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No. 682474

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

LLOYD ENTERPRISES, INC.,

Appellant,

v.

Intervest-Mortgage Investment Company and Receiver John P. Radar,

Respondents.

BRIEF OF APPELLANT LLOYD ENTERPRISES, INC.

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I. INTRODUCTION

This appeal relates to the trial court's decision to reopen a receivership after the action had been formally terminated pursuant to the parties' settlement agreement and the trial court's order. The parties spent almost two months negotiating and finalizing a written settlement agreement that was presented to and accepted by the trial court as fair and reasonable. Three months later, the Milton Senior Community, LLC ("MSC") Receiver filed a motion to vacate the order terminating the receivership and reopen the receivership pursuant to CR 60(b)(3) and (4), alleging fraud, misrepresentation and newly discovered evidence.

The MSC Receiver and Intervest-Mortgage Investment Company ("Intervest") alleged that the parties misrepresented the value of certain property (the "Harder Claim") that was transferred as part of the settlement agreement. The defendants adamantly denied the MSC Receiver's allegations and presented declarations and other evidence refuting the claims. The MSC Receiver failed to provide evidence of the nine elements of fraud or other misconduct by clear, cogent, and convincing evidence and could not point to any "newly discovered evidence" that could not have been discovered through even minimal diligence.

The undisputed facts demonstrate that the MSC Receiver and Intervest and their attorneys had more than sufficient notice and evidence about the Harder Claim and either knew or should have known the value of the claim. Under Washington law, even where the opposing party has the highest fiduciary duty to disclose, it is incumbent upon parties like the MSC Receiver and Intervest to examine closely the value of an asset before releasing rights to it in a settlement agreement. Under Washington law, parties that chose not to investigate are not allowed to return to court and challenge or overturn the release they signed. This is especially true where the releasing party was represented by counsel and had adequate resources and opportunity to investigate, as the MSC Receiver and Intervest did in this case.

Despite not having a proper legal basis to vacate the order and reopen the receivership, the trial court granted the MSC Receiver's motion on December 20, 2011. The trial court reopened the receivership without holding an evidentiary hearing and without entering any specific findings or conclusions to support its decision. There is no indication anywhere in the record that the trial court even considered the elements of fraud or applied the requisite clear, cogent, and convincing standard. Rather, the trial court summarily stated in its written order that it found "good cause" to grant the motion. Such a finding is legally insufficient to vacate and

reopen a receivership that was terminated pursuant to the parties' settlement agreement. The trial court's failure to make proper findings or conclusions is not surprising because under the undisputed facts of this case, there is no legal basis to vacate the order terminating the receivership.

Appellant Lloyd Enterprises, Inc. ("LEI") respectfully asks this Court to reverse the trial court's December 20, 2011 order and award LEI its attorneys' fees and costs on appeal.

II. ASSIGNMENTS OF ERROR

The trial court abused its discretion by:

- (1) Vacating its September 21, 2011 final judgment terminating the receivership where there are no proper grounds for doing so under CR 60(b)(3) or CR 60(b)(4);
- (2) Failing to make any written findings or oral rulings that support fraud or other misconduct sufficient to vacate a judgment pursuant to CR 60(b)(4) or CR 60(b)(3);
- (3) Failing to find each of the requisite nine elements of fraud by clear, cogent, and convincing evidence; and
- (4) Failing to hold an evidentiary hearing before vacating the judgment;

For any or all of these reasons, the trial court's order should be reversed.

III. STATEMENT OF THE CASE

A. OVERVIEW OF APPEAL

On July 13, 2011, the trial court issued an order approving the parties' settlement agreement. CP 871-73. On September 21, 2011, the trial court granted the MSC Receiver's motion discharging the receiver and formally closing the receivership case. CP 88-90. The September 21, 2011 order was the final judgment in the action as it resolved all remaining issues and terminated the receivership. CP at 88-90. This Appellate Court, as part of this appeal, has already determined that the September 21, 2011 order was a final judgment.

Three months later, the Receiver filed a motion to vacate the September order and reopen the receivership pursuant to CR 60(b)(3) and (4), based on allegations of fraud to the effect that LEI and other defendants failed to disclose and or misrepresented the true value of a MSC claim assigned to LEI as part of the parties' settlement. CP 91-110. The trial court granted the motion and vacated the judgment based on a vague finding of "good cause." CP 703-04. The trial court reopened the receivership without applying the clear, cogent, and convincing standard, without making any of the required findings to support a determination of fraud, and without holding an evidentiary hearing. CP 703-04. LEI then initiated this appeal.

B. OVERVIEW OF MSC RECEIVERSHIP ACTION

The underlying action relates to a general receivership for MSC that was initiated through a petition filed by Intervest in January 2008. MSC was created for the purpose of developing a senior care facility in Milton, Washington. CP 507. When finished, the senior facility was to be operated by Sunwest Management, Inc. (“Sunwest”). CP 507.

In connection with the project, MSC entered into a loan agreement in November 2006 with Intervest. CP 553. Intervest is wholly owned by Sterling Savings bank (Intervest and Sterling are collectively referred to herein as “Intervest.”) and executed a deed of trust accordingly. CP 553. By December 2008, MSC defaulted under the terms of the loan. CP 555.

Intervest petitioned the trial court to have a general receiver appointed for MSC and the court appointed John P. Rader as the receiver in January 2009. CP 739-745. In February 2009, the court entered an amended order giving the MSC Receiver authority to, among other things, make efforts to complete construction and market the property for sale, and had control over MSC’s property. CP 748-757. Additionally, the court appointed the law firm of Karr Tuttle Campbell (“Karr Tuttle”) as counsel for the Receiver, with Ms. Diana Carey being appointed as lead attorney. CP 753.

C. OVERVIEW OF LEI LIEN CLAIMS

Appellant LEI is an earthwork and utilities contractor based in Federal Way, Washington who performed work on the MSC project. LEI has been in business since 1966. CP 892-96. LEI asserted lien claims in the underlying action for unpaid work, interest and attorney fees in amounts well in excess of \$2 million. CP 892-96. Various other contractors also filed liens on the property. LEI also filed an administrative claim against the receivership estate. Additional counterclaims and cross-claims were filed by Intervest and the other parties in the lien litigation.

In November 2010, Third-Party Defendants were brought into the receivership action by Intervest including Prime Estate, LLC, Land Lloyd Development Company, Inc. Robert Lloyd, Robert Couper, Danny Lloyd, Randy Lloyd, Russell Lloyd, and Kathy Lloyd (the "Third Party Defendants"). CP 374-75. Intervest claimed in its Third Party Complaint that the Third-Party Defendants had committed fraud by failing to disclose the existence of LEI's lien or potential lien claim. CP 374-75.

D. OVERVIEW OF MSC'S CLAIMS IN THE HARDER BANKRUPTCY

Jon M. Harder was the CEO of Sunwest, which owned and operated hundreds of senior living facilities nationwide. CP 611. MSC was a limited liability company formed to develop a senior living facility

in Milton, Washington. CP 611. MSC's plan was to build the facility and then have Sunwest operate it. CP 611. MSC's original members were Prime Estate, LLC, Robert Couper, Jon Harder, and Thomas Reynolds. CP 611.

In 2008, Sunwest and Harder defaulted on multiple loans across the country. CP 611. As a result, in December 2008, Mr. Harder filed for individual bankruptcy in Oregon. CP 611. Around this same time, multiple lenders on Sunwest related properties, including Intervest, filed petitions for state court receiverships. CP 611. Intervest's December 2008 petition for a receiver resulted, as detailed above, in the appointment of John Rader and the Karr Tuttle law firm as his counsel in early 2009.

