66695-9 66695-9

NO. 66695-9-I

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

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

Respondent,

v.

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

Appellants,

EDWARD K. LE and VIENNA LE,
Individually and as spouses/partners,

Third-Party Defendants.

BRIEF OF RESPONDENT

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INTRODUCTION

This Court previously disposed of Lan Nguyen and Roberto Diaz-Luong's first three (consolidated) appeals, affirming all of the (often unchallenged) findings, holding that the contempt sanctions were coercive, and remanding with instructions to award appellate fees. Lan and Roberto's fourth appeal raises two issues: (1) whether there is insufficient evidence to support the contempt finding that they have still failed to produce a computer containing Le-firm files; and (2) whether the contempt sanctions are punitive. The first argument fails, where expert testimony, which the trial court explicitly found more credible, supports the court's findings. There are also many other dispositive contempt findings that Lan and Roberto fail to challenge, or mention only in passing.

The second argument also fails: contempt sanctions that this Court correctly held to be civil do not suddenly become punitive simply because Lan and Roberto have allowed them to pile up over many years of continued contempt of court. Their argument necessarily suggests that the more contumacious their contempt, the less likely coercive sanctions will be upheld. The Court should reject that perverse result, and affirm. The Court should also award the Les attorney fees and costs on appeal.

STATEMENT OF THE CASE

A. Lan and Roberto all but fail to acknowledge their prior appeals in which this Court affirmed orders finding Lan and Roberto in contempt for repeatedly disobeying court orders requiring them to return Le-firm files (in any form), lying, and destroying evidence.

For twelve pages, Lan and Roberto[1] discuss the first contempt as if this Court did not already render a decision in this ongoing saga. BA 3-14; ***Le & Associates, PS v. Diaz-Luong***, Unpub. Op. Nos. 61912-8-I, 63011-3-I, 63012-1-I (2010). Lan and Roberto previously filed three appeals from the trial court's contempt orders, findings and conclusions, attorney fees award, and related orders. ***Le & Associates*** ¶ 1. Consolidating the appeals, this Court affirmed and remanded, instructing the trial court to determine appellate fees:

> We hold that the trial judge did not abuse her discretion in deciding the contempt motions based on declarations rather than live testimony at an evidentiary hearing. We also hold that the judge did not abuse her discretion in holding Lan and Roberto in contempt. The challenged findings are supported by substantial evidence and support the conclusions of law regarding the contemptuous conduct. In our de novo review of the claimed violations of due process, we conclude that the judge did not violate Lan and Roberto's constitutional rights. Finally, the judge did not abuse her discretion either in awarding Le & Associates, PS ("the firm") attorney fees or in determining the amount of the fees for its

[1] This brief uses first names consistent with this Court's prior opinion. No disrespect is intended.

> successful prosecution of the contempt proceedings. We affirm and remand with directions.

Id. at ¶ 2; *see also* ¶ 79. The following background is taken from this Court's correct decision on the prior appeals.

Lan and Roberto were both associates at Le & Associates ("the Le firm"). *Id.* at ¶ 3. On October 23, 2007, the parties executed a separation agreement and an addendum, listing specific cases Lan and Roberto had worked on, and stating methods for fee sharing between the former associates and the Le firm. *Id.*

The firm sued Lan and Roberto in December 2007, believing that they had "improperly downloaded and copied client files, wrongfully solicited firm clients, and engaged in other unlawful activity." *Id.* at ¶ 4. In January 2008, the firm sought a preliminary injunction enjoining Lan and Roberto from continuing to possess the Le firm's electronic client database and hard copies of client files and ordering Lan and Roberto to return the same to the firm, and enjoining Lan and Roberto from having any contact with other Le-firm clients. *Id.* at ¶ 5.

The trial court entered a preliminary injunction, finding that the firm reasonably feared that Lan and Roberto were violating the Le firm's legal rights and that Lan and Roberto's actions were or

would likely injure those rights. CP 358. Perhaps most significantly, the trial court found that (1) Lan and Roberto had downloaded the firm's entire electronic database, for existing and closed-cases, without authorization from the firm or the firm's clients; (2) Lan and Roberto did not deny obtaining the electronic files; and (3) the files contain confidential information and client secrets. CP 359-60.

The trial court therefore entered a simple and direct order:

- enjoining the former associates from possessing the Le firm's database or "any copies of any sort of the information from that data base";
- enjoining them from using, copying, modifying, adding, or deleting any part of the Le firm's database;
- permitting an IT expert to make two copies of the database taken from the Le firm, filing one with the trial court clerk, and giving the other to the Le firm's counsel;
- requiring the IT expert to destroy any trace of the Le firm's database "on any and all such computers of the defendants or their surrogates";
- requiring the former associates to file within seven days sworn statements of compliance with the trial court's orders and intent to comply with the preliminary injunction; and
- ordering the IT expert to certify that he had complied with the order or to explain why he could not do so.

CP 361-64. This Court correctly noted that the material portions of this order, which formed the basis of the first contempt findings, were "straightforward":

> Lan and Roberto were to identify to the firm and its IT professional all computers that then or at anytime contained any part of the firm database. They were also individually to provide to the court an undertaking stating that he or she had fully complied with the court's orders with respect to the destruction of the electronic file materials.

Le & Associates, ¶ 58.

In April 2008, the firm sought a contempt order, alleging that Lan and Roberto had violated the preliminary injunction. *Id.* at ¶ 6. The trial court found Lan and Roberto in contempt and subsequently denied their motion for reconsideration. *Id.* at ¶ 7.

Lan and Roberto appealed. *Id.* at ¶ 8. The trial court subsequently entered additional orders related to the first contempt order, and entered a second contempt order. *Id.* at ¶ 9. Lan and Roberto filed second and third notices of appeal. *Id.* at ¶ 10. This Court consolidated the three appeals. *Id.*

B. Lan and Roberto's prior appeal was primary procedural, never seriously contending that they did not conceal and destroy evidence and violate the court's orders.

Lan and Roberto raised primarily procedural arguments in the first three (consolidated) appeals. *Id.* at ¶ 1. They claimed that the trial judge was not neutral, and that they were entitled to a live evidentiary hearing, to a heightened standard of proof at the contempt hearing, and to a jury trial. *Id.* This Court rejected all of

these arguments, the latter two of which Lan and Roberto raised for the first time on appeal. *Id.* at ¶ 2, 66.

C. This Court affirmed the findings that Lan and Roberto violated the courts orders, concealed evidence, and destroyed evidence.

