, which consist of the clients who chose to retain Diaz & Nguyen as their counsel. (CP 2534)

Specification 9: Defendants have "refused" to pay Andrew's invoice.

The Court also found three instances of completed contempt:

Specification 2: failure to timely identify flash drives and false testimony regarding their existence.

Specification 3: Destruction of data using secure clean.

Specification 7: violation of the Court of Appeals February 11, 2009 Stay Order.

The Court entered the following orders:

(1) Defendants shall pay the Court $1,000 per day "from the date compliance was required and the sanction was entered (June 16th, 2008) until such time as they fully comply with the Injunction, Contempt Order and Sanctions Order."[27] (CP 2537)

(2) "Defendants shall immediately comply with all terms of the Injunction, Contempt[I] order, and Injunction Order." *Id.*

(3) Defendants shall pay plaintiffs for all losses, including attorney fees for this proceeding. (CP 2538)

[27] Defendants were ordered to deposit the amount owed within 10 days, or submit separate sworn declarations as to why they could not do so. *Id.* The imposed sanctions were approximately $1,600,000.

(4) Defendants shall pay Andrew's invoices.

(5) Defendant's affirmative claims are stayed until they "demonstrate compliance with the Preliminary Injunction, Contempt Order, Sanctions Order and this Order." *Id.*

On March 3, 2011, the Court entered a judgment and Findings of Fact and Conclusions of Law awarding plaintiff's attorney fees of $136,933 for their attorneys; $12,433.33 in attorney fees for the attorney Mike Andrew hired to protect himself after plaintiffs began to delve into his behavior related to the Roberto profile; and $26,312.50 in payment of Andrew's invoices. (CP 2613-2639)

IV. ARGUMENT

Diaz and Nguyen made big mistakes in this case. They should have turned over all Le & Associates files (other than for clients who chose to have Diaz & Nguyen represent them) as soon as Le & Associates demanded the files' return. Diaz should not have spoliated evidence. They should have been more cooperative at the outset of the lawsuit.

Inexperienced lawyers both, Diaz and Nguyen made all of these mistakes before Contempt I was decided. Perhaps all or most of them could have been avoided with more firm and level-headed legal counsel early in the case.

This appeal, however, is not about whether Diaz & Nguyen committed sanctionable acts prior to Contempt I. They were already held in contempt for those actions. The issue here is whether the Court's multi-

million dollar sanctions against defendants for ongoing contempt are sustainable under the law and the evidence of this case.

Diaz and Nguyen's early transgressions understandably put them in a bad stead with the trial court. The court was entitled to weigh their early indiscretions in determining their ongoing credibility. However, the continuing, coercive sanctions imposed by the trial court were based not on defendants' credibility, but upon a highly contested and demonstrably unsupportable set of expert opinions, issued by a witness who was clearly entrenched in defending his opinions at all cost.[28] Moreover, the massive sanctions imposed bear no reasonable relationship to the defendants' resources, the harms alleged, or the ends that were, by the time Contempt II was decided, at stake.

It is perhaps when a party has through their actions, raised the ire of the Court that it is most necessary to take precautions that the legitimate legal rights of that party continue to be observed. This is especially true where, as here, the very individuals whose dignity is affronted by the party's behavior are acting as prosecutor, fact finder, and sentencer.[29]

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[28] Even Andrew's intractability is perhaps understandable and explicable, given how aggressively defendants and Goodman challenged his credibility and integrity. As with the Les, this may have become personal for Mr. Andrew.

[29] Bloom v. Illinois, 391 U.S. 194, 202, 88 S. Ct. 1477, 1482 (1968):

> Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament. Even when the contempt is not a direct insult to the court or the judge, it frequently represents a rejection of judicial authority, or an interference with the judicial process or with the duties of officers of the court.

While the trial court's inclination to continue to punish Diaz and Nguyen for their past indiscretions is understandable, it is not sustainable under the law of contempt nor the evidence presented. The trial court's errors may be understandable, but they are, nevertheless, reversible errors.