Additionally, the SEC filed an action in Oregon District Court against Sunwest for violations of federal securities law and requested a receiver be appointed. CP 612. The Oregon District Court appointed Michael Grassmueck as SEC Receiver and consolidated the actions, including the bankruptcy action, in the District Court in Eugene, Oregon ("Harder Bankruptcy"). CP 612.

On April 29, 2009, Karr Tuttle (less than three months after being appointed counsel for the MSC Receiver in the trial court in this case) was also appointed as the law firm for approximately 3000 claimants ("the TIC Claimants") in the Harder Bankruptcy. CP 259-262, 283-312. Ms. Diana

Carey again appeared as lead counsel in that action. CP 259-262, 283-312. Over the past three years, Karr Tuttle has had extensive involvement in the Harder Bankruptcy as lead attorneys for the TIC Claimants. CP 280-373. As attorneys of record in the Harder Bankruptcy, Karr Tuttle and Ms Carey received information and notice relating to the manner in which claims were to be filed and claimants right to make an election between three options—receiving distributions in cash or in common stock or preferred units that claims had been approved and that large distributions had been made to the holders of the approved claims. CP 259. On June 1, 2010, Karr Tuttle sent a letter to its TIC Claimants detailing the procedures for selecting a distribution preference in the Harder Bankruptcy. CP 301.

On March 24, 2010, MSC filed a proof of claim in the Harder Bankruptcy in the amount of \$15,061,464.00. CP 328-66. By early July, 2010, MSC had received notice from the Harder Receiver that MSC's claim had been tentatively allowed in the amount of \$7,800,000.00. CP 367-68. On July 9, 2010, MSC's attorney at the time, Bernie Lanz, sent a letter to the Harder Receiver objecting to the proposed allowed amount for the claim and requesting additional amounts be allowed. CP 367-68. On December 17, 2010, the Oregon District Court entered an order establishing allowed amounts for the claims. CP 305-312. The order

established that MSC's claim was allowed in the amount of \$7,800,000.00. CP 305-312. Pursuant to the order, the Harder Receiver made a distribution in December 2010 to all approved claim holders, including MSC, at a rate of 40% of their approved claims. CP 282, 290.

MSC opted to receive its claim in Preferred Units instead of a cash distribution. CP 102. Instead of cash or a check, MSC received Preferred Units valued at \$3.1 million. Due to its election of Preferred Units, MSC did not receive a payment in December of 2010. As a holder of Preferred Units, MSC was entitled to receive dividend distributions if funds for such dividends were available but not an immediate payment of full anticipated value of the Preferred Units. CP 112. A company known as Sunwest Member Rollover, LLC ("SMR") was formed by the Harder Receiver to handle distributions to preferred unit holders. SMR issued two checks to MSC on January 25, 2011 in the amount of \$76,418.63 and March 31, 2011 in the amount of \$46,158.90 for dividends from the Preferred Units. CP 261, 314-16. On March 11, 2011, MSC's then counsel Mr. Lanz sent a letter to the MSC Receiver informing him that MSC had received the January 25, 2011 check and identified it as proceeds from the MSC claim in the Harder Bankruptcy. CP 119. Mr. Lanz then withdrew as counsel for MSC and the Third Party Defendants in the receivership. CP 119.

On March 28, 2011, the Receiver's counsel Karr Tuttle sent letters to Robert Couper (a member of MSC) and to Robert Lloyd (a member of Prime Estate, LLC that was in turn a member of MSC) demanding turnover of payments received from the Harder Bankruptcy and requested information about the existence of any other property that may be property of the estate. CP 121-22, 124-25. Neither Mr. Couper nor Mr. Lloyd responded to these letters. After Mr. Lanz withdrew, John Welch of Carney Badley Spellman P.S. appeared on April 7, 2011 on behalf of the Third-Party Defendants but not on behalf of MSC. CP 388.

On April 25, 2011—before mediation or settlement—the MSC Receiver filed a motion to compel turnover of property of the receivership estate. CP 764-69. In support of its motion, the Receiver submitted a Declaration from Daniel Bugbee, one of the Karr Tuttle attorneys representing the MSC Receiver that attached several documents from the Harder Bankruptcy that Karr Tuttle had received from the Harder Receiver. CP 111-155. Mr. Bugbee attached the following documents to his declaration:

- A copy of the MSC proof of claim filed by Robert Lloyd in the Harder Bankruptcy stating the amount claimed is \$15,061,464.00. The proof of claim form lists MSC's claim number C2345. CP 328-52.
- A copy of Mr. Lanz's July 9, 2010 letter to the Harder Receiver showing that MSC's claim was tentatively approved for

\$7,800,000.00 and again listing the MSC claim number. CP 367-68.

- A copy of the March 11, 2011 letter from Mr. Lanz notifying the receiver about the Harder Claim and stating: "I am advising you that I delivered a check in the amount of \$76,418.63, made payable to [MSC], to Mr. Couper last month. The check represented payment of the proceeds of a bankruptcy claim filed in the bankruptcy proceeding of Sunwest in Oregon." CP 370.

As proven by Mr. Bugbee's declaration, the Receiver's attorneys had a copy of MSC's proof of claim, the claim number, and the July 9, 2010 letter from Mr. Lanz confirming that the Harder Receiver was poised to approve the claim in the amount of \$7.8 million. In addition, as lead counsel for the TIC Claimants (the largest group of claimants), Karr Tuttle had copies of all the key pleadings from the Harder Bankruptcy and had full knowledge of the claims procedures and that a December 2010 40% distribution had been made to claimants like MSC, based on the value of their approved claims. CP 256-79.

E. OVERVIEW OF MEDIATION AND SETTLEMENT

The parties agreed to mediate their disputes on April 27, 2011. CP 98. Prior to mediation, Intervest had found a willing buyer for the senior care facility and was anxious to settle the lien foreclosure lawsuit so that LEI's liens could be released and the facility sold. All parties attended the mediation and were represented by counsel. In fact, Intervest was represented at the mediation by three separate law firms.

Although the main focus at mediation was resolving the lien claims and the impending sale of the property, there was some discussion regarding the Harder Claim and to whom the rights in it would be assigned. CP 264. At the mediation, the parties were informed that MSC had received the second check from SMR as a further proceed of the MSC Harder Claim. CP 266. The parties were focused on which party should receive the two checks and not on the overall value or potential value of MSC's claim in the Harder Bankruptcy. CP 264. In discussing who should receive the funds, the argument was made that it would be inequitable for the Receiver or Intervest to receive the funds since it was MSC and its members who filed the claim in the Harder Bankruptcy. CP 265. It is undisputed that both the Receiver and Intervest had failed to file, let alone timely file, a claim on behalf of MSC in the Harder Bankruptcy. After this discussion, the parties agreed that the Receiver would assign the Harder claim to Prime Estates, LLC, one of the original members of MSC. CP 280-82. The only discussion relating to the value of the claim occurred when Karr Tuttle asked LEI's counsel, Richard Skalbania, what future proceeds could be expected from the Harder Bankruptcy and Mr. Skalbania responded truthfully by stating he did not know. CP 263, 281. Neither the Receiver nor Intervest made any further inquiry into the value of the claim. CP 265. They did not ask any further questions

regarding the claim or the likelihood or expected amount of future payments, they did not request any limitation on the amount of future proceeds that could be received as a result of the assignment, and they did not seek any additional time to conduct future investigation into the value of the claim. CP 265.