This Court summarily rejected challenges to the findings supporting the contempt order, to the extent that Lan and Roberto raised any (*id.* at ¶¶ 68-69):

> To the extent the claims on appeal include challenges to the trial judge's findings of fact, we reject them. All the findings are supported by substantial evidence.
>
> For example, Lan challenges finding of fact 8 in the June 11 order. The finding states,
>
>> The declarations of the Defendants identify no computers that once contained any of the data. They identified a single portable USB hard drive as having contained the Le firm's client database. However, only a computer can access the data on that drive. As made clear to the Defendants, any computer accessing the USB drive did at some point have, and may still have, copies of the data on it. Nevertheless, the defendants refused to identify any computers as having once had the data, or accessed the data.
>
> Lan claims that because her deposition testimony shows that she deferred to Roberto on computer and other technology matters, the trial court erred in finding her in contempt in this regard. But an examination of the trial court's preliminary injunction and Lan's February 15, 2008 declaration to the trial court shows that this finding is supported by substantial evidence.

These contempt findings are verities – the truth. ***Yousoufian v. Office of Ron Sims, King Cnty. Executive***, 168 Wn.2d 444, 450, 229 P.3d 735 (2010)..

As such, it is uncontested – the truth – that Lan and Roberto failed to identify any (much less all) computers containing Le-firm data. CP 515. They first claimed that they had no computers containing Le-firm files. CP 514-15. They then disclosed a USB drive ("USB2"), falsely claiming it was the only device they possessed containing Le-firm files. CP 517. But a different USB drive ("USB1") was originally used to download the Le-firm files. CP 516-17. USB2 contained only data copied off of a computer that Lan and Roberto failed to identify. CP 517-18.

Confronted with forensic evidence revealing that USB2 was a fake, Lan and Roberto admitted that USB2 was a copy of USB1. CP 521.[2] They destroyed USB1 after attempting to duplicate it. *Id.* The trial court rejected as incredible Roberto's claims that he "accidentally" destroyed USB1 (CP 521-22):

> Creation of a partial copy of Le data on the second USB drive and presenting it to the IT specialist pursuant to the order was an intentional attempt to mislead . . . the Court.

---

[2] Forensics showed that USB2 was only a partial duplicate of USB1, where many of the files had been moved back of USB2. CP 519-20.

> Defendants intentionally falsified the evidence in order to claim compliance with the Court's order and avoid any further investigation of their computers.

This was just the beginning of Lan and Roberto's destruction of evidence. Lan and Roberto later revealed that Roberto had used a screwdriver to destroy the hard drives in his laptop, Lan's laptop, and the parties' desktop. CP 522. The trial court expressly rejected Lan and Roberto's various excuses for their intentional spoliation of evidence and violations of the court's injunctions. *Id.*

And while Lan and Roberto belatedly tried to exonerate Lan and lay all the blame on Roberto, the trial court also rejected this dodge (CP 523):

> [Lan] knew about the creation of the second drive, its false presentation to the IT expert, and the subsequent destruction of the USB and computer hard drives. Included in the facts supporting this finding are the parties were married, worked together from their home, filed identical declarations, [Lan] claimed knowledge and purchase of the USB drive, and one of the hard drives intentionally destroyed was in her personal [laptop].

Lan and Roberto's repeated lies, evasion, and destruction of evidence compelled the following contempt findings – verities:

- Lan and Roberto's continued failure to comply with the order to disclose all computers and storage devices containing Le-firm files, and their continued failure to certify was contempt. CP 515.

- Lan and Roberto's continued refusal to identify computers in addition to the false USB drive were in contempt of the injunction. CP 518.
- Roberto's formatting, reformatting and manipulating the dates relative to the disclosed USB were contempt. CP 519.
- Lan and Roberto's three false certifications were contempt. CP 519-20.
- All of this plainly violated the court's preliminary injunction and constituted a contemptuous attempt to defraud the court. CP 524-25.

D. This Court also affirmed unchallenged findings that Lan and Roberto had the present ability to comply.

Lan and Roberto did not challenge the trial court's findings that they had the present ability to comply with the court's order (1) "'including the certification and identification of additional' computers or electronic media containing or having once contained the firm's data"; (2) for the payment of IT charges; and (3) for the financial remedial sanctions imposed as a result of their contempt. ***Le & Associates***,¶ 45.

E. Lan and Roberto now try to collaterally attack findings from the first contempt.

Despite their claims to the contrary, Lan and Roberto collaterally attack two findings from the first contempt order, claiming that it is important for this Court to note "the aggressiveness" with which the Le's have pursued their contempt claims. BA 11-14. Again, findings this Court already affirmed in the

consolidated appeals are verities. *Supra*, Statement of the Case § C. Lan and Roberto stole Le-firm files and clients, falsified a USB drive, destroyed hard drives, and repeatedly lied, evaded, and misrepresented. Their "aggressiveness" makes the Les look passive by comparison.

F. The Les were forced to move for a second contempt order when Lan and Roberto continued to violate court orders.

The second contempt arises out of a series of declarations Lan and Roberto filed, falsely certifying compliance with the court's prior orders. The preliminary injunction, first contempt order, and the order imposing sanctions for the first contempt, each required Lan and Roberto to file "undertaking[s]" certifying: (a) that they had identified all computers containing (or once containing) all or any part of the Le-firm database; and (b) that they had fully complied with the court's orders. CP 362, 527, 731. In February and March 2008, Lan and Roberto filed three declarations certifying compliance with the preliminary injunction. CP 366-71, 372-82, 424-29, 430-35, 436-447. In the first contempt, the trial court found that the declarations and supporting testimony were false in several regards. CP 517, 519-20, 525.

The court ordered Lan and Roberto to file amended declarations no later than June 12, 2008, fully complying with the court's orders. CP 527. Lan and Roberto filed new declarations, swearing their compliance. CP 757-63; 765-771. The Le firm notified Lan and Roberto that the amended declarations fell short, but they did not reply, amend, or supplement their declarations. CP 728.

The Le firm again moved for contempt sanctions on August 14, 2008. CP 2737-49. Roberto filed another declaration repeating the same claims that Lan and Roberto had disclosed every computer and storage device they had access to since October 2007. CP 529-32. The trial court again found that the declarations were non-compliant, ordering Lan and Roberto to comply no later than February 6, 2009. CP 726-33.