A. STANDARD OF REVIEW.

The Court of Appeal reviews a contempt finding for abuse of discretion. *In re M.B.,* 101 Wn. App. 425, 454, 3 P.3d 78 (2000). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Id.* However, "[w]hether a purge condition exceeded the court's authority or violated a contemnor's due process rights, however, are questions of law, which are reviewed de novo." *Id.* A court's authority to impose sanctions for contempt is a question of law, which is reviewed de novo. *In re Dependency of A.K.,* 162 wn.2d 632, 644, 174 P.3d 11 (2007).

B. DIAZ AND NGUYEN LACK THE PRESENT ABILITY TO PURGE THEIR CONTEMPT.

A crucial dividing line for contempt sanctions is whether they are "remedial" or "punitive." "A '[r]emedial sanction' is one 'imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform.'" *In re Silva,* 166 Wn.2d 133, 141-42, 206 P.3d 1240 (2009) (quoting RCW 7.21.010(3)). "Remedial sanctions" are also known as

"coercive" sanctions; they are civil in nature. *Id.* "In contrast, a punitive sanction is imposed to punish a past contempt of the court for purpose of upholding the authority of the court." *Id.* Punitive sanctions are criminal in nature. *Id.* When they are imposed, the contemnor must be afforded full criminal due process. *Id.*[30]

The purpose of a criminal sanction is to punish for past behavior and uphold the authority of the Court; the purpose of a remedial sanction is to coerce future behavior that complies with a court order, often for the benefit of the opposing party. *King v. DSHS,* 110 Wn.2d 793, 800, 756 P.2d 1303 (1988).

> Because most contempt sanctions contain both remedial and punitive elements, however, distinguishing criminal from civil contempt is a notoriously difficult task. In determining whether a particular sanction is civil or criminal, courts look not to "'the subjective intent of a State's laws and its courts,'" but examine the "'character of the relief itself.'" In addition, the contempt power must be used with great restraint. As the U.S. Supreme Court has noted, "the contempt power also uniquely is liable to abuse."

In re M.B., 101 Wn. App. 425, 438-439, 3 P.3d 780 (2000) (quoting *International Union, United Mine Workers of America v. Bagwell,* 512 U.S. 821, 831, 114 S.Ct. 2552 (1994) (footnotes omitted).

Because defendants were not afforded full criminal process, the

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[30] Those due process rights include the initiation of the action by the filing of charges by the prosecutor, assistance of counsel, the privilege against self-incrimination, and proof beyond a reasonable doubt. *State v. Jordan,* 146 Wn. App. 395, 402, 190 P.3d 516 (2008).

sanctions at issue can only be upheld if they are remedial. In other words, they may only be upheld if they were imposed to coerce defendants into obeying a court order that was yet within their power to perform.

> It is well settled that "'the law presumes that one is capable of performing those actions required by the court ... [and the] inability to comply is an affirmative defense.'" But exercise of the contempt power is appropriate only when "the court finds that the person has failed or refused to perform an act that is yet within the person's power to perform." Thus, a threshold requirement is a finding of current ability to perform the act previously ordered.

Britannia Holdings Ltd. v Greer, 127 Wn. App. 926, 933-34, 113 P.3d 1041 (2005) (emphasis in original) (citations omitted). *Accord, Hipple v. McFadden,* 161 Wn. App. 550, 255 P.3d 730, 736 (2011) ("A threshold requirement is a finding of current ability to perform an act previously committed.") (emphasis added)

In the recent case of *Smith v. Whatcom County District Court,* 147 Wn.2d 98, 52 P.3d 485 (2002) the Supreme Court overturned an order holding a party in civil contempt for failure to pay a judgment, on the basis that the trial court did not adequately explore whether the contemnor had a present ability to comply with the order to pay. *Id.* at 111-12. Likewise, in *Britannia Holdings, supra,* the Court overturned a coercive contempt sanction on the same basis, even though it had been established that at some point earlier in the litigation, the contemnor did have the money to pay the ordered amount. 127 Wn. App. at 933-34.