The parties reached a settlement and executed a CR 2A Agreement at the April 27, 2011 mediation. CP 463-65. As part of the settlement, the parties agreed that LEI would release its lien in exchange for \$775,000.00, the funds received from the Harder Bankruptcy would be turned over to the Receiver, and the Receiver would assign its rights to the Harder Bankruptcy claim to Prime Estate, LLC. CP 460-65. Specifically, the CR 2A stated:

MSC, LEI, Prime Estate, LLC, Land Lloyd Development Co., and Lloyd agree to submit to the Receiver all funds received by any of them as of April 27, 2011, and thereafter (collectively, the "Harder Funds"), as a result of MSC's proof of claim filed in the Harder bankruptcy filed in the U.S. Bankruptcy Court District of Oregon and the SEC matter and all related cases, consolidated under Case No. 09-cv-6056-HO (collectively, the "Harder matter"), and the Receiver agrees to withdraw its motion seeking these funds and agrees to withdraw its claim for sanctions upon receipt of the Harder Funds.

Upon the parties meeting the Conditions contained in this agreement, the Receiver and Intervest agree that Prime Estate, LLC will be paid the Harder Funds. After the discharge of the receivership, neither Intervest nor the Receiver shall have any right to the Harder Funds.

CP 377.

All parties negotiated and agreed to this language. CP 463-65.

On April 29, 2011, two days after mediation and after execution of the CR 2A Agreement, counsel for Third-Party Defendants delivered two checks to the Receiver. CP 377. In its cover letter, counsel for the Third-Party Defendants noted that the two checks represented all "payments" that have been received to date from the Harder Bankruptcy. CP 377. Pursuant to the CR 2A, the Receiver then struck its motion to compel.

Because the contemplated sale of the facility fell through, the CR 2A agreement became void by its own terms. However, the parties elected to continue to negotiate the language of the final settlement

agreement. CP 377-78. These negotiations lasted approximately eight weeks. CP 377-78. During settlement negotiations, it was agreed that the Harder Claim rights would be assigned to LEI, not to Prime Estate, LLC, as originally agreed in the CR 2A. CP 280-373. The Receiver and its attorneys, Karr Tuttle, and Intervest and its three law firms were all active in making and approving amendments to the settlement agreement. In fact, it was Dan Bugbee, attorney for the Receiver, that drafted the final language regarding the assignment of the Harder Claim to LEI. CP 280-373. The parties eventually finalized and executed a written settlement agreement. Pursuant to a stipulation by the parties and the Receiver's recommendation, the trial court reviewed and approved the settlement agreement and terminated the receivership on September 21, 2011. CP 88-90.

F. THE RECEIVER MOVES TO VACATE THE ORDER TERMINATING THE RECEIVERSHIP AND REOPEN THE RECEIVERSHIP

In December 2011, the Receiver filed a Motion to Vacate Order Terminating Receivership and to Reopen Receivership with the court. CP 93-110. The Receiver alleged that defendants and their counsel committed fraud by not disclosing the true value of MSC's Harder Claim during the settlement process. CP 93-110. The Receiver alleged that the Third Party Defendants, LEI, and their "counsel deliberately misled the

Receiver into believing that the Harder Funds claim was only worth approximately \$122,000 and had only a ‘speculative’ future income stream.” CP 93-110. The Receiver alleged that it learned for the first time on October 31, 2011 that MSC’s funds from the Harder Bankruptcy had been reduced to an “allowed” claim of \$7,800,000, payable at 40%, and that MSC elected to receive this in SMR Preferred Units. CP 116.

The Receiver argued that defendants’ failure to disclose this information to the Receiver was grounds for vacating the termination and reopening the receivership pursuant to CR 60(b)(3) or CR 60(b)(4) to allow the Receiver to investigate the ownership of the funds from the Harder Bankruptcy and MSC’s failure to timely disclose and turn over the assets. CP 108. Intervest joined in the Receiver’s motion. CP 636.

LEI and the Third-Party Defendants adamantly disputed the Receiver’s and Intervest’s claims and submitted declarations and other admissible evidence showing: (1) that the Receiver knew or should have known the value of MSC’s claim in the Harder Bankruptcy since it knew a claim for \$15,061,464.00 had been made by MSC in the Harder Bankruptcy, that MSC’s claim had been approved in the amount of \$7,800,000, that the claim had been assigned a claim number of C2345, that two payments had been received, that future payments were possible, and that a 40% distribution of approved claim amounts had been made

months before the Settlement Agreement was signed; (2) that defendants did not misrepresent the value of the Harder funds as the only statements they made related to the funds received so far and Mr. Skalbania stating he did not know the value of any future payments, which was true; (3) that defendants never intended on misleading the Receiver; (4) that any reliance by the Receiver on defendants' statements or alleged failure to disclose was unreasonable given the nature of the statements and the information available to the Receiver and its attorneys and Intervest and Intervest's three law firms and the adversary nature of the litigation leading up to the settlement; (5) that the Receiver's attorneys and Intervest and its attorneys were intimately involved in the Harder Bankruptcy and had received or had access to all of the key pleadings and documents explaining the claim and payout process and had easy access to public information regarding the claim value; and (6) that the Receiver's and Intervest's and their attorneys' decision was out of their own volition to settle the dispute without further investigation into the value of the MSC claim and releasing any claim to it barred their request to reopen the receivership. CP 280-373, 646-672, 386-486.

G. THE COURT VACATES THE ORDER AND REOPENS THE RECEIVERSHIP

On December 20, 2011, the trial court held a show cause hearing on the Receiver's motion to vacate and heard brief oral argument from the parties' counsel. CP 703-04. The trial court did not hold an evidentiary hearing and did not take any testimony from any of the parties. CP 703-04.

As set forth in the court's written order, the court granted the motion based on a finding of "good cause":

23 | arguments of counsel. Finding that there was good cause to vacate the order terminating the
24 | receivership and reopen the receivership in order to investigate and administer the funds obtained by
25 | Milton Senior Community, LLC, under a claim filed in a bankruptcy proceeding in Oregon known as
26 | the Harder Funds Claim, it is hereby:
27 |

1 | ORDERED that the Receivership of Milton Senior Community, LLC, shall be reopened and
2 | the previous order terminating the receivership is vacated; it is

3 | FURTHER ORDERED that John P. (Jack) Rader is hereby re-appointed as the general
4 | receiver ("Receiver") to take charge of substantially all of the assets of Defendant Milton Senior
5 | Community, LLC, in order to investigate the ownership of the Harder Funds and the failure of Milton
6 | Community, LLC, in order to investigate the ownership of the Harder Funds and the failure of Milton
7 | to timely disclose and turn over to the Receiver certain valuable assets of the receivership estate; it is

8 | FURTHER ORDERED that the February 5, 2009 Amended Order Appointing General
9 | Receiver remains valid and shall govern this reopened receivership.
10 |

CP 703-04. The court did not enter any specific findings, did not analyze any of the nine elements of fraud, did not discuss the clear, cogent, and

convincing standard, and did not explain the basis for the court's ruling.
CP 703-04.

The court's oral comments are similarly lacking. At the conclusion of oral argument, the court stated:

22 First off, I am going to find that there is good cause to
23 vacate the order terminating the receivership. The
24 receivership shall be reopened and I will reappoint John
25 Rader as the general receiver. I believe that Mr. Lloyd did
1 owe a fiduciary duty, he failed to disclose the issuance of
2 the preferred units, and that is the basis for the Court's
3 ruling.