On February 6, Lan and Roberto filed two more undertakings and a certification of compliance, claiming compliance with the court's orders. CP 570-72, 573-75. On February 11, 2009, then Commissioner Neel entered a temporary emergency stay, staying the order requiring Lan and Roberto to turn over the computers and staying the $1,000 *per diem* coercive sanction, pending further appellate court orders. CP 801-03. Then Commissioner Verellen

subsequently issued an order lifting the stay. CP 814-26. On March 27, 2009, Lan and Roberto filed another certification of compliance, claiming compliance with this Court's stay. CP 781-85. On February 25, 2010, the Les moved for contempt, contempt sanctions, and an order prohibiting Lan and Roberto from pursuing affirmative defenses until they comply. CP 576-99.

G. Expert Michael Andrew unequivocally opined that Lan and Roberto had violated the court's orders in many ways, including failing to disclose a computer that contained or still contains Le-firm files.

Expert Michael Andrew testified on the Les' behalf in both the first and second contempt proceedings. Lan and Roberto ignore most of Andrew's expert testimony, which provided the basis of the trial court's contempt findings. BA 21-30; CP 2524-36. But they argue (in their Statement of the Case) that Andrew's testimony did not support the trial courts findings that there is still an undisclosed computer. BA 21-30. The Les address these arguments in the argument section. *Infra*, Argument §§ A, B & C. In brief, while Lan and Roberto unconvincingly attempt to poke holes in Andrew's testimony, Andrew unequivocally opined that Lan and Roberto have failed to disclose at least one computer used to store Le-firm files:

- With "a reasonable degree of professional certainty" and "on a more probable than not basis," Lan and Roberto have failed to produce a computer and a pen drive to the court. CP 627, 639.
- More probably than not there is another computer. 06/15 RP 127.
- Lan and Roberto more likely than not used an undisclosed storage device to email themselves Le-firm files. 06/16 RP 13.
- The aggregate of the evidence indicates on a more probable than not basis that there is a form of electronic storage containing Le-firm files. 06/16 RP 62.
- It is more likely than not and more probable that not that there is an undisclosed computer storing Le-firm files. 06/16 RP 62-63.

H. The trial court again found Lan and Roberto in contempt.

The trial court found that Lan and Roberto's sworn undertakings: (1) contained more lies; (2) were insufficient to purge the prior contempt findings; (3) were themselves violations of the court's orders; and (4) constituted additional contempts. CP 2526. In brief sum, Lan and Roberto committed the following contempts, addressed below in the Argument section B:[3]

- Specification 1 – Lan and Roberto never identified the computer used to falsify USB2. CP 2525. Roberto lied when he swore that he used the Dell computer he destroyed to duplicate the USB. *Id.* Andrew confirmed the existence of

[3] The Le firm withdrew Specification 6 as Lan and Roberto allowed Andrew to examine their email accounts after the Les filed their contempt motion. CP 2532.

an undisclosed computer containing or once containing all or part of the Le-firm database. CP 2526.

- Specification 4 – Lan and Roberto failed to disclose an HP computer with the user profile "Tito1972." CP 2528-29. This undisclosed HP computer more likely than not contained – or still contains – Le-firm data. *Id.* Lan and Roberto used this computer after falsely swearing that they destroyed all computer drives and media that contained all their electronic files. *Id.*

- Specification 5 – Lan and Roberto continue to possess electronic Le-firm files, violating the injunction and contradicting their sworn statements. CP 2530. Lan and Roberto refused to produce their laptops to Andrew as ordered, waiting ten months until Commissioner Verellen ordered them to comply with the trial court's order. CP 824-25, 2531. When they finally disclosed their laptops to Andrew, he found 43 folders from Le-firm clients, 22 of which contain documents dated before October 23, 2007.[4] CP 2531-32. At least some of these documents are in the same electronic format as when they were created at the Le-firm. *Id.*

- Specification 8 – Lan and Roberto continue to possess hard copies of Le-firm files. CP 2534. Lan and Roberto openly admit that they still possess paper copies of Le-firm files they printed out after having been ordered to return all hardcopies and not to make duplicates. *Id.* Roberto purported to seek the trial court's "guidance" as to possessing paper copies of files for client he and Lan claim to now represent. *Id.* He should have sought "guidance" when he contemptuously printed the documents two years ago. *Id.*

- Specification 9 – Lan and Roberto failed to pay the costs resulting from their repeated contempts. CP 2634. After many other excuses, Lan and Roberto claim that they cannot pay their portion of Andrew's bill, as required by the court's prior orders. *Id.* But they admit that they were paying their attorneys during this time. CP 532. The court did not

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[4] This is the date Lan and Roberto downloaded the Le-firm database.

believe their self-serving statements that they could not afford to pay, and Lan and Roberto offered no other evidence. CP 2535.

In addition to these contemps, Lan and Roberto do not challenge the following three contempt findings:

- Specification 2 – failing to timely identify flash drives and lying about their existence: Lan and Roberto failed to promptly identify thumb drives containing Le-firm data. CP 2526. They also lied (again), claiming that they purchased these drives in June 2008. *Id.* But forensic evidence revealed that Lan and Roberto used the drives in April 2008, before the first contempt hearing. CP 2526-27. They also used data-destroying software on at least one of the drives. CP 2527. Lan and Roberto cannot purge this particular contempt, so the remedial sanctions do not apply. *Id.*

- Specification 3 – Using data-destroying software to destroy data and lying about it: Lan and Roberto used (or allowed to be used) data-destroying software on flash drives and at least one of their current laptops. CP 2527. Roberto denied, having done so, but later admitted having done so. CP 2527-28. Lan and Roberto cannot purge this particular contempt, so the remedial sanctions do not apply. CP 2528.

  Specification 7 – violating this Court's stay: this Court issued a temporary stay ordering Lan and Roberto to refrain from copying, destroying, deleting, or altering in any way any computer, storage devices, electronic data, drives, files, etc. CP 2533. They violated this order. *Id.* Lan and Roberto cannot purge this particular contempt, so the remedial sanctions do not apply. *Id.*

ARGUMENT

Lan and Roberto begin their argument with the truly fantastic claim that they simply made "mistakes" when they failed to produce evidence in violation of the court's orders and when they destroyed

evidence. BA 32. Even more incredibly, Lan and Roberto blame their "mistakes" on their legal counsel. *Id.*

Lan and Roberto raise two equally meritless arguments: (1) that Andrews' expert opinion does not support the contempt finding that there is an undisclosed computer; and (2) that the sanctions are not coercive. BA 33.[5] Andrew plainly and repeatedly testified that Lan and Roberto have still failed to disclose at least one computer (and a storage device) containing Le-firm files. *Supra*, Statement of the Case § G. The trial court adopted Andrew's opinions, finding that they were "more credible." CP 2529. This Court will not review credibility determinations. ***Simpson v. Thorslund***, 151 Wn. App. 276, 287, 211 P.3d 469 (2009). The Court should affirm.