In *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770 (9th

Cir. 1983), Miller brought civil contempt charges against Falstaff Brewing when Falstaff violated a protective order by failing to turn over approximately 1,200 documents covered by a protective order. Staff for Miller was appointed by the Court to investigate what happened to the documents. Miller's counsel concluded Falstaff's current and former counsel had negligently failed to maintain the protected documents; and had concealed from Miller and the court the fact that the protective order had been violated. *Id.* at 775. Miller argued that although the missing documents could not be found, it was "obvious that the documents must be some place." *Id.* The court found Falstaff in contempt and imposed a $10,000 sanction payable to the court. The order specified, however, that if Falstaff were to find and return the documents, the Court would consider refunding of a portion of the sanction. *Id.* at 777.

The Ninth Circuit reversed the contempt order, reasoning that the evidence clearly showed Falstaff, though negligent, could not currently comply with the order because the documents had been lost:

> Conditioning an order of contempt on the performance of an impossible act, for the purpose of punishing a contemnor for its incapacity to perform the act, does not square with the Supreme Court's admonishment that "[e]very precaution should be taken that orders issue ..., only after legal grounds are shown and only when it appears that obedience is within the power of the party being coerced by the order." The power to impose coercive sanctions to compel obedience to an order in a civil contempt is limited by the individual's ability to comply with the court's order. <u>No matter how reprehensible the conduct is it does not "warrant issuance of an order which creates a duty impossible of performance, so that punishment can follow</u>."

> If the record establishes that there in fact is a present inability to comply with a production order, the " ' civil [contempt] inquiry is at an end' " insofar as the court may coerce compliance because obedience to the order is no longer within the contemnor's power.

Id. at 781 (emphasis added) (citations omitted). Impossibility remains a defense to coercive contempt even if self-induced. *Id.* at 781, n. 7. *Accord, Britannia Holdings,* 127 Wn. App. at 933-34 (even though evidence supported the court's finding that defendants were contumacious, and that defendants once had the money to pay the court's order, contempt order reversed because there was not evidence of the defendants' current ability to comply.); *In re Estate of Elliott,* 993 P.2d 474 (Colo. 2000) (trial court's imposition of coercive sanction to force payment overturned where Court's own findings suggested an inability for the contemnor to comply); *United States v. Drollinger,* 80 F.3d 389 (9th Cir. 1996) ("Ability to comply is the crucial inquiry, and 'a court should weigh all the evidence properly before it determines whether or not there is actually a present ability to obey.'" (quoting *Donovan v. Mazzola,* 761 F.2d 1411, 1418 (9th Cir.1985))

In addition to the foregoing, the contemnor's ability to comply must not be dependent upon a third party or any other condition outside of his or her control. *In re Silva,* 166 Wn.2d 142, n.5 ("Purge conditions are valid only if they are in the contemnor's capacity to immediately purge." Admission into a treatment facility was not entirely within contemnor's ability to accomplish); *In re Estate of Elliott,* 993 P.2d at 480-81 (purge condition that required contemnor to obtain money back from family

members she had wrongfully given it to was not valid).

The "mother of all specifications of contempt" in this case is the undisclosed computer specification. (RP 6/18: 15)[31] That specification, in turn, depends upon a finding that defendants can purge their contempt by turning over a computer that contains the data in question. Two thousand dollars per day rides upon that question.

The only evidence of Diaz and Nguyen's ability to purge the undisclosed computer specification is the thread spun by plaintiff's hired forensic expert Andrew; a thread that increasingly unraveled throughout the proceedings. In the end, it was barely a filament: Andrew chased and abandoned far too many explanations for the anomalies contemnors and their expert identified. He was ultimately forced to openly concede the balance of support for his opinions did not establish the existence of the unknown computer on a more probable than not basis. Although the trial court is accorded broad discretion in making factual findings in contempt hearings, that discretion is not unlimited. It was clearly abused here.

In fairness, the trial court was only able to hear the testimony from the bench. A review of the record indicates how utterly confusing that testimony often was. Further, there was a sixty-day delay between when the court heard that evidence and when it issued its ruling. In the intervening space, it is not entirely surprising that the court's memory of defendants' past indiscretions might have outweighed its memory of the

[31] From plaintiff's closing argument.

details and dueling technicalities of the experts. Andrews also delivered his opinions with unbending conviction, regardless of the extent to which they were collapsing around him. Fortunately, this Court is in a position to engage in the kind of close and objective scrutiny of the record necessary to see through Andrew's bluster, and discern the utter lack of foundation to his conclusions.