When pressed for a more detailed explanation of the basis of the ruling and whether or not there was a finding of fraud, the court only stated that: "Based on the information that I have, yes, that is what I am finding...I have found good cause and that I am doing it as a result of at least what I see thus far fraud." The court's decision lacks the requisite findings and conclusions necessary to support an order vacating a judgment and reopening the receivership

IV. ARGUMENT AND AUTHORITIES

A. STANDARD OF REVIEW

A trial court's conclusions of law are reviewed de novo. *Morin v. Burris*, 160 Wn.2d 745, 753 161 P.3d 956 (2007) ("We review questions

of law de novo.”); *Bainbridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 441, n. 2, 161 P.3d 956 (2008) (“This court reviews conclusions of law de novo whether or not they are styled as ‘findings of fact.’”); *In re Marriage of Newlon*, 167 Wn. App. 195, 199, 272 P.3d 903 (2012) (Motions to vacate are reviewed for an abuse of discretion. “We however review questions of law...de novo.”). A trial court’s factual findings on a motion to vacate under CR 60(b) are reviewed for an abuse of discretion. *Haller v. Wallis*, 89 Wn.2d 539, 543, 573 P.2d 1302 (1978).

An abuse of discretion occurs where the trial court’s decision is manifestly unreasonable or based on untenable grounds or reasons. *Davis v. Globe Mach. Mfg. Co.*, 102 Wash. 2d 68, 77, 684 P.2d 692 (1984); *Knies v. Knies*, 96 Wn. App. 243, 248, 979 P.2d 482 (1999). “A decision is based on ‘untenable grounds’ or made for ‘untenable reasons’ if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” *Mitchell v. Washington State Inst. of Public Policy*, 153 Wn. App. 803, 821-22, 225 P.3d 280, *review denied*, 169 Wn.2d 1012, 236 P.3d 205 (2009) (quoting *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995)). A trial court’s decision is “manifestly unreasonable” if no reasonable person would find the same way and the decision is outside the range of acceptable choices. *Id.* (citations omitted).

Accord Fisons Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.,
122 Wn.2d 299, 339, 345-46, 858 P.2d 1054 (1993).

Here, the trial court's order should be reversed for any one or all of the following reasons:

- (1) Intervest and the Receiver were aware of the existence of the MSC Claim and their duty to fully investigate its value when they had ample opportunities and resources to do so, bars their claim of fraud;
- (2) The parties released all known and unknown claims as part of the settlement and, therefore, are barred from bringing claims for fraud or other misconduct and waived all rights to attack the judgment or settlement;
- (3) There are no tenable or reasonable grounds for vacating the September order under CR 60(b)(3) or CR 60(b)(4);
- (4) The trial court failed to make any findings or oral rulings that support fraud or other misconduct sufficient to vacate a judgment pursuant to CR 60(b) or CR 60(b)(4)a;
- (5) The trial court failed to find each of the requisite nine elements of fraud by clear, cogent, and convincing evidence; and
- (6) The trial court failed to hold an evidentiary hearing before vacating the judgment

B. THE RECEIVER AND INTERVEST FAILED TO INVESTIGATE THE VALUE OF THE MSC CLAIM BEFORE RELEASING ALL CLAIMS AND AS SUCH ARE BARRED FROM ATTACKING THE SETTLEMENT AND JUDGMENT

The trial court's order should be reversed because under applicable law, the Receiver's and Intervest's claims are barred because they gave up their rights to the Harder Claim. They had sufficient notice of the claims value, had sufficient time and resources to investigate its value on their

own, and voluntarily elected to execute, with the advice of multiple law firms, a settlement agreement that contained a broad release of known, unknown, past, present or future claim. Under these undisputed facts, the Receiver and Intervest are barred from making any claims, including fraud, or otherwise attacking the settlement or judgment. Because this is a question of law, this Court's review is de novo.

1. Under Washington law, Intervest's and the Receiver's knowledge of the MSC claim and their duty to investigate its value is fatal to their claims as a matter of law.

Washington courts have consistently held, even in situations where parties owe each other the highest fiduciary duty to disclose the value of assets, that the party has an obligation to examine the information available to them closely. If a party chooses not to do so, it cannot seek relief from the settlement agreement after the fact. The courts have consistently refused, where a party is on notice of the existence of an asset, to vacate a judgment where one party claims the other party failed to fully disclose the value of an asset. Where the complaining party knew about the asset and failed to fully investigate its value, its failure to fully investigate is fatal to its attack on the settlement. This is true even where the parties involved are far less sophisticated and have less financial and legal resources than the Receiver and Intervest possessed in this case. It is

also true where fraud and failure to disclose by the opposing party are alleged.

These principles are made clear in the case of *In re Marriage of Maddix*, 41 Wn. App. 248, 703 P.2d 1062 (1985). In *Maddix*, the wife moved for vacation of her decree of dissolution on the ground her former husband fraudulently withheld from her the value of his business. *Id.* at 249. In support of her motion to vacate, the wife submitted an affidavit stating she had asked about the value of the company prior to agreeing to the property settlement, but had been told by her husband it had no value. *Id.* Subsequent to the entry of the final decree, she was told her share of the company was worth approximately \$25,000. She also discovered a financial statement which indicated the net worth of the company was \$93,296. *Id.*

The husband disputed both the timing of his wife's discovery and the value placed on the business. *Id.* He further argued that rather than do an independent audit, his wife allowed the final decree to be entered, without further investigation. *Id.* The trial court set aside the decree for the sole purpose of establishing the value of the business. *Id.* The appellate court reversed and remanded for the taking of testimony on the issue raised by the affidavits supporting and resisting vacation. *Id.*

The *Maddix* court addressed sua sponte the issue of whether failure to disclose the true value of an asset disposed of in a dissolution proceeding constitutes the fraud necessary to vacate the decree. In addressing disclosure and fiduciary duties, the *Maddix* court explained that:

Based on the rule of full disclosure, if the evidence proves Mrs. Jensen had knowledge of the true value of the business, or at least sufficient notice to protect her interests prior to the entry of the final decree, it was incumbent upon her at that time to examine more closely that value before proceeding with the dissolution. If she voluntarily chose not to do so, she should not be allowed to return to court to do what should have been done prior to entry of the final decree.

(Emphasis added.) *Id.* at 253.

In re Marriage of Curtis, 106 Wn. App. 191, 23 P.3d 13 (2001), is also on point. In *Curtis*, the wife moved to vacate the settlement agreement with her husband, arguing that the husband's business was not properly valued and awarding it to him was an unfair disparity in the settlement. *Id.* at 197. Division III held that the wife was aware of the business at the time of the settlement and was bound by her decision not to have an expert provide a valuation prior to settling. *Id.* The court held that she missed her opportunity to challenge the agreement, regardless of the disparity in the award. *Id.* Specifically, the court stated: "The duty to

value an asset is on the parties when they know of the asset's existence...A party who voluntarily chooses not to value an asset before settlement 'should not be allowed to return to court to do what should have been done prior to entry of the final decree.'" *Id.* (citing *In re Marriage of Maddix*, 41 Wn. App. 248, 253, 703 P.2d 1062 (1985)). Division I of the Court of Appeals has cited to the *Maddix* case with approval in a non-dissolution case. *See Stoullil v. Epstein*, 101 Wn. App 294, 3 P.3d 764 (2000).

The above dissolution cases are applicable to the situation in this case as spouses owe each other as high or higher fiduciary duties than any parties in this case owed. In finding and determining who is ultimately entitled to assets in a dissolution proceeding, "spouses owe each other the highest fiduciary duties." *In re Marriage of Lutz*, 74 Wn. App. 356, 369, 873 P.2d 566 (1994); *see also Peters v. Skalman*, 27 Wn. App. 247, 251, 617 P.2d 448 (1980).