Lan and Roberto's second argument is equally unpersuasive. Despite repeated opportunities to do so, they offered no evidence, other than their own self-serving statements, that they could not afford the contempt sanctions. CP 2535. Nor did they comply with the court's order on the second contempt, requiring them to pay within ten days or file separate declarations

[5] Lan and Roberto focus almost exclusively on the missing-computer contempt "Specification" (#4), all but ignoring their many other contempts. *Infra*, Argument § B.

stating why they would not or could not pay. CP 2537. The trial court was more than justified in refusing to take their word, where they have repeatedly proved that they will lie, mislead, and evade the truth. CP 2535.

These misguided arguments say it all – Lan and Roberto still do not get it. This Court should affirm and award the Les fees.

A. Standard of Review – this Court will not review the trial court's correct determination that Andrew's expert opinions where "more credible."

> "Whether contempt is warranted in a particular case is a matter within the sound discretion of the trial court; unless that discretion is abused, it should not be disturbed on appeal." But "[a] court's authority to impose sanctions for contempt is a question of law, which we review de novo." Additionally, "[t]he applicability of the constitutional due process guaranty is a question of law subject to de novo review." In short, though this court reviews a contempt finding for abuse of discretion, we review de novo questions of law related to the court's authority and a contemnor's due process rights.

Le & Associates, ¶ 28 (citing in the order cited: ***King v. Dep't of Soc. & Health Servs.***, 110 Wn.2d 793, 798, 756 P.2d 1303 (1988); ***In re Dependency of A.K.***, 162 Wn.2d 632, 644, 174 P.3d 11 (2007); ***In re Det. of Fair***, 167 Wn.2d 357, 362, 219 P.3d 89 (2009) ***In re M.B.***, 101 Wn. App. 425, 454, 3 P.3d 780 (2000)).

This Court will not review the trial court's credibility determinations including those determinations on the credibility of

expert opinion. ***Marriage of Rideout***, 150 Wn.2d at 337, 350, 77 P.3d 1174 (2003); ***Simpson***, 151 Wn. App. at 287; ***Marriage of Harrington***, 85 Wn. App. 613, 637, 935 P.2d 1357 (1997); ***Marriage of Sedlock***, 69 Wn. App. 484, 491, 849 P.2d 1243, *rev. denied*, 122 Wn.2d 1014 (1993). ***In re Pers. Restraint of Bugai***, 35 Wn. App. 761, 765, 669 P.2d 903 (1983). The trial court has a great advantage over the appellate courts to observe witnesses and "gauge first hand their candor and truthfulness." ***Dykes v. Dykes***, 69 Wn.2d 874, 876, 420 P.2d 861 (1966).

This Court also does not weigh expert testimony. ***Sedlock***, 69 Wn. App. at 491. Rather, the Court gives the trial court wide latitude in the weight to give expert opinion, even if it disagrees with the trial court's reasoning. *Id.*

The trial court adopted Andrew's opinions, rejecting Lan and Roberto's expert's opinions. CP 2529. Due to Andrew's "more extensive" background and "much more thorough" analysis, the trial court found that Andrew's opinions were "more credible." *Id.* Andrew's opinions also were "more credible" in light of Roberto's long history of manipulating his computer's date and time functions and of offering false, misleading, or mistaken testimony (CP 2529-30):

> On balance, while the Court does not question Ms. Goodman's credibility, it finds that Mr. Andrew's background, education and experience in computer forensics are more extensive than Ms. Goodman's, and that Mr. Andrew performed a much more thorough analysis of the forensic data than Ms. Goodman did. Therefore the Court finds his opinions in this matter to be more credible on balance.
>
> . . .
>
> On balance, [Roberto's] previous history of deliberately manipulating his computer's date and time functions . . . and [Lan and Roberto's] documented history of offering sworn testimony that is either mistaken, misleading, or outright false, convince the Court that Mr. Andrew's testimony and his forensic evidence is the more credible.

B. Andrew's testimony is more than sufficient to support the contempt findings.

The trial court found numerous contempts covering, among other things, undisclosed computers, hardcopies of Le-firm files, intentional spoliation of evidence, repeated violations of court order, and numerous false sworn statements. CP 2524-36. As discussed above, Lan and Roberto do not dispute that they (1) failed to timey identify flash drives containing Le-firm data and lied to the court about their existence; (2) used data-destroying software on at least one of the flash drives and at least one of their current laptops; and (3) violated this Court's stay order. *Supra*, Statement of the Case § H.

Lan and Roberto focus primarily on Specification 4 – the yet undisclosed computer – arguing, without any support, that Andrew

ultimately admitted that he could not opine on a more probable than not basis that there is a missing computer. BA 39. This is completely false. Andrew repeatedly opined that there is more probably than not a missing computer. *Supra*, Statement of the Case § G (citing and discussing CP 627, 639; 06/15 RP 127; 06/16 RP 13, 62-63). In any event, this Court need not review this argument, where Lan and Roberto offer no support and little (if any) argument. ***Satomi Owners Ass'n v. Satomi, LLC***, 167 Wn.2d 781, 807-08, 225 P.3d 213 (2009). The Les nonetheless address this and the other disputed contempt Specifications in turn.

1. Specifications 1 and 4 – Lan and Roberto failed to identify one or more computers containing Le-firm files.

a. Specification 1 – Lan and Roberto failed to identify the computer used to falsify USB2

The trial court found that Lan and Roberto never identified the computer they used to falsify USB2 even though "forensic evidence clearly and undisputedly indicated the existence of at least one computer which had the Le data base transferred to it." CP 2524-25. Roberto testified under oath that he used his Dell to create USB2, but also claimed that he destroyed the Dell because it did not contain Le-firm files. CP 2525. These claims are inconsistent – if Roberto used the Dell to create USB2, which

contained Le-firm files, then the Dell necessarily contained Le-firm files. *Id.*[6]

The Dell's hard drive would have confirmed or refuted Roberto's story, but he destroyed it, obviously defying the court's orders. *Id.* There is a presumption that this spoilated evidence is unfavorable to Lan and Roberto – a point they never address. ***Marshall v. Bally's Pacwest, Inc.***, 94 Wn. App. 372, 381, 972 P.2d 475 (1999).