The undisclosed computer purge clause[32] is also invalid because it requires the participation of Andrew for it to be effectuated. If past history is any indication, even if defendants were able to magically manufacture a computer, Andrew would forensically examine it, make a determination whether it contained the subject data, determine the history of that data, and decide whether he believed there were yet more undisclosed devices. Given how subjective and arguable such opinions appear to be, it cannot be said defendants are fully in control of their ability to purge this contempt.

C. THE COURT FAILED TO MAKE REQUIRED FINDINGS REGARDING DEFENDANTS' RESOURCES AND THE LIKELY EFFECTIVENESS OF THE SANCTIONS, AND TO WEIGH THE MAGNITUDE OF THE SANCTIONS AGAINST THE ENDS TO BE SERVED.

Remedial fines may be compensatory or coercive. *United States v. United Mine Workers of America,* 330 U.S. 258, 304, 67 S. Ct. 677 (1947). A coercive fine, however, must be based upon the complainant's

[32] The Court has never explicitly stated defendants have to produce some actual piece of equipment to purge their contempt, but it appears clear that is what they are being required to do.

actual loss. *Id.; General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1380 (9th Cir. 1986). In this case, there is no allegation or evidence plaintiff's losses approach even by orders of magnitude the seven-digit fines leveled against defendants. To be upheld then, the sanctions must be legitimate coercive fines.

> [An] important protection applicable in civil contempt proceedings where a fine is imposed as a coercive sanction is that the trial court's discretion in imposing the amount of the fine is not unlimited. The United States Supreme Court explained that in determining the amount of a coercive or criminal fine the court
>
> > must ... consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.
>
> It is a corollary of the above principles that a court which has returned a conviction for contempt <u>must, in fixing the amount of a fine</u> to be imposed as a punishment or <u>as a means of securing future compliance, consider the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant</u>.

Parisi v. Broward County, 769 So.2d 359 (Fla. 2000) (quoting *United Mine Workers,* 330 U.S. at 304) (emphasis in original). Numerous cases, applying these principles, have overturned coercive contempt fines on the basis that the evidence preponderated against such findings, or on the basis that the trial court simply failed to make such findings. *See, e.g., E.E.O.C. v. Local 638,* 81 F.3d 1162 (2nd Cir. 1996) (coercive fine reversed on the basis that the trial court "failed to address the potentially disastrous financial impact" of the sanction; it was abuse of discretion to

impose the fine in the face of evidence it would bankrupt the contemnor); *Dole Fresh Fruit Co. v. United Banana Co., Inc.,* 821 F.2d 106 (2nd Cir. 1987) ("None of the findings or conclusions that the district court incorporated by reference explain why personal fines would be effective, whether appellants could pay them, or why they should be in the amount of $1,000 per day."); *General Signal Corp. supra* ("On remand the district court should clarify whether the suspended sanction is intended to be compensatory or coercive. . . . If coercive, . . . the amount of the award should be determined under the *United Mine Workers* standard."); *Shuffler v. Heritage Bank,* 720 F.2d 1141 (9th Cir. 1983) (fine overturned on basis that, *inter alia,* the moving party had "not pointed to any portion of the record demonstrating that the district court imposed the fine after a reasoned consideration of [the *United Mine Workers*] criteria.")

Here, the trial court made no findings whatsoever satisfying the *United Mine Workers* criteria. In any event, it is impossible those criteria could be met. By the time the Contempt II hearing was held, plaintiffs had abandoned any effort to prove defendants' ongoing alleged possession of some portion of their old electronic pleadings was causing plaintiffs any real harm. Neither the Contempt II order (CP 2522-38), nor the Permanent Injunction (entered March 5, 2010) (Sub No. 865) made a single finding that plaintiffs were suffering any current harm as a result of defendants' alleged possession of Le & Associates' dusty electronic pleadings.[33]

[33] In fact, no such finding of harm has ever been made in this case. Even in Contempt I, the Court held plaintiffs had failed to demonstrate defendants were using the

Regardless, although the evidence of defendants' financial worth is scant in this record (CP 532), it is patently unreasonable to fine two neophyte attorneys just launching their practice over $1.5 million—climbing at a rate of $2,000 per day—to force compliance with an order in a case that involves total damages in the tens of thousands of dollars.