As the *Maddix* and *Curtis* cases make clear, even when an opposing party has the obligation of full disclosure and the highest fiduciary duty, where a party is aware of an asset, it is incumbent upon the party to examine on its own the assets before settling. If a party voluntarily chooses not to do so, the party cannot return to court to do what should have been done prior to settlement and entry of judgment.

Any duty that any of the defendants had to disclose does not excuse the Receiver and Intervest from their failure to further inquire into the value of a \$15 million claim they knew had been approved in the amount of \$7.8 million. Their knowledge of the amount of the claim alone would trigger the *Maddix* and *Curtis* duty to investigate but the facts of this case make a much more compelling case than either *Maddix* or *Curtis*.

a) Defendants not only knew about the existence of the MSC Harder Claim prior to settlement, they had the resources and funds to fully investigate its value on their own.

Under *Maddix* and *Curtis*, all that is needed is knowledge of the asset prior to settlement. However, in this case, the Receiver, Intervest and their attorneys knew not only about the existence of the Harder Claim and its amount but so much more. Before signing the settlement agreement and seeking court approval, the Receiver and Intervest were aware of all of the following:

1. That a claim on behalf of MSC had been filed in the Harder Bankruptcy in the amount of \$15,061,464;
2. That the Receiver and Intervest were in possession of a full copy of the MSC proof of claim, which listed its Harder bankruptcy claim number C2345;
3. That the Receiver and Intervest were in possession of correspondence, which confirmed that the claim had been approved in the amount of \$7.8 million;

4. That the Receiver's and Intervest's attorneys were in possession of an order of the Harder Bankruptcy court entered approximately eight months before the Settlement Agreement was entered into, which listed all approved claims and the amount approved by claim number, including the MSC claim number and ordered that the MSC claim be allowed in the amount of \$7.8 million;
5. That the Receiver and Intervest were in possession of two checks (one in the amount of \$76,418.63 and one in the amount of \$46,158.90) issued as proceeds of the MSC proof of claim;
6. That the Settlement Agreement specifically contemplated the possibility of future proceeds being paid on the claim and did not provide any restriction on or limitation on the amount of such future proceeds;
7. That the Receiver and Intervest had access to the Harder Bankruptcy Receiver and his website, which provided complete detail as to the amount of prior distributions on approved claims (40% in December of 2010);
8. That the Receiver and Intervest had full access to ask questions to the Harder Receiver regarding the value of the MSC claim;
9. That Karr Tuttle, the Receiver's attorney, had submitted claims for over 3000 claimants in the Harder bankruptcy and was one of the lead law firms in the Harder bankruptcy and was fully aware of not only the claims procedures in the Harder bankruptcy, but also the fact that a 40% distribution on approved claims had been made approximately eight months before the July 12, 2011 settlement agreement was signed;
10. That Intervest's attorneys, both Witherspoon Kelley and DLA Piper, had been involved in filing claims in the Harder Bankruptcy, including at least one claim on behalf of Intervest/Sterling that was approved in the amount of \$4.2 million for which Sterling received a 40% distribution (along with other claimants including MSC) in December of 2010;

11. That numerous news articles were written about the December 2010 40% distribution and, as stated above, that the Harder bankruptcy Receiver maintained a website, which was available to the public, which detailed pre and post distribution that a 40% distribution was going to be made and post distribution that the 40% had been made on approved claims; and
12. That the Receiver's and Intervest's attorneys received letters directly from the Harder Bankruptcy in December of 2010 that a 40% distribution had been paid on all approved claims.

In addition, the Receiver and/or Intervest or their attorneys could have spoke with the attorneys at Karr Tuttle who were working in the Harder Bankruptcy. The Receiver and Intervest could have used the proof of claim and claim number to look up MSC's claim and found out that the claim was to be paid out in Preferred Units of SMR. The Receiver could have asked the Harder Receiver how to find out more information about the claims. The Receiver likely would have learned that there is a website known as www.grassmueckgroup.com that was put up by the Harder Receiver in 2009 and is available to the public. Members of the Karr Tuttle law firm were also undoubtedly aware of the website prior to settlement. Through the website, there is public access to information disclosing that a 40% payment toward all MIMO claims had been distributed on December 22, 2010 and that the issuance of common and preferred shares was valued at \$100 per share.

The Receiver, Intervest and the law firms that represented them either knew or should have known about the value of the Harder Claim. Washington law regarding the finality of settlements, the narrow grounds for vacating an order, and the due diligence expected of parties before settling are in place to prevent a party from doing exactly what the Receiver and Intervest are trying to do in this case. Essentially, the Receiver and Intervest want a do over and are arguing that the settlement is unfair because the claim it chose to assign to LEI is worth more than it thought at the time of the settlement. Washington appellate courts reject such arguments.

Based on the decisions in *In re the Marriage of Maddix supra* and *In re the Marriage of Curtis supra*, the Court should reverse and reject Intervest and the Receiver's claims to reopen the Receivership as a matter of law. Despite their wealth of knowledge about the MSC Claim, the Receiver and Intervest agreed to assign the claim to LEI and release all claims to it.

C. INTERVEST'S AND THE RECEIVER'S CLAIMS ARE INDEPENDENTLY BARRED BECAUSE THEY SIGNED A SETTLEMENT AGREEMENT THAT RELEASED ALL UNKNOWN FUTURE CLAIMS

The parties' settlement agreement releases "any and all claims whether known or unknown, asserted or unasserted, past, present, or

future.” CP 144-145. The release extends to the parties’ “officers ... shareholder, [and] members.” CP 144-145. As a result, the Receiver and Intervest are barred from bringing any claims for fraud, misrepresentation, mistake, other misconduct, or any other claims relating in any way to the Property, LEI’s Liens, the Actions, and/or the Project against LEI or Third-Party Defendants. These “unknown future claims” are specifically contemplated and released by the parties’ settlement agreement.

1. Recent decisions of the Ninth Circuit provide persuasive authority that Intervest and the Receiver’s Claim should be barred

The recent and highly-publicized Ninth Circuit Court of Appeals decision *Facebook, Inc. v. Pac. Northwest Software, Inc.*, 640 F.3d 1034 (9th Cir. 2011) dealt with facts almost identical to those here. In *Facebook*, the Winklevoss twins—the brothers who accused Facebook founder Mark Zuckerberg of stealing their idea—entered a settlement agreement with Facebook during mediation. *Facebook*, 640 F.3d at 1036-1037. The settlement agreement included a provision requiring a “mutual release as broad as possible.” *Id.* at 1037.

Shortly after signing the settlement agreement the Winklevosses sought to have the agreement rescinded on the basis of fraud. According to the Winklevosses:

Facebook misled them into believing its shares were worth four times as much [as represented during the mediation]. Had they known about this valuation during mediation, they never would have signed the Settlement Agreement.

Facebook, 640 F.3d at 1038. In response to the Winklevosses' attempt to re-start the litigation, Facebook moved to enforce the settlement agreement. *Id.* The District court granted Facebook's motion and the Winklevosses appealed to the Ninth Circuit. *Id.* at 1037. In a unanimous decision, the Ninth Circuit upheld the District's court's enforcement of the settlement agreement. *Facebook*, 640 F.3d at 1039. In the words of Justice Kozinski, "At some point, litigation must come to an end. That point has now been reached." *Facebook*, 640 F.3d at 1042.