There is more too – there was forensic evidence that the Dell's hard drive was not big enough to accomplish this transfer. *Id.*[7] And Lan and Roberto never explained what happened to Le-firm files that they transferred off of USB2. *Id.* They had to go somewhere. In short, Lan and Roberto's "continued failure . . . to identify the computer(s) used in the creation of USB2 is a violation of the Injunction, Contempt Order and Sanctions Order, and constitutes further contempt of court." CP 2526.

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[6] Lan and Roberto cannot feign ignorance of the fact that the computer used to create USB2 might contain Le-firm files. The litigation hold the Les served Lan and Roberto in March 2008 made this point abundantly clear. CP 791-93.

[7] Lan and Roberto argue in a footnote that the Dell drive was not big enough to accomplish this transfer. BA 45 n.34. It is irrelevant that Goodman disagreed with Andrew – this Court does not weigh expert testimony or review credibility determinations. *Compare id. with* ***Sedlock***, 69 Wn. App. at 491.

Lan and Roberto feign ignorance, claiming that it is unclear whether Specification 1 is a finding that there is an undisclosed computer (in which case they argue it "collapses" into Specification 4) or whether Specification 1 just requires Roberto to more "formally" state that he used the Dell he destroyed to copy Le-firm files onto USB 2. BA 45-46. This pretend confusion ignores the plain and repeated findings that Lan and Roberto are in contempt for continuously refusing to identify the computer used to create USB2. CP 2525-26. Put simply, the trial court believed the forensic evidence – not Roberto's lies. *Id.*

b. Specification 4 – failing to identify and repeatedly lying about the existence of an undisclosed HP computer.

The trial court found that Lan and Roberto failed to disclose an HP computer with a "tito1972" user account that once contained (and may still contain) Le-firm electronic data. CP 2528-29. Lan and Roberto used this computer after claiming they destroyed all media containing Le-firm data. CP 2528. Although Goodman disagreed with Andrew's forensics on this point, the trial court expressly found that Andrew's opinions are more credible.[8] CP 2529-30. This was due in part to the fact that Andrew's findings

[8] This disagreement pertains to the Revision 1 documents, discussed below.

were consistent with Roberto's history of manipulating his computer's date and time functions. CP 2530. Lan and Roberto's failure to disclose this computer – and their lies about it – are contempt. *Id.*

Lan and Roberto do not address Specification 4 in their argument, claiming (without citation) that they exhaustively address it elsewhere. BA 46. Since there is no argument on this point, this Court need not address it. ***Satomi***, 167 Wn.2d at 807-08.

In any event, Andrew's testimony is more than sufficient to support the court's findings. Lan and Roberto's primary argument (in their fact section) is that certain atypical functions on their computer undermine Andrew's testimony. BA 21-30. As discussed below, however, Andrew not only explained what Lan and Roberto's computers were doing, but also opined that their computer's behavior supported his opinions.

Expert Andrew examined four drives on the computers Lan and Roberto turned over, finding 43 folders and files for Le-firm clients (as of October 23, 2007). CP 633. Twenty-two of these folders contained Le-firm client files created before October 23, 2007. *Id.* Metadata confirms that at least some of these files were

created at Le & Associates and were stored in an electronic format since then. CP 635.

At least five different times during March through October 2008, Lan and Roberto used "Secure Clean" software to delete and permanently overwrite files and folders on their flash drives, hard drives, and on the USB drive they falsified. CP 635-36. Using Secure Clean left nearly 3,000 records relating to erased files on the thumbdrive, and over 1.2 million records on the Dell. *Id.*[9] They ran Secure Clean on their thumb drives using an undisclosed computer. CP 636.

A number of documents on the four drives Lan and Roberto produced contained electronic copies of Le-firm files that existed in an "unbroken line" from October 23, 2007, when they were placed on the drives. CP 636.[10] One such document is a fee agreement virtually identical to the electronic Le-firm fee agreement, stating "Diaz and Nguyen" in the opening paragraph, but stating "Edward K. Le" in the attorney signature block. CP 636. Lan and Roberto

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[9] These records do not correspond to the number of Le-firm files Lan and Roberto possessed, as Andrew could not tell how many Le-firm files were destroyed. 06/17 RP 198.

[10] This means that the documents always existed in an electronic format. 06/16 RP 4-5.

had to possess this fee agreement in electronic form to substitute their names. *Id.*

On April 19, 2008, Lan and Roberto created 19 folders in 50 minutes on one of the disclosed thumb drives. *Id.* Sixteen of those folders appear to be related to the 43 Le-firm clients. *Id.* Lan and Roberto subsequently put the same folders on the other disclosed thumb drive and both laptops. *Id.*

The metadata time and date values on these files indicate that they were stored in an electronic format from November 29, 2007, to April 18, 2008. CP 637. Roberto swore under oath that he destroyed both the USB drive used to download Le-firm files, and also three hard drives, in April 2008. *Id.* If that is true, then the destroyed media could not have been the source of the 16 folders Andrew found on the disclosed thumb drives and laptops. *Id.*

The disclosed computers had original documents – a/k/a "Revision 1" documents – created on a computer with the registered owner "Tito1972" and the registered company "Hewlett-Packard." CP 637-38.[11] Neither the Dell nor the HP Lan and Roberto disclosed have the registered owner "Tito1972" with the

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[11] Revision 1 documents are discussed in more detail below, in response to Lan and Roberto's argument on this point.

registered company "Hewlett-Packard." CP 638.[12] As such, the Revision 1 documents could not have been created on the disclosed computers. *Id.* These files were created on an undisclosed "Hewlett-Packard." computer registered to Tito1972, used as recently as March 8, 2009. CP 639.

In addition to at least one undisclosed computer, Lan and Roberto failed to disclose a "SanDisk" USB drive that was connected to the HP they disclosed. CP 636, 639.

