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 No. 69156-2-I

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

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MARK CALVERT, as Liquidating Trustee of Meridian Mortgage Investor Fund I, LLC, Meridian Mortgage Investor Fund II, LLC, Meridian Mortgage Investor Fund III, LLC, Meridian Mortgage Investor Fund V, LLC, Meridian Mortgage Investor Fund VI, LLC, Meridian Mortgage Investor Fund VII, LLC, Meridian Mortgage Investor Fund VIII, LLC, Meridian Mortgage Investor Fund IX, LLC, Meridian Mortgage Investor Fund X, LLC, MPM Investor Services, Inc., Meridian Real Estate Opportunity Fund I, LLC, Meridian Real Estate Opportunity Fund II, LLC, and the Liquidating Trust of June 21, 2011; Adeline Shannon; ADP; Al Chandler; Alan C. Stewart/Stewart Family Recov.; Alan D. Cornell; Alan F. Roberts IRA; Alan G. Willerf/AIWillet; Alan M. Barron 1995 Rev. Trust; Albert A. James Living Trust; Albert W. Emonds; Alberta J. Fahlsing; Alden M. Garrett; Alexander Children LLC; Alice Johnson Exemption Trust; Alice Wraith; Allen & Millicent Day; Anderson Family Recovable Living Trust; Andrew L. Orton IRA; Andrew L. & Mary Lee Orton; Anita Hendrickson; Ann Morris & James Sobieck; Annette Lave Ostergaard; Anthony & Julie Panagiotu; Anthony Brian Davenport; Anthony J. Robins; Anthony Tamaccio & Chi Lay Bahn; Antonietta Galotola; Atsuko Klein; Barbara & Pat Carey; Barbara A. Smith; Barbara Bums; Beth P. Carver-Kennel; Big E Construction; Bob Pappas; Bocek Family LP II; Brian P. Mulligan; Brian Pearson IRA/Viking; Brian Yates; C. Eric Gulotta; Camelia J Dobrick; Caren L Toney; Carl & Karen Elliott; Carl & Karen Elliott; Carlos Herrera; Carole Maddock; Carolyn Gaylord; Catherin Maxwell; Chad Reed; Charles Albright; Charles E Jenks; Charles Flynn; Charles L LeFevre/Viking Retirement Charles R Knight; Chris Seeley; Christianson Living Trust; Christina Koons; Christopher Kane Rollover IRA; Clauson Family Trust; Clifford N Harby; Constance Weiss; Cornerstone Alternative Fixed Income; Fund LP; Craig & Darla Brand; Craig A. Norsen IRA; Craig Bruya; Craig R. Edwards; CRER Capital Holdings LLC; Crista Ministries; Crista Ministries Operating Acct; Crista Ministries/ASAR Endowment; Crista Ministries/CVM Endowment; Crista Ministries/SC Endowment;