In *Facebook*, rather than acting prudently to protect themselves, the highly sophisticated Winklevosses—who had been represented by "half-a-dozen lawyers" at mediation—agreed to "mutual releases as broad as possible." *Id.* They were therefore stuck with a release that included "both known *and* unknown securities claims." *Id.* at 1040. This necessarily included their fraudulent inducement claim since "an agreement meant to end a dispute between sophisticated parties cannot reasonably be interpreted as leaving the open the door to litigation about the settlement process." *Id.* Having signed an agreement "meant to release claims arising out of the settlement negotiations" the

Winklevosses' had lost the right to attack the settlement agreement on the basis of fraud. *Id.*

Facebook follows on the heels of another Ninth Circuit decision requiring litigants to accept the settlement they negotiated, despite claims that the settlement was induced by lack of disclosure of the value of an asset at issue in the settlement (the exact facts here at issue). In *Petro-Ventures, Inc. v. Takessian*, 967 F.2d 1337 (9th Cir. 1992) the Court was faced with the “validity of a release of all unknown claims in the context of a settlement of ongoing litigation.” *Id.* at 1338. There, plaintiff Petro-Ventures released “any and all claims demands, damages, or causes of action” but a year later sued the defendants arguing that “during the settlement negotiations neither defendant nor anyone else ... disclosed [material information and instead] continued to lead me to believe that the Great American Partners’ securities were in fact registered with the Securities and Exchange commission.” *Id.* at 1338-1339. The Ninth Circuit of Appeals found plaintiffs’ claims were barred:

The [Settlement] Agreement and surrounding facts point to Petro-Ventures desire to end its litigation... To that end, it knowingly, gave up all rights to future litigation that might arise out of the transaction.

Id. at 1343.

2. Washington law is in accord with the Facebook and Petro-Ventures decisions.

The appellate courts also bar attacks on settlements where fraud and other wrongdoing is alleged if the settlement agreement provides the language barring such claims. In the case of *Kwiatkowski v Drews*, 142 Wash App. 463, 76 P.3d 510 (2008), the court rejected the party's attack on the settlement agreement based on a claim by the party that he had been induced into entering into the settlement due to fraud and failure to disclose by banks that owed him a fiduciary duty. The *Kwiatkowski* court rejected plaintiff's attack on the settlement in that case based on language in the settlement agreement intended to fully resolve all matters between the parties. See *Kwiatkowski* at page 481. In addition, the court rejected plaintiff's attack on the settlement agreement in that case based on its conclusion that plaintiff's alleged reliance on representation and failures to disclose by other parties (the banks) to the litigation were unreasonable as a matter of law because at the time the settlement was negotiated, the parties were in an adversarial relationship. *Kwiatkowski* at 482.

Kwiatkowski is directly on point to the facts of this case. Not only did the Receiver and Intervest give up their rights to any future unknown claims in the settlement agreement, but under Washington law they had no right to rely on any alleged failure to disclose or misrepresentations, due

not only to the adversarial nature of the dispute between the parties at the time of settlement, but also because of their knowledge of the existence of the \$15 million MSC Claim and their duty under *Maddix, Curtis* and *Kwiatkowski* to investigate the value of that claim on their own before settling. The Receiver and Intervest were sophisticated parties who were represented by a host of lawyers during the entire eight plus week settlement process. Like the plaintiffs in *Facebook, Petro-Ventures*, and *Kwiatkowski*, the Receiver, Intervest and their cadre of lawyers failed to investigate the value of an asset at issue in the lawsuit and after signing a broad release claimed fraud, failure to disclose and other wrongdoing. For the same reasons stated in *Facebook, Petro-Ventures*, and *Kwiatkowski*, the Receiver and Intervest's attack on the validity of the settlement agreement must fail.

Here, the Receiver and Intervest are sophisticated, well financed parties who were represented by four different law firms and multiple individual lawyers during the mediation and during the eight weeks after mediation in which the final settlements documents were drafted. They could have refused to mediate and elected to conduct further discovery. They could have refused to settle in mediation. They could have placed a limit on the amount recoverable by LEI on the Harder Claim. They could have drafted a less expansive release of claims and could have made

simple inquiries to the Harder Receiver or to other members of their own law firms to find out more information regarding the value of the Harder Claim. They chose to not do any of the above. Instead, the Receiver and Intervest agreed to a broad release expressly releasing “unknown future claims.” As found by the Ninth Circuit, such a release does not “leave open the door to litigation about the settlement process.” *Facebook*, 640 F.3d at 1040. Like the plaintiffs in *Facebook* and *Petro-Ventures*, the Receiver and Intervest and their myriad attorneys chose to end the litigation with language that ensured finality. They must live with the consequences of having done so. In the words of Justice Kozinski, “At some point, litigation must come to an end. That point has now been reached.” *Facebook*, 640 F.3d at 1042. The same is true in this matter and accordingly, this Court should find that the Receiver and Intervest are barred from making any claims relating to fraud or failure to disclose and reverse the trial court’s order as a matter of law.

**D. THE TRIAL COURT ABUSED ITS DISCRETION
BECAUSE THE RECEIVER FAILED TO MEET THE
REQUIREMENTS FOR VACATING A JUDGMENT
UNDER CR 60(B)(3) OR (4)**

The Receiver moved for vacation pursuant to CR 60(b)(3) and CR 60(b)(4). CR 60(b) is a severe remedy and provides relief from judgments only in very narrow instances:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment...for the following reasons:

(3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);

(4) Fraud (whether heretofore denominating intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party;

The focus of CR 60(b)(4) is on judgments that were unfairly obtained, not those that may be premised on incorrect facts. *People State Bank v. Hickey*, 55 Wn. App. 367, 371-72, 777 P.2d 1056 (1989). There is an “overriding public interest in settling and quieting litigation.” *United States v. McInnes*, 556 F.2d 436, 441 (9th Cir. 1977); *see also Haller v. Wallis*, 89 Wn.2d 539, 545, 573 P.2d 1302 (1978). “Promotion of this policy requires judicial enforcement of settlement agreements.” *MWS Wire Indus., Inc. v. California Fine Wire Co., Inc.*, 797 F.2d 799, 802 (9th Cir. 1986).

As stated above, in Washington, an attack on a settlement based on a claim that the settling party was unaware of the value of an asset that was part of the settlement can not be a basis for an attack on a settlement agreement, when the party was on notice of the existence of the asset and had the means and opportunity to determine its value on its own. *See In re*

Marriage of Maddix supra, In re Marriage of Curtis supra. In addition, where a party has signed a settlement agreement that releases unknown future claims, an attack on the claim based on fraud in the inducement to settle or based on failure to disclose, is barred. . . See *Facebook supra, Petro-Ventures supra* and *Kwiatkowski supra*. However, even if these principles (which are more directly on point to the facts of this case) did not exist, the Receiver and Intervest still cannot establish a basis to overturn the settlement agreement.

The case of *Haller v. Wallis*, 89 Wash 2d 539, 544 (1978) is on point. In *Haller*, the personal injury claim of a minor was settled at a court hearing over the prior written objection of the parents of the minor. An attempt was then made to set aside the settlement based on CR 60(b). The *Haller* court ruled that a motion to vacate a judgment after a settlement is treated differently than a default decree because the parties have appeared before the court and have sought approval of their agreement disposing of the case. *Haller v. Wallis*, 89 Wash. 2d 539, 544 (1978). The Washington Supreme Court stated in *Haller*:

If [the judgment] conforms to the agreement or stipulation, it cannot be changed or altered or set aside without the consent of the parties unless it is properly made to appear that it was obtained by fraud or mutual mistake or that consent was not in fact given, which is practically the same thing.