In addition to the foregoing, "A coercive sanction is justified only on the theory that it will induce a specific act that the court has the right to coerce. Therefore, should it become clear that the civil sanction will not produce the desired result, the justification for the civil sanction disappears." *In re M.B.,* 101 Wn. App. 425, 440, 3 P.3d 780 (2000). Here, it is quite simply facially absurd that defendants would continue to hold onto Le & Associates' electronic data in the face of their repeated losses and the hurricane of litigation and pain the Le's had unleashed upon them for the preceding three and a half years. Judge Darvis, in fact, openly expressed her skepticism in this regard:

> THE COURT: . . . One of the things I'm struggling with, assuming I accept the facts as presented by the plaintiff, it is hard for me to reconcile in my own mind what strikes me as, putting it mildly, the height of irrationality that the defendants could have some [cache] somewhere. . . . [S]ome drive, some computer, some something out there. After all this, they are still risking everything to hold on to that. . . . . [I]t strikes me as so irrational, it makes it hard to believe, frankly.

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electronic data to pilfer their clients or defame them through contact with third party providers. (CP 523-24)

(RP 6/18: 67) As a result, Judge Darvis wondered aloud what was "to be gained by imposing new contempt sanctions?" (RP 6/18: 69) Plaintiff's counsel admitted to being at a loss to craft a coercive sanction that would resolve the situation. (RP 6/18: 69-70)

It is not defendants' position that intransigence should be rewarded simply because it is extreme. Rather, the contention is that at some point, it becomes irrational and a violation of due process to continue to impose coercive sanctions that have no reasonable relationship to the magnitude of the interests at stake and which appear to be having no actual coercive effect. Especially where, as here, there is such scant evidence to even establish it is possible for the contemnor to purge.

D. THE SANCTIONS HAVE CROSSED THE LINE INTO PUNITIVE.

Plaintiff, in drafting the findings, conclusions and orders adopted by the trial court, was careful to craft the sanctions as if they were remedial; i.e., designed solely to coerce defendants to obey orders they have the present ability to obey. However, upon closer examination, sanctions take on an increasingly punitive character. The contempt orders meticulously document every allegation of completed disobedience, demonstrating plaintiff's and the trial court's considerable frustration with defendants. Completed acts cannot be purged, and thus, can only be punished punitively. Fines that so substantially outweigh the harm they are meant to remediate must necessarily cease to be considered remedial. Instead, they become about vindicating the authority of the court. Add to

this the fact that there is no actual reasonable grounds to conclude on a more likely than not basis that defendants have a computer or data they can produce to purge their contempt, and the sanctions here tip into the realm of the punitive.

E. ARGUMENT RE: INDIVIDUAL SPECIFICATIONS.

Defendants address the following contempt specifications, which appear to be the only ones which are ongoing. Because the validity of the court's sanctions depend upon them being coercive (as opposed to punishment for completed contempt), these are the most relevant specifications to this appeal.

1. Specification 1: Refusal to Identify the Computer Used to Falsify USB Drive Evidence (CP 2524-26)

For this specification, the court found defendants "have never formally specified the computer that was used to produce 'USB2.'" (CP 2525) (emphasis added) Of course, Diaz has repeatedly testified that he used his Dell laptop to transfer the file copies from USB1 to USB2. (CP 502; RP 6/18: 226-27) The court found that defendants never explained what happened to the data allegedly moved off of USB2 and never returned, but this does nothing to prove those files were not moved onto the old Dell hard drive that Diaz destroyed.[34]

[34] The finding that forensic evidence showed the Dell's hard drive was not large enough to accommodate the transfer was simply incorrect. (CP 2525) The Dell drive in the computer at the time of the transfer was more than large enough to accommodate the Le files. (CP 2552-53)

Ultimately, it is unclear what defendants must do to purge specification I. If the court is saying there is an undisclosed computer that was used to create USB2, this collapses into specification 4. If the court is simply saying Diaz has to state more "formally in a declaration "I used my Dell laptop with the discarded hard drive to create USB2," this cannot form the basis for the serious sanctions imposed. As noted, Diaz has already testified on multiple occasions what computer he used to create USB2. A more "formal" declaration could not possibly justify $2,000 per day coercive sanctions. *See, Johnston v. Beneficial Management Corp. of America*, 96 Wn.2d 708, 709, 712-13, 638 P.2d 1201 (1982) (technical violation of order which did not violate the purpose of pretrial order did not justify finding of contempt).