Crystal Mountain Founders Club; Cynthia S Lair/Charles Schwab; Dale & Linda Miller; Dale Knelevich; Dale L. Cowles; Dan Dingfield; Dan Gatchet; Dana Taylor Davenport; Daniel Kearin; Daniel Kearin IRA; Daniel T & Jessie G Hayden; Unitrust/Crista; Darle & Patricia Blumenthal; Darpat LLC; Dave & Karen Hobson; David & Anne Gilbert; David & Barbara Rogers; David & Sonia Alexander; David & Susan Stewart Family Trust; David A. Buecker; David A. Spencer; David Alexander; David C.E. Williams; David Charles Leisy; David Graybill/David Graybill; IRA/Charles Schwab; David Greenheck; David J. Barenborg; David Lee Johnson; David M. Bray III; David M. Bray III; David M. Hyink; David Moseley; David N. Chichester; David O'Hara; David Stempel; David Stewart/Sterling Trust Co; David W. & Kortney L. Graybill; Dawn D. Tumham; Debbie C. Acton; Deborah & Jennifer Brehm; Deborah A. Weasea; Deborah Garrett; Deborah Garrett 2002 Trust; Deborah M. Geffrard; Deborah M. Geffrard; Debra Blumberg; Dee Tour du Monde; Denise C. Chandler Smith; Dennis & Wilma Johnson; Sharing Trust; Dennis Iverson; Dennis Rossman; Dennis Weston IRA; Dennis Weston IRA; Denny Schuler; Diane Katz/Viking; Diane Stielstra/Diane Stielstra & Don Fry; Donald Esfeld; Donna Whitney IRA; Donna Willett; Doris M. Kate Credit Trust; Dorothy M. Rupert; Drew Fletcher; Drew Thoresen; Dudley W. Johnson; E. Doris Gough Trust; Ea Lilja; Eduardo R. Garcia; Eduardo R. Garcia & Jane C. Hoerig; Edward Charles Kauffman; Edward J. Alto; Edward J. O'Toole; Edward Kevin Greenfield; Edward M. Hartstein; Edward R. Stanek IRA; Eldon Larson; Eleanor Karapetian; Eleanor Karapetian; Elizabeth Dowd; Elizabeth Hampson aka Karen E. Elmer; Elizabeth Hampson aka Karen E. Elmer; Elizabeth lone Newman; Elizabeth Tilbury-Marquard; Ellen J. Koutsky; Emma Sigmund Trust; Enid R. Clauson; Estate of Margaret Thoresen; Evan Smith & Barbara Schechter; Evergreen Barbeque; F. Ross Boundy; Fairweather Lane; Floyd B. Barnes; Forrest Lee Brissey; Frances Byrne; Frank M. Mercker; Franklin B. Flowers; Fred & Marilee Slusser; Fred G. Neufeld; Fred Wert; Frederic J. Sigmund; Frederic J. Sigmund IRA/Viking; Frederic J. Sigmund IRA/Viking; Frederic J. Sigmund IRA/Viking; Frederick W. Lurmann; Garrett M. Upper; Gary Galeottj IRA; Gary Galeotti IRA; Gary Galeotti Sep IRA; Gary Galeotti/Galeotti Living Trust; Gayle A. Murdock; Gene Fetters; George E. Burt IRA; George G. Toussaint; Gerald (Jerry) Hendin; Geraldine Ann King GST Trust; Glenn R. Holst; Glenn R. Holst IRA/Equity Trust; Goldie Feinberg; Gordon L. Rockhill/Gordon Rockhill IRA; Gordon Willett; Greg Whitney IRA; H. Raymond & Jina Lankford; Hallie S. Maxon Trust; Hanan Berman; Harold & Jacklyn Vhugen; Harold E. Olsson IRA; Harold F.

Vhugen; Harris Family Trust; Harry C. Morse; Heather Moynihan; Helen M. Miller; Henry Brehm IRA; Henry H. Happel III; Henry R. E. Spouse; Herrera Environmental Consult.; Hope R. Garrett; Hyun Ju Low; Irwin Gruverman; Isabelle Noiret; Jack & Linda Middlebrooks; Jack Jackson aka C. Jack Jackson; Jacklyn Vhugen; Jacqueline Pappas; James & Camelia Dobrick; James & Marianne Wilkinson; James A. Tryon; James and Lisa O'Neal; James C. Dobrick; James J. Casey; James J. Casey; James L. & Lynne M. Addington; James L. Addington IRA; James M. Becker; James M. Marquard; James P. Newcomb; James Pechan; James R. Anderson; James R. Swanson; James Sweet; Jan Diepenheim/Jan Diepenheim/Viking; Jane C. Hoerig; Janet Stanton IRA/Charles Schwab; Janis Ban IRA; Jann A. Curley; Gift Trust UA DTD 11/01/94; Gift Trust #2; Jay M. Botkin; Jeanne Edwards; Jeanne W. Carlson; Jeffrey Keck; Jeffrey L. & Denise J Beauchamp; Jene H. Deguchi; Jenner Charitable Remainder Unitrust; Jeremey & Linda Mattox; Jerry R. Ronk IRA; Jerry T. Party; Jessica Prince; Jill A. Flynn; Jim Purdy; Jo Ann Corfman; Joan L. Johnson Living Trust; Joanne E. Galloway Trust; Joanne Meyers IRA; Jody M. Albright; Joel Korotzer; John A. McLeod; John Carr; John D. Opalka; John Davids; John E. Pendergast; John F. & Marjorie A. Thatcher; John Francis Henry Trust; John Francis Henry Trust; John H. (Jack) & Patricia A Stahl; John L. Backes/Charles Schwab; John L. Backes & Robin J. Roberts aka J; Backes & R. Roberts Revocable Trust; John Spicer; John T. Towey; John W. Warjone; John W. Young; John W. Young IRA/Charles Schwab; Jon F. Nordby; Joseph L. Davis; Joseph Waskom; Judith A. Jance; Judith Cooper Hayden aka Judith Hadyen; Judith Hughes; Judy Bledsoe Addington Credit Trust; Julie Carkin; June Burghardt; Karen Hobson IRA; Kari J. Guddal Record aka Kari Record; Karleen K. Kennedy; Karyn L. Kelley; Katherine D. Schmidt; Katherine N. Heun; Kathleen Opler; Kathleen T. Snyder/Charles Schwab; Kathryn R. Sigmund IRA/Viking; Kathryn R. Sigmund IRA/Viking; Kathy & Dunne Timmons; Kathy Gerke; Kay M. Edwards; Keith Schafer; Kelley Kennedy; Kelsey M. Edwards; Ken & Lorretta Story; Ken B. Martin; Ken Story; Ken Story IRA; Kendal Martin; Kenneth & Katlerine Heeter; Kenneth Heeter/Charles Schwab; Kenneth R. Koehler; Kevin & Alia Peterson; Kevin & Kelley Kennedy; Kevin Gabelien; Kevin Kennedy; Kimberly Susan Sinfield Family Trust; Kourtney Lorriane Graybill IRA/Charles Schwab; Kristin A. Jamerson; Kurt C. Edinger; Kyle Edwards; Lance Mueller; Lance Mueller & Assoc.; Lance Mueller & Assoc. Profit Sharing Plan; Lance P Mueller IRA/RBC Capital; Markets Larry M. Jensen; Larry Stauffer; Laura L. Anderson; Laurie Towey; " Lawrence Michael, Lawrence, & Michael