As discussed above, Andrew unequivocally and repeatedly opined that Lan and Roberto failed to disclose at least one computer and USB drive containing Le-firm files. *Supra*, Statement of the Case § G. Lan and Roberto nonetheless try to undermine Andrew's opinion, arguing that he could not explain why the Revision 1 documents on Roberto's computer where behaving atypically. BA 21-26. A Revision 1 document is an original document, created using a new, blank word document. 06/15 RP 31-33. Every time a document is saved and changed – within the same document – the revision number increases. *Id.* If a

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[12] The Dell Lan and Roberto disclosed does not have a registered owner, and "Hewlett-Packard" does not appear in the Dell's company registry. CP 638. "Lan" is the registered owner of the HP Lan and Roberto disclosed. *Id.*

document is saved with a new name, then new document starts out with a revision number 2. *Id.*

Documents have a "creator field" – a metadata field – reflecting the registered user and the registered owner of the computer the Revision 1 document was created on, and the date the document was created. *Id.* at 36; CP 637, 890. Metadata reflecting the registered user and owner never changes, no matter how many revisions a document goes through. 06/15 RP 36. This is so even if a Revision 1 document is used to create a new document (a revision 2) under a different name (*id.* at 37):

> THE COURT: Okay. So if somebody E-mails me a Word document, and I open it up on my computer, and use it as a template, make changes and I save it under some different name, it is still going to show the creator as whatever was in the Windows registry on the machine that the document was initially created on?
>
> [ANDREW:] That is correct, your Honor.

But the document's creation date changes if a document is saved under a new name. *Id.* at 38-39. If a Revision 1 document is saved under a new name (creating a Revision 2 document), then the creation date reflects the date the revision 2 was created. *Id.* Documents also have a "last modified" metadata field, which

contains the user account that last changed the document and the date the change occurred. *Id.* at 38.

Lan and Roberto's expert, Lisa Goodman, found Revision 1 documents on Roberto's computer with a last modified date subsequent to the creation date. 06/15 RP 49; CP 1482. Goodman opined that this casts doubt on the metadata in the revision number – when the document was created – where a document that has been modified cannot be a true Revision 1 document.[13] *Id.* Andrew disagreed, unequivocally opining that this did not call into question the reliability of the creation date reflected in the Revision 1 documents (CP 1531-33):

> It is my opinion that the system processes were functioning properly, the metadata values were accurately recorded, and that the relevant documents were created on an undisclosed Hewlett Packard computer over a 9 month period, from June 2008 to early March of 2010.

Goodman did not provide any forensic evidence that the process of writing Revision 1 metadata was failing on Lan and Roberto's computers. CP 1532-1536. Her opinion was based on several files with a single value incongruent with expectations. *Id.* But there are "a number of consistent records that indicate that the

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[13] Recall that each saved change would typically increase the revision number. 06/15 RP 31-33.

metadata-writing process was functioning normally and that the metadata records are accurate" (CP 1536):

> Ms. Goodman's objections translate in to a single inconsistency (the last modified date being different than the created date) versus a significant number of consistent and expected results both within the metadata of the five Revision 1 documents, as well as the other Word documents contained on defendant's systems.

CP 1536-37. Again, the court accepted Andrew's opinions, rejecting Goodman's opinions as less credible. CP 2529-30.

Lan and Roberto ignore this when they carry on about Andrew's attempts to explain the Revision 1 "anomaly." BA 21-26. Andrew's expert opinions cover extremely complex computer forensics, which the trial court sifted through for several days. This Court will not re-weigh the evidence or review the trial court's finding that Andrew's opinions were more credible. ***Rideout***, 150 Wn.2d at 350; *Infra*, Argument § A.

In any event, examples from Lan and Roberto's arguments on this point show how misguided they truly are. Andrew explained that converting documents into a PDF format could change the modification date without changing the revision number. 06/15 RP 119-23. This explains how a Revision 1 document – an original

document – would have a modified date later than the creation date. *Id.*

Lan and Roberto take issue with this explanation, stating that Andrew admitted that changing a document into a PDF would not "normally" change the modified date. BA 24. What other computers might "normally" do is irrelevant – Andrew found evidence on Lan and Roberto's computers that the modified date changed when word documents were converted to PDFs. 06/15 RP 123-24.

Lan and Roberto also take issue with Andrew's explanations for documents with face dates later than the metadata creation date, that their computer's battery was dying or that Lan and Roberto intentionally set the dates back on their yet undisclosed computer. BA 26-28; 06/16 RP 58-59, 80, 93-95; 06/17 RP 200. Lan and Roberto previously changed the times and dates on USB2 several times, to make it look like the falsified USB2 was the drive used to download Le-firm files. 06/16 RP 60. Andrew unequivocally opined that the face dates did not change his opinion that the Revision 1 documents where true Revision 1 documents, indicating an undisclosed computer. 06/15 RP 141.

Goodman questioned Lan and Roberto's intentional backdating because the documents had different time lapses between the metadata date and the face date, which could occur only if the user repeatedly changed the computer's date. 06/17 RP 161. This did not "make a lot of sense" to Goodman because there are easier ways to falsify metadata. *Id.* This simply proves that Lan and Roberto were ignorant of the easiest way to falsify metadata.

It does not "make . . . sense" to falsify a USB drive – including intentionally backdating documents, destroying the original, and turning the fake over to the court. It does not make sense to use a screwdriver to destroy several hard drives and laptops. It does not make sense to hide flash drives from the court and use data-destroying software. Lan and Roberto concede that they did all of these things. Statement of the Case § H. As such, it certainly does not make sense to assume, as Goodman does, that Lan and Roberto have behaved rationally or honestly. 06/17 RP 161; CP 2530. This is one of the reasons the trial court found Andrew's opinions more credible – they are consistent with Lan and Roberto's history of irrationally dishonest behavior. CP 2530.

2. Lan and Roberto continue to possess electronic and paper Le-firm files.

a. Specification 5 – Lan and Roberto still possess electronic Le-firm files.

The trial court found that Lan and Roberto still possess electronic Le-firm files, which Andrew found all over their hard drives. CP 2531. Lan and Roberto's computers contain 43 folders for Le-firm clients. *Id.* Twenty-two of those folders contained documents with face dates before Lan and Roberto downloaded them on October 23, 2007. CP 2531-32. There was also a fee agreement that was "obviously manipulated" from an electronic Le-firm file. CP 2532. Lan and Roberto must have retained these files from the Le-firm. *Id.* Lan and Roberto claimed that they were entitled to possess Le-firm files for clients they stole from the Le-firm, but they never sought to have the injunction modified and never obtained releases from the clients. *Id.*[14] Their possession of Le-firm electronic data, their failure to identify it, and their lies about it, are contempt. *Id.*

Lan and Roberto do not address Specification 5 other than to claim that it "collapses" into Specification 4. BA 46. But

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[14] Lan and Roberto originally claimed that they had no Le-firm files, only later admitting that they had files belonging to those clients they claimed to represent. CP 479; 06/17 RP 240, 243.