Id. at 544 (internal citations omitted); *see also Metro. Life Ins. Co. v. Ritz*, 70 Wn.2d 317, 321 (1967) (the evidence must be “clear and convincing”). The heightened evidentiary standard is justified by “the law favor[ing] settlements, and consequently...their finality.” *Haller v. Wallis*, 89 Wn.2d 539, 544 (1978).

Accordingly, under Washington law, even where the challenge to the settlement does not involve the value of an asset and even where there has not been a release of unknown future claims, a judgment that is based on an agreement between the parties can only be vacated where there is: (1) fraud; (2) mutual mistake; or (3) consent was not given. *See Haller at 544*. Here only fraud has been raised. Additionally, to be entitled to vacate a judgment under CR 60(b)(4) for fraud, the moving party has a high burden: the fraud must be proved by clear and convincing evidence. *Mitchell v. Wash. State Inst. Of Pub. Policy*, 153 Wn. App. 803, 825, 225 P.3d 280 (2009). Further, “the conduct must be such that the losing party was prevented from fully and fairly presenting its case or defense.” *People State Bank v. Hickey*, 55 Wn. App. 367, 372, 777 P.2d 1056 (1989).

Washington courts require clear, cogent, and convincing evidence of no less than nine dispositive elements: (1) A representation of an existing fact; (2) its materiality; (3) its falsity; (4) the speaker's knowledge

of its falsity or ignorance of its truth; (5) the speaker's intent that it should be acted on by the other party; (6) the other party's ignorance of its falsity; (7) the other party's reliance on the truth of the representation; (8) the right of the other party to rely upon it; and (9) consequent damage. *State v. Hardesty*, 129 Wn.2d 303 (1996); *Stieneke v. Russi*, 145 Wn. App. 544, 564 (2008). Accordingly, these elements include proving that the representation was knowingly false and that the party alleging the fraud had both a right to rely on the representation and was ignorant of the representation's falsity. *Id.*

1. **There is no basis to vacate under CR 60(b)(4) as the Receiver failed to prove the elements of fraud by clear and convincing evidence and failed to show the requisite prejudice.**

As set forth above, where the judgment is entered pursuant to a settlement agreement, the Receiver must prove all nine elements of fraud by clear and convincing evidence in order to vacate the judgment and reopen the receivership. That includes proving that the defendants made a knowingly false representation and that the party alleging the fraud had both a right to rely on the representation and was ignorant of the representation's falsity.

- a) Defendants did not knowingly make any false representations of material fact on which the Receiver relied.**

Here, the defendants made no false representation of existing facts to the Receiver or its counsel; nor was there any intent to induce the Receiver to act. The Receiver and Intervest are highly sophisticated parties, represented by numerous law firms and counsel. The parties, each on their own volition, chose to settle the claims and recommend the settlement to the court. In doing so, the Receiver and Intervest had ample information necessary to evaluate the value of the Harder Claim.

Prior to the mediation, the Receiver was notified about the claim MSC filed in the Harder Bankruptcy. The Receiver also knew that the claim had been recommended for approval in the amount of \$7.8 million, had a copy of the proof of claim and knew it was in the amount of \$15,061,464.00. The Receiver also had the ability to easily verify the amount of the approved claim by either calling the Harder Receiver or by using the claim number to check the court order approving claims that was in their possession. The Receiver also knew, based on its own filing of claims and involvement in the Harder Bankruptcy, that a distribution valued at 40% of the approved claim amounts (in the case of MSC, \$7.8 million x 40% = \$3.1 million) had been distributed on all approved claims

in December of 2010 (five months before the mediation and seven months before the Settlement Agreement was signed).

During the eight weeks of settlement negotiations after mediation, Intervest (who was the real party in interest) and the Receiver had ample opportunity to seek additional information directly from the Harder Receiver, from members of law firms that represented them, from pleadings on file and available to the public, from the Harder Receiver's website, from newspaper articles and from other sources. Additionally, the Receiver could have taken any number of steps to clarify the information it had received or confirm its understanding including but not limited to serving interrogatories, requiring warranties or representations in the settlement documents, limitations on the amount of future proceeds payable on the Harder claim to LEI or numerous other actions to better inform themselves regarding the value of the Harder claim that they were giving up. For whatever reason, neither Intervest nor the Receiver took steps to evaluate the claim's value. Instead, they waited until after the Settlement Agreement was signed releasing all know, unknown, past, present or future claims, and a final order entered terminating the receivership, to begin their investigation. Under Washington law, their lack of diligence defeats their claims as a matter of law.

2. There is no basis to vacate under to CR 60(b)(3) as the Receiver failed to prove the existence of any newly discovered evidence.

A motion to vacate on the grounds “of newly discovered evidence will not be granted unless the evidence: (1) will probably change the result of the trial; (2) was discovered after trial; (3) could not have been discovered before trial even with the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching.” *Graves v. Department of Game*, 76 Wn. App. 705, 718-719 (1994). Failure to satisfy any one of these five factors justifies denial of the motion. *State v. Swan*, 114 Wn.2d 613, 642 (1990).

Further, an affidavit in support of a motion to vacate a judgment pursuant to CR 60(b)(3) must not only describe the nature of the new evidence but it must also affirmatively show why the new evidence could not have been earlier discovered and presented to the court. *In re Estate of Rynning*, 1 Wn. App. 565, 571-572, 462 P.2d 952 (1969). “A mere allegation of diligence is not sufficient; the moving party must state facts that explain why the evidence was not available for trial.” *Vance v. Thurston County Comm’rs*, 117 Wn. App. 660, 671, 71 P.3d 680 (2003).

It is axiomatic that a motion to vacate on the grounds of newly discovered evidence requires, at a minimum, newly discovered evidence. Thus, the Receiver’s and its counsel’s failure to review evidence in his

possession will not provide grounds to vacate under 60(b)(3). For example, in *Go2net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 60 P.3d 1245 (2003), the defendant's attorney's failed to review emails in her possession before attending a summary judgment hearing. Her failure precluded any relief under 60(b)(3). *Go2net* 115 Wn. App. at 88-89.

The Receiver like the losing party in *Go2net* attempts to use its untimely *conclusion* about the value of the Harder Claim as a substitute for actual, newly discovered evidence. This is insufficient—the Receiver is required to prove “that the evidence was acquired after [the approved settlement].” *In re Estate of Rynning*, 1 Wn. App. 565, 571-572 (1969). Tellingly, the evidence submitted with the Receiver's motion, namely Mr. Bugbee's supporting declaration, neither describes what the “new” evidence is nor accounts for how this “new” evidence was discovered. In fact, the Receiver did not submit a single exhibit that was not already in the Receiver's or its counsel's possession prior to the settlement.

Rather than affirmatively offer new evidence as required by the CR 60, the Receiver is completely silent as to: (1) *what evidence caused the Receiver to learn the value of the Harder Claim*; and (2) *how his office acquired it*. The Receiver's silence violates the express requirement and burden of proof necessary for CR 60(b)(3) relief.

In LEI's response brief at the trial court, LEI challenged the Receiver and Intervest to produce some new evidence that could not have been discovered earlier with the exercise of reasonable diligence. Both Intervest's and the Receiver's failure to provide any such evidence in its subsequent briefing confirms that no such evidence exists.

Finally, even if the Receiver had produced some quantum of new evidence in its briefing, CR 60(b)(3) relief would still not be warranted. The Receiver and its counsel had the proof of claim, the claim number, the order allowing \$7.8 million of the claim as approved, and they knew the percentage amount of and manner in which the December 2010 distribution was made. Thus, the Receiver cannot show that any alleged (and undisclosed) new evidence is "material" and "not merely cumulative or impeaching" given that the Receiver's counsel Karr Tuttle has been one of the lead counsel in the Harder Bankruptcy for three years and had all the information necessary to value the Harder Claim prior to settlement.