2. Specification 4: Undisclosed Computer.

This has been discussed extensively *supra.*

3. Specification 5: Defendants' Continued Possession of Le Electronic Files.

Once again, this appears to collapse into the "mother of all specifications," the undisclosed computer.

4. Specification 8: Continued Possession of Paper Copies of Diaz and Nguyen Client Files.

This specification simply makes no sense, because it pertains to files of clients who voluntarily chose to have Diaz & Nguyen as their attorneys. As discussed *supra,* from the time they first entered into the Separation Agreement, Le & Associates contemplated that Diaz &

Nguyen would take a number of clients and their files with them. Throughout the litigation, Diaz and Nguyen repeatedly made clear that their undertakings did not apply to former Le & Associate clients who had chosen to be represented by Diaz & Nguyen. (CP 765-66) Even the permanent injunction, entered before the Contempt II order, specifies that its provisions do not apply to former Le & Associates' clients who became bona fide Diaz & Nguyen clients. (Sub No. 865) Furthermore, this strict interpretation of the preliminary injunction unnecessarily harms innocent clients of Diaz & Nguyen, who will suddenly have their files taken from their chosen attorneys. As discussed *supra*, technical violations that don't violate the purpose of the order cannot form a valid basis for contempt sanctions, especially ones as severe as those imposed here. This specification should be reversed.

5. Specification 9: Failure to Pay IT Bill.

Diaz and Nguyen repeatedly offered and requested in pleadings that Andrew's invoices be paid out of the proceedings of their attorney fees in the *Powers v. Rabanco* matter, held in the registry of Judge Downing's court.[35] Plaintiff requested and obtained an order freezing those funds in the registry specifically for the purpose of meeting defendants' financial obligations pursuant to the contempt orders. (CP 528) On March 3, 2011, the Court ordered that the fees be reimbursed out

[35] Diaz & Nguyen obtained a $460,000 judgment for Ms. Powers in that matter. (CP 535)

of the *Powers* registry. (CP 2630) Defendants do not object to this disbursement. They should not have been held in contempt for the plaintiff's and the court's failure to earlier accept their request that Andrews' fees be paid from this fund.

F. THE SANCTIONS AGAINST DIAZ & NGUYEN SHOULD BE VACATED.

In *Cunningham v. Weston,* 180 Fed. Appx. 644, 2006 WL 1236675 (9th Cir 2006), the 9th Circuit Court of Appeals held that when a contemnor who has been subject to coercive fines is found to have purged his or her contempt, accrued coercive fines are appropriately vacated. *Id.* at 48, *2-3 (citing *Falstaff Brewing Co., supra,* 702 F.2d at 779-80). Here, because it is appropriate to reverse the trial court's imposition of coercive fines against Diaz and Nguyen, the accrued fines to date should also be vacated. Likewise, there was no valid basis for the trial court to stay defendants' affirmative claims.

F. THE AWARD OF ATTORNEY FEES TO PLAINTIFFS SHOULD BE VACATED.

The trial court awarded plaintiffs and their expert Andrew approximately $150,000 in attorney fees. This award was founded upon the validity of the sanctions imposed upon defendants. As those sanctions are in error and should be reversed, so too should the award of attorney fees to plaintiffs.

V. CONCLUSION

The nearly 1,000 filings in this matter, which has never

progressed beyond the issues raised by the preliminary injunction, are a chilling indication of the character this case took on at an early stage. While the trial court may have been understandably frustrated with Diaz and Nguyen, it nevertheless should have maintained enough objectivity to avoid imposing millions of dollars in sanctions under the circumstances of this case. In the end, the trial court became caught up in plaintiffs' vengeful zeal, and committed reversible error. Defendants respectfully request that the contempt sanctions entered against them be vacated.

DATED this 29th **day of** August**, 2011**

ROBERTO DIAZ, Pro Se

By _____

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Attorney for Appellants