Specification 5 address electronic Le-firm files on the computers Lan and Roberto disclosed. This cannot "collapse" into Specification 4, addressing a yet undisclosed computer.

b. Specification 8 – Lan and Roberto continue to possess paper copies of Le-firm client files.

Lan and Roberto do not deny Specification 8 – that they still possess hard copies of Le-firm files. CP 2534; BA 46-47. Rather, they admit that they possess hard copies for clients they claim to represent. *Id.* This is contempt. *Id.*

Lan and Roberto argue that this specification "simply makes no sense" because some Le-firm clients "voluntarily chose" to hire Lan and Roberto. BA 46. They claim that returning electronic files for clients they claim to represent would hurt those clients, even suggesting that their refusal to return such files is only a "technical" violation of the permanent injunction. BA 46-47.

The permanent injunction does not allow Lan and Roberto to keep files for any clients they claim to represent – it allows them to keep information "solely related to clients who have expressly consented in writing to [Lan and Roberto's] possession of such information." *Compare* BA 47 *with* CP 2794. Lan and Roberto did not provide releases for the clients they claim to represent or seek to amend the injunctions. CP 2532. They cannot steal the files, lie

about it repeatedly, and keep them because they say the clients have "voluntarily" hired them. BA 46.

This matter has not yet been tried on the merits, so it is unresolved whether Lan and Roberto improperly solicited Le-firm clients. For over two years, Lan and Roberto improperly possessed hard copies of Le-firm files in violation of court orders, seeking the trial court's "guidance" on this issue for the first time at the latest contempt hearing. CP 2534. They should have done so when they first printed the documents (violating the court's orders). *Id.*

3. Specification 9 – Lan and Roberto failed to pay the costs resulting from their repeated contempts.

The trial court found that Lan and Roberto failed to pay Andrew's professional fees, despite court orders repeatedly ordering them to pay Andrew. CP 2628. Lan and Roberto never did so, nor do they claim otherwise. *Id.* Since the first contempt, the Les have paid almost all of Andrew's fees, while Lan and Roberto ignored the court's orders. *Id.*

In their first response to the latest contempt motion, Lan and Roberto claimed Andrew forfeited any right to payment. CP 2534. In their second response, they claimed that they had not received all of Andrew's invoices. *Id.* At the hearing, they claimed that they could not pay. *Id.*

Other than their own "unsupported conclusory statements," Lan and Roberto offered no evidence that they could not pay. CP 2535. The trial court did not accept Lan and Roberto's "claims of poverty," "given the history of . . . offering false or misleading testimony." *Id.* Their failure to make any payment – however small – or to explain why they had failed to do so, cast further doubt on their claims. *Id.*

Lan and Roberto argue that they asked the trial court to pay Andrew from funds in the court's registry from the Powers case and that the court eventually did so. BA 47-48 (citing CP 2630). They misrepresent what really took place.

The Les objected to Lan and Roberto's request to use the Powers funds to satisfy Lan and Roberto's obligation to Andrew. CP 1460. The trial court ordered the Powers funds into the court registry to guarantee compliance with the court's orders, and the Les have an attorneys lien against the funds. *Id.* Lan and Roberto were essentially asking to pay Andrew with money obligated to the Les and to the court. *Id.*

Since the Les paid Andrew, the court entered an order directing the clerk to reimburse the Les from the Powers funds. CP 2628-29, 2630. This was not, however, intended to relieve Lan and

Roberto of their obligation to pay Andrew's fees. CP 2628-29. The trial court also entered a judgment for the Les against Lan and Roberto for $26,312.50 to reimburse them for the fees they paid Andrew. *Id.*

C. Lan and Roberto's arguments challenging the contempt sanctions are meritless.

1. Lan and Roberto's first argument rests entirely on their meritless claim that Andrew's testimony does not support Specification 4 – that there is an undisclosed computer. (BA 34-40).

Lan and Roberto's argument on this point is five pages of law with a single paragraph summarily concluding that they cannot purge the missing-computer contempt because Andrew did not prove that there is an undisclosed computer. BA 34-39. They do not address their ability to purge any of the other contempts. BA 34-40. As discussed above, Andrew's testimony is sufficient to support the trial court's findings that Lan and Roberto failed to identify at least one computer containing Le-firm files. *Supra*, Statement of the Case § G, Argument § B. Lan and Roberto's argument on this point necessarily fails.

The "law presumes" that a contemnor is "capable of performing those actions required by the court." ***Britannia Holdings Ltd. v. Greer***, 127 Wn. App. 926, 933, 113 P.3d 1041

(2005). While the court must find that a contemnor has the current ability to purge the contempt, the "inability to comply is an affirmative defense." ***Britannia***, 127 Wn. App. at 933-34. In other words, Lan and Roberto had to prove that they cannot comply with the court's order to identify the yet-undisclosed computer. *Id.*

The trial court's findings are incredibly careful and detailed. CP 2524-36. For each of the eight contempts at issue, the court discussed the allegations, the evidence, and Lan and Roberto's ability to purge. *Id.* Unless otherwise stated in this lengthy discussion, the court found that Lan and Roberto have the present ability to purge. CP 2535. The court more than met its obligation. ***Britannia***, 127 Wn. App. at 933-34.

Lan and Roberto argue that Andrew's testimony "unraveled" to the point that he eventually admitted that he could not say there was an undisclosed computer on a more probable than not basis. BA 39. Since they provide no support or citations to the record (*id.*), this Court need not address this false assertion. ***Satomi***, 167 Wn.2d at 807-08. Again, however, Andrew repeatedly opined that Lan and Roberto have still failed to identify a computer containing Le-firm files. *Supra*, Argument § B.

Lan and Roberto also argue that they cannot purge the undisclosed-computer contempt because their ability to purge cannot be dependent on third persons. BA 38-39. They argue that they cannot purge the contempt without Andrew because even if they produced an undisclosed computer, Andrew would have to examine the computer to see if it contained Le-firm files, and whether it indicated still more undisclosed devices. BA 40. It is indeed unfortunate for all involved that Lan and Roberto have been so untruthful that their sworn statements must be tested by a forensics expert.

But Lan and Roberto misunderstand Andrew's role. Lan and Roberto can purge this contempt by identifying the computer(s) they have failed to identify thus far.[15] Although Andrew could have some role in determining whether their claims are true, he has no role in whether they identify the computer(s) in the first instance. Much to their dismay, Lan and Roberto are solely responsible for their actions past, present and future.