Similarly, the Receiver cannot show that its alleged undisclosed "new evidence" could "not have been discovered before trial even with the exercise of due diligence" given that the documentation at Karr Tuttle's disposal was more than sufficient to, at a very minimum, put the Receiver and its counsel on notice. *See 1000 Virginia Ltd. P'ship v. Vertecs*, 158 Wn. 2d 566, 581, 146 P.3d 423 (2006) ("A person who has notice of facts

that are sufficient to put him or her upon inquiry notice is deemed to have of all the facts that a reasonable inquiry would disclose.”)

Like the losing party in *Go2Net*, the Receiver apparently failed to review the available evidence. The Receiver, its counsel, and Intervest and the three law firms representing Intervest had ample time and resources (Intervest is a major banking institution represented by three separate law firms) to evaluate the value of the Harder Claim. However, they chose not to do so. They are bound by those choices and the agreement they signed. *Haller*, 89 Wn.2d at 544 (Erroneous advice of counsel, pursuant to which the consent judgment was entered is not ground for vacating it). The Receiver has failed to introduce any newly discovered evidence and cannot meet multiple elements of CR 60(b)(3).

E. THE COURT ALSO ABUSED ITS DISCRETION BY NOT ENTERING FINDINGS AND BY NOT HOLDING AN EVIDENTIARY HEARING

If this Court concludes that the evidence presented supports the trial court’s decision and does not reverse on substantive grounds, the trial court’s order must still be reversed for procedural errors. The trial court abused its discretion by not entering findings and conclusions on the issue of fraud and by not holding an evidentiary hearing.

1. **The court abused its discretion by not entering appropriate findings on the elements of fraud.**

The Washington Supreme Court's decision in *State v. Hardesty* is instructive:

The findings and conclusions as to fraud here are inadequate. The trial court's findings state Hardesty disclosed two prior felonies when he actually had four, and, therefore, he defrauded the trial court. This amounts to finding Hardesty's representation was in error. There are no findings as to Hardesty's knowledge of falsity and intent the State should act upon his statement. There are no findings as to the State's ignorance of the falsity of the statement, or its reliance and right to rely upon Hardesty's statement. **Absent any evidence and specific findings on the elements of fraud, the trial court abused its discretion in modifying the original judgment** and sentence, and imposing an increased sentence.

Additionally, the court in *Marriage of Maddix*, 41 Wn. App. 248, 703 P.2d 1062 (1985) also held that findings are required. In *Maddix*, Mr. Jensen contended that the court failed to find nine elements of fraud with clear, cogent and convincing evidence. The appellate court criticized the trial court's lack of findings:

The findings and conclusions do not make specific reference to fraud, but only state Mr. Jensen failed to disclose the value of his business and vacate the decree for the sole purpose of establishing that value. The facts alleged by Mrs. Jensen were disputed by Mr. Jensen; no further testimony was taken by the court to resolve the controverted issues...It is also true that if, on remand, the court

does find fraud, findings and conclusions with respect to each of the nine elements are required.

Here, the Receiver did not provide any evidence, must less clear, cogent and convincing evidence, that establishes any of the defendants' actions amount to fraud. There is no indication whatsoever that the trial court considered the nine elements of fraud. The trial court made no findings as to what, if any, false statements defendants' made; defendants' knowledge of falsity; defendants' intent in making such statements; or defendants' intent that the Receiver should act upon their statements. Additionally, there are no findings as to the Receiver's ignorance of the falsity of the statement, the Receiver's diligence or knowledge, or the Receiver's reliance and right to rely on any false statements. The trial court was required to make specific findings on all of these elements and must find that the Receiver proved each element with clearly, cogently, and convincingly. The court's order is void of any evidence and specific findings on the elements of fraud and, therefore, the trial court abused its discretion in vacating the judgment.

2. The court abused its discretion by not holding an evidentiary hearing.

Washington law requires that where fraud is at issue and there is conflicting evidence, the trial court must hold an evidentiary hearing to

resolve the issues before granting a motion to vacate. The Washington Supreme Court's decision in *State v. Hardesty* is again instructive:

When fraud is the ground to set aside a judgment, the fraud must be shown by clear and convincing evidence. *State v. Scott*, 101 Wash. 199, 206, 172 P. 234 (1918); *Lindgren v. Lindgren*, 58 Wn. App. 588, 596, 794 P.2d 526 (1990), *review denied*, 116 Wn.2d 1009 (1991); *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 372, 777 P.2d 1056, *review denied*, 113 Wn.2d 1029 (1989). **If the affidavits raise the issue of fraud, it is error to vacate the judgment without first hearing and weighing testimony concerning the alleged fraud, and entering appropriate findings on the elements of fraud.** *Marriage of Maddix*, 41 Wn. App. 248, 251-52, 703 P.2d 1062 (1985).

Id. at 318-319 (emphasis added).

In *State v. Hardesty*, the Washington Supreme Court cited to *Marriage of Maddix*, 41 Wn. App. 248 (1985). These procedural requirements, as set forth in *Hardesty* have been previously cited with approval by this Court as well. In *Stoullil v. Epstein Operating Co.*, 101 Wn. App. 294, 298 (2000), this Court explained:

When a CR 60(b)(4) motion does raise disputed facts, a court errs by "vacating the judgment without first hearing and weighing testimony regarding fraud, misrepresentation or other misconduct." *In re Marriage of Maddix*, 41 Wn. App. 248, 252, 703 P.2d 1062 (1985).

In *Stoullil*, this Court stated that a trial judge may deny a CR 60 motion without hearing argument only "[w]hen a judge ruling on a motion to

vacate presided over the trial, the nonmoving party had ample opportunity to respond and did not request oral argument, and the motion is based on undisputed facts that could have been presented at trial...”

The court abused its discretion by not holding an evidentiary hearing and not taking testimony before granting the motion to determine the issue of fraud based on the conflicting affidavits submitted by the parties.

F. LEI IS ENTITLED TO ITS REASONABLE ATTORNEYS' FEES AND COSTS.

Pursuant to RAP 14 and 18.1, LEI is entitled to its reasonable attorneys' fees and costs under the parties' settlement agreement and Washington law. The settlement agreement states:

12. In the event of litigation between the parties hereto, declaratory or otherwise, in connection with or arising out of this Agreement, the prevailing party shall recover its costs, including experts' fees, and attorneys' fees actually incurred, including for appeals, which shall be determined and fixed by the court as part of the judgment. The parties covenant and agree that they intend by this Section and by any other reference in this Agreement to attorneys' fees, to compensate for attorneys' fees actually incurred by the prevailing party to the particular attorneys involved at such attorneys' then normal hourly rates and that this section shall constitute a request to the court that such rate or rates be deemed reasonable.

CP at ___. Therefore, LEI respectfully requests an award of its fees and costs.

V. CONCLUSION

LEI respectfully requests this Court reverse the trial court's December 20, 2011 order reopening the receivership and asks this Court to enforce the September Order approving the settlement and terminating the

receivership. In the event the Court decides not to reverse and enforce the settlement, the Court should still reverse and remand for purposes of requiring the trial court to hold an evidentiary hearing and make a new determination supported by the required findings of fact and conclusions of law.

RESPECTFULLY SUBMITTED this 31st day of May, 2012.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the state of Washington that on the 31st day of May, 2012, I caused a true and correct copy of the brief of Appellant Lloyd Enterprises, Inc. to be delivered to counsel in the manner indicated, as follows:

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