Glenn"; Lee A. Smith; Leslie Garrett 2002 Trust; Linda Breiwick;  
Linda D. Adams; Linda G. Jeans; Linda Griffin; Linda H. Preizler;  
Loyd A. Knight Charitable Remainder; Unitrust/Crista; Lois  
Gelman/Eric Fassler; Lola A. Yeend Growth Fund LLC &; Lola A  
Yeend Bond Income LLC; Loretta Kelly; Loretta Story; Loretta Story  
IRA; Lorin J. Anderson Trust; Lynne M. Addington IRA; Mahlon &  
Jeanne Nichols; Malcolm L. Edwards; Malcolm L. Edwards & Elizabeth  
Dowd; Malmfeldt Living Trust; Marc & Trina LaRoche; Marc LaRoche  
IRA; Margaret AH Siemion; Margaret Ann Ross; Margaret Tilbury;  
Margey Thorsen aka M. A. Thoresen; Marilyn H. Kean; Marjorie J.  
Holstege; Mark &. Joan Lombardi; Mark B. Upson; Mark Cramer;  
Mark Weisman IRA; Mark Weisman IRA; Marlee Kleca; Marlene  
Winter; Martin Thomas Paul; Martyn F. Adams; Mary A. Siffennan;  
Mary Ann Gonzalez; Mary Ann Mackay; Mary Ann Moore; Mary Ann  
Moore Roth IRA; Mary B. Veal; Mary Elizabeth Kelly; Melissa  
Klebanoff; Meyers Investment LLC; Michael & Diane Quiriconi;  
Michael Ken Menth; Michael Krutsinger; Michael Quiriconi IRA;  
Michael R. Oreskovich; Michael Rasmussen; Milton & Jane Barrett;  
Mimi Cristall/Macho Mouse; Monica H. Mackin; Monte & Nancy  
Szendre; Morgan G. Edwards; Muriel Van Housen Charitable;  
Remainder Unitrust; Nathan Benedict & Steven Nyman; Neal Sullins;  
Neville & Louella Dowell FLP; Norma Barnecutt; Norma Jean Spouse;  
Pamela B. McCabe; Patricia A. Campbell; Patricia Anne Friedland/Pat  
Friedland; Patricia Marie Logan; Patricia Sabin/Penny Sabin; Patrick J.  
Burns; Paul A. Nelson; Paul Fergen; Paul G. Ellingson; Paul H.  
Soderlund IRA; Paul M. McDermott; Paul Stutesman; Paul Walker;  
Payton Smith IRA; Peter G Alder; Peter Garrett; Peter  
Langmaid/Elizabeth Langmaid UGMA/Jessica Langmaid UGMA/Peter  
Langmaid & Audrey Shiffman; Peter Sutherland; Phil & Anita  
Rockefeller; Philip Stielstra; Pieter & Claire Van Wingerden; Poul &  
Joann Hansen Living Trust; Ralph B. Walker; Ralph R. Zeck DDS MS  
PS; Ray Bowen; Raymond Klein; RDV Racing LLC; Richard & Hope  
Stroble; Richard & Linda Korver; Richard & Susan Warsinke; Richard A.  
Snyder/Charles Schwab; Richard B. King Exempt Trust; Richard D.  
Padrick; Richard Izmer Revocable Living Trust; Richard Lawrence  
Johnson; Richard Michael Creighton IRA; Richard R. Radloff; Richard  
Ress; Richard S. Munsen Jr IRA; Richard W. Campbell; Richard W.  
Johnson IRA/Sterling Trust; Richard W. Johnson Living Trust; Richard  
W. Johnson Living Trust; Rick & Betsy Ellingson/Rick & Mary;  
Ellingson; Rita Pampanin; Robert & Karyn L. Kelley; Robert & Lyndi  
Taylor; Robert C. Abbe; Robert C. Wallace; Robert Dennis & Peggy Jean

Turner; Charitable Unitrust/Crista; Robert E. Miller; Robert F. & Cynthia M. Mokos; Robert G. Noftsger JRA/Viking; Robert G. Noftsger Roth/Viking; Robert J. & Katherine Heun Trust; Robert J. & Nancy Hutnik; Robert J. Gerke; Robert J. Heun; Robert J. Hutnik; Robert J. Stanton Trust FBO James L.; Stanton; Robert Jeans; Robert L. Cooper Family LLC; Robert L. Hoffman; Robert Murray Darling/R. Murray; Darling; Robert Noftsger; Robert O. Edwards Trust; Robert P. & Catherine A. Betz; Robert Sours; Robert Staudacher; Robert Tauscher; Robert Taylor IRA; Robert Wroblewski; Robin J. Knepper Living Trust; Robin J. Knepper Living Trust; Robin Knepper GST Non Exempt QTIP; Roger K. Hammers IRA & Roth; Roger L. Winter; Roland & Margaret Ross; Roland J. Ross IRA; Ronand Norris/Ronand Norris & Linda; Talley; Ronald & Deborah Parker; Ronald J. Kiracofe; Roy & Kathleen Whitman; Roy A. Slack MD; Ruhl Family Trust/K. Michael Ruhl; Samuel Selinger IRA; Sandra Alto; Sara L. Schmitt; Sarah Johnson Armstrong; Scott D. Murdock; Scott Jennings; Scott Silver; Seidner Investments LLC; Sharon Lynne Davidoff; Sheila K. Striegl; Shelley Smith; Sherri Zom IRA; Sherrie Wilson; Shirley Iverson; Stanek Family Trust; Stanley B. Eastberg; Stephen P. Walker III; Stephen R. Jepson; Stephen W. Radons; Steven & Evelyn Chestnut; Steven Ban; Steven P. Wisner; Susan A. Stewart/Sterling Trust Co; Susan Ann V. Bray; Susan Melodia; Susan Stanek Winget Sep IRA; Suzanne Kotz; Suzanne Roberts IRA; Tacor Properties LLC; Terry & Rita Deschenes; NCCF Support Inc/Bill Layton; Theodore & Nancy Preg; Thomas B. Keefer; Thomas C. Green IRA/Charles Schwab; Thomas C. Green MD IRA/Charles; Schwab; Thomas E. & LouAnn Rypka; Thomas F. Topel; Thomas F. Topel IRA/Charles Schwab; Thomas McGreevy; Thomas O. Orvald; Thomas P. Rook IRA; Thomas W. & Cheryl L Mccriman; Thomas W. Friedland; Thomas W. Roberts; Timothy Higgins; TJI II LLC; Todd D. Silver; Tom Nickels; Tryg Winquist; Uri Silberstein; Walter & Denise Smith; Warren (Terry) & Shari Hill; Warren (Terry) & Shari Hill; Wilbur Schick; William E. Whitaker; William Elmer IRA/Kibble Prentice; William F. Amman; William Fahlsing; William Gaylord; William H. Martin; William Larson; William P. Wolfe; William Serres; Yates Family LLC; Yates Family LP; Yoko Murao; Zhanbing Wu; Zimmerman Trust/Miriam A.; and Zimmerman Living Trust,

Appellants,

vs.

FREDERICK DARREN BERG, an individual,  
MOSS ADAMS, LLP; and  
DOES 1 through 50, inclusive,

Respondents,

and

EAGAN AVENATTI LLP,

Appellant.

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BRIEF OF APPELLANTS  
CALVERT, EDWARDS, AND EAGAN AVENATTI LLP

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Philip A. Talmadge, WSBA #6973  
Talmadge/Fitzpatrick  
18010 Southcenter Parkway  
Tukwila, WA 98188  
(206) 574-6661

Attorneys for Appellants

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A. INTRODUCTION

Ignoring a plaintiff's right under CR 41(a)(1)(B) to dismiss its case without prejudice, the trial court in this case improperly delayed entry of an order of dismissal in order to force the plaintiffs, a group of investors defrauded by Frederick Berg (hereinafter "the investors"), to produce certain documents to defendant Moss Adams, LLP ("Moss Adams"), an accounting firm that negligently audited Berg and his investment funds, making Berg's Ponzi scheme viable. To compound its error, the trial court entered an outrageously large judgment for sanctions against the investors and their counsel.

The trial court's delay in entering an order of dismissal under CR 41(a)(1)(B) was inexcusable. Instead, the trial court turned the case into the precise "cottage industry" on sanctions and a fee-shifting opportunity against which our Supreme Court warned in *Washington State Physicians Insurance Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 356, 858 P.2d 1054 (1993).

This Court should exercise its supervisory role with respect to the trial court's actions here to reverse and vacate the sanctions judgment.

B. ASSIGNMENTS OF ERROR

(1) Assignment of Error

1. The trial court erred in entering a judgment of nearly \$75,000 in sanctions against the investors and their counsel on July 25, 2012.

(2) Issues Pertaining to Assignment of Error

1. Under CR 41(a)(1)(B) when a plaintiff files a motion to dismiss, if the plaintiff is compliant with the terms of the rule, is the plaintiff entitled to an immediate order of dismissal, thereby ending any further activity in the case? (Assignment of Error Number 1)

2. Did the trial court err in delaying entry of the order of dismissal under CR 41(a)(1)(B) here and effectively conditioning entry of the order on the investors' compliance with various discovery-type directives and payment of sanctions supposedly associated with them? (Assignment of Error Number 1)

3. Did the trial court err in concluding that the investors failed to comply with its discovery-type directives? (Assignment of Error Number 1)

4. Did the trial court err in imposing sanctions against the investors and their counsel and in the amount of such sanctions? (Assignment of Error Number 1)

C. STATEMENT OF THE CASE

The present action arises out of Moss Adams' negligent failure to properly audit the activities of Frederick Darren Berg who over the course of approximately nine years established and administered an investment company and investment funds (the "Meridian Funds") he then utilized to defraud approximately 750 investors out of more than \$150,000,000. CP 15-16. As the auditor for various Meridian funds, Moss Adams issued clean audit reports for the funds. CP 16. Those funds were a Ponzi scheme and ultimately became the subject of bankruptcy proceedings, *In re Meridian Mortgage Investors Fund v. LLC*, in the United States Bankruptcy Court for the Western District of Washington, in which the funds sought bankruptcy protection. CP 17. Mark Calvert was appointed the Chapter 11 bankruptcy trustee. *Id.* He was later appointed the liquidating trustee to carry out a liquidation plan in which persons adversely affected by Berg's actions would receive benefits from a Liquidation Trust and they would assign the proceeds of any claims against Berg to that Trust to be handled by Calvert as its Trustee. CP 23. The plaintiffs were represented by Luvera, Barnett, Brindley, Beninger & Cunningham, a Washington firm and Eagan Avenatti, LP, certain of whose attorneys were admitted pro hac vice. CP 52.

Berg pleaded guilty to wire fraud, money laundering, and bankruptcy fraud in the United States District Court for the Western

District of Washington (Cause No. CR 10-0310RAJ) and is presently serving a 18-year prison sentence in federal prison in Lompoc, California, for his misappropriation of moneys in the funds used to sustain a lavish life style in which he spent millions on special buses, homes, yachts, and private jets. CP 29-30. Berg provided sworn testimony to the United States Attorney attesting to his amazement at Moss Adams' negligence; for example, he testified how Moss Adams would tell him weeks in advance which mortgage files it was going to confirm and that the advance notice allowed him to fabricate those files. CP 35.

The investors filed the present action in the King County Superior Court on December 7, 2011 against Moss Adams for professional negligence and negligent misrepresentation, against Berg and Moss Adams for fraud, and against Moss Adams for violation of the Consumer Protection Act, RCW 19.86 ("CPA"). CP 1-52. The case was ultimately assigned to the Honorable Catherine Shaffer.

Instead of answering the complaint, Moss Adams conducted an aggressive, confrontative defense.<sup>1</sup> It filed a motion to dismiss asserting the investors lacked standing or, in the alternative, for a more definite statement of the investors' claims on January 12, 2012. CP 53-67. On

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<sup>1</sup> This litigation style by Moss Adams' counsel continues even with the dismissal of the case. For example, Moss Adams filed a motion in the bankruptcy court similar to a motion it filed below, CP 357-63, to have Eagan Avenatti's pro hac vice admission revoked based on the judgment entered in this matter. The motion was denied.

February 17, 2012, the trial court denied the motion to dismiss, except as to the investors' CPA claim, which the court dismissed without prejudice. CP 93.<sup>2</sup> The court did, however, order the investors "to provide to Defendants within thirty (30) days the following information as to each plaintiff (a) who invested in which fund; (b) when they invested; (c) how much they invested; and (d) what audit they looked at or relied upon. If the information is not provided the Court will order directly a bill of particulars." CP 93-94. In effect, the trial directed that the investors provide voluminous information to Moss Adams *outside the discovery process*. The investors attempted to do so, CP 203, but Moss Adams claimed the information was insufficient and filed a motion for sanctions on April 9, 2012. CP 96-105.<sup>3</sup>

In response to the Moss Adams' motion, the trial court on May 1, 2012 ordered the investors to provide further information by May 31,

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<sup>2</sup> Moss Adams asserted to the trial court that the investors' claims against it were "flimsy." CP 274. This characterization is belied by the trial court's denial of its motion to dismiss and subsequent activities testified to below by Michael Avenatti, one of the attorneys for the investors. Mr. Avenatti noted that Moss Adams sought to mediate the parties' dispute after the trial court's denial of the motion to dismiss. At that mediation, Moss Adams allegedly made a \$25 million offer; which was rejected. CP 349-50. Such an offer belied a "flimsy" case.

<sup>3</sup> It is noteworthy that the investors sought at that time to undertake the traditional forms of discovery—sending out requests for production and noting depositions. CP 134-92. Moss Adams refused to make witnesses available for deposition and supplied a paltry response to the requested documents. CP 203-04. Moss Adams served discovery requests on the investors in early April, to which the plaintiffs responded on May 7, 2012. CP 289, 307-24.

2012, or to file a "bill of particulars," by June 15, 2012. CP 268-69.<sup>4</sup> The trial court also barred any discovery by the plaintiffs for 30 days. CP 268.

On May 21, 2012, *before* either of the deadlines in the trial court's May 1, 2012 order, the investors moved for voluntary dismissal under CR 41(a)(1)(B). CP 270-73. The investors noted the motion for hearing on May 30, 2012, *before* any deadlines set in the trial court's May 1, 2012 order.<sup>5</sup> Moss Adams opposed the motion, asking the trial court to dismiss the investors' claims with prejudice, and filed a cross-motion for sanctions. CP 274-86.

Moss Adams also filed a motion on shortened time to strike the investors' reply on the motion to dismiss, for sanctions (yet again), and to revoke the pro hac vice admission of Eagan Avenatti. CP 357-63, 369-81.

As of June 15, despite the mandatory nature of CR 41(a)(1)(B), the trial court still had not ruled on the motion for voluntary dismissal so that out of an abundance of caution, and even though not required to do so, the investors filed a "bill of particulars" in compliance with the May 1, 2012 order. CP 486, 766-881. Moss Adams then filed a "Supplemental

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<sup>4</sup> A "bill of particulars" is a term more commonly used in connection with the factual sufficiency of criminal information. CrR 2.1(c). A bill of particulars is designed to give a defendant notice of the charges. *State v. Peerson*, 62 Wn. App. 755, 768, 816 P.2d 43 (1991), *review denied*, 118 Wn.2d 1012 (1992).

<sup>5</sup> The investors noted the motion on six days notice, even though such a motion does not require such notice. *See Greenlaw v. Renn*, 64 Wn. App. 499, 503-04, 824 