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[15] In a footnote, Lan and Roberto suggest that purging this contempt would require them "to produce some actual piece of equipment." BA 40 n.32. They admit, however, that the trial court did not require them to do so. *Id.* Rather, they must "identify" the missing computer. CP 2529-30. The court recognized that this could mean identifying a computer Lan and Roberto no longer have. *Id.*

2. The coercive *per diem* sanctions do not become punitive because Lan and Roberto have continued to commit contempt for more than two years. (BA 40-45).

Lan and Roberto fail to address one very important aspect of the trial court's orders addressing the accrued *per diem* sanctions:

> [Lan and Roberto] shall within 10 days pay the amount of the accrued sanctions to date, or submit separate sworn declarations as to why they will not or cannot comply.

CP 2537. Despite the opportunity to explain their purported inability to pay, Lan and Roberto never submitted anything, failing to comply with this order as well. They cannot now claim on appeal, that the accrued sanctions are more than they can bear. RAP 2.5(a)

Lan and Roberto argue that the trial court did not, and could not, enter findings satisfying the "criteria" addressed in ***United States v. United Mine Workers of America***, 330 U.S. 258, 304, 67 S. Ct. 677, 91 L. Ed. 884 (1947). BA 41-42. But Lan and Roberto misunderstand or misrepresent ***United Mine Workers***, claiming it holds that coercive sanctions must be based on the "complainant's actual loss." BA 40-41. Compensatory – not coercive sanctions – must be based on actual loss:

> Where compensation is intended, a fine is imposed, payable to the complainant. Such fine must of course be based upon evidence of complainant's actual loss, and his right, as a civil

> litigant, to the compensatory fine is dependent upon the outcome of the basic controversy. But where the purpose is to make the defendant comply, the court's discretion is otherwise exercised. . . .

United Mine Workers, 330 U.S. at 304 (footnotes omitted); *see also* ***General Signal Corp. v. Donallco, Inc.***, 787 F.2d 1376, 1380 (9th Cir. 1986) (*same*), cited at BA 41. This Court already upheld the *per diem* sanctions. ***Le & Associates***, ¶ 45.

Lan and Roberto state that they are not arguing that "intransigence should be rewarded simply because it is extreme." BA 44. Rather, they argue that the *per diem* sanctions are punitive because they have no real coercive effect. *Id.* They point to the trial court's statement that it would be the "height of irrationality" for Lan and Roberto to still hide a computer and that she wondered what good it would do to continue imposing remedial sanctions that Lan and Roberto had ignored in the past. *Id.* at 43-44 (citing 6/18 RP 67).

As hard as Lan and Roberto's "irrationality" is to believe, the trial court indeed found that they are still hiding at least one computer. CP 2528-30. Again, this Court already held that the *per diem* sanctions are coercive. ***Le & Associates***, ¶ 45. A coercive

fine does not become punitive simply because it accrues over years of contemptuous conduct.

Finally, Lan and Roberto argue that the sanctions "necessarily cease to be considered remedial" when they "outweigh the harm they are meant to remediate." BA 44. Since they offer no authority to support this argument, this Court need not address it. ***Satomi***, 167 Wn.2d at 807-08,

This argument is meritless in any event. The coercive sanctions are not compensatory. Their goal is not to make the Les whole, but to coerce Lan and Roberto to comply with the court's orders. And there has been no trial. No one yet knows the extent of the damage that Lan and Roberto have caused and continue to cause.

3. This Court should affirm the accrued coercive *per diem* sanctions. (BA 48).

Lan and Roberto ask this Court to vacate the accrued sanctions if the Court reverses the trial court's coercive sanctions. The Court should affirm on all grounds, so need not consider this argument.

Lan and Roberto completely misunderstand the only authority they cite, ***Cunningham v. Weston***, 180 F. App'x 644 (9th Cir. 2006). There, the contempt order gave the trial court discretion

to forgive the accrued sanctions "*depending* on whether the defendants have completed or substantially completed their compliance with the injunction." ***Cunningham***, 180 F. App'x at 648 (emphasis original). The trial court vacated accrued sanctions when the contemnor purged the contempt. *Id.* The Ninth Circuit affirmed the trial court's discretionary decision, rejecting the plaintiff's arguments that the sanctions were compensatory, so must be paid. *Id.* Since Lan and Roberto have not purged their many contempts, ***Cunningham*** is inapposite.

Again, the trial court ordered Lan and Roberto to pay the accrued sanctions within ten days, or file sworn declarations stating why they did not of could not comply. CP 2537. They failed to do so. And nothing would prevent the trial court from reducing or forgiving the accrued *per diem* sanctions (as in ***Cunningham***) if Lan and Roberto ever purge their contempts.

D. The Court should affirm the Les' fee award and award the Les appellate fees. (BA 48).

Lan and Roberto ask this Court to reverse the fee award if the Court reverses on some other ground. BA 48. They do not otherwise challenge the fee award, and only objected to the length of the Les' fee request below. CP 2617.

This Court should affirm the fee award and award the Les appellate fees under RAP 18.1 and RCW 7.21.030(3), providing that a "court may, in addition to the remedial sanctions set forth in subsection (2) of this section, order a person found in contempt of court to pay a party for any losses suffered by the party as a result of the contempt and any costs incurred in connection with the contempt proceeding, including reasonable attorney's fees." A "party defending the appeal of a contempt order may recover attorney fees under RCW 7.21.030(3)." ***In re Marriage of Curtis***, 106 Wn. App. 191, 202, 23 P.2d 13 (citing ***R.A. Hanson Co. v. Magnuson***, 79 Wn. App. 497, 505, 903 P.2d 496 (1995)), *rev. denied*, 145 Wn.2d 1008 (2001).

CONCLUSION

Lan and Roberto end by insulting the trial court, arguing that Judge Darvas was "caught up in the [Les'] vengeful zeal." BA 49. To the contrary, the court's orders were remarkably careful and measured. Lan and Roberto's repeated contemps – lying, destroying evidence, withholding evidence, otherwise violating the court's orders – were met with multiple opportunities to comply and to purge. Again, Lan and Roberto have no one to blame but themselves.

This Court should affirm on all grounds and award the Les appellate fees.

RESPECTFULLY SUBMITTED this 11th day of October, 2011.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I caused to be mailed, a copy of the foregoing **BRIEF OF RESPONDENT** postage prepaid, via U.S. mail on the 11th day of October 2011, to the following counsel of record at the following addresses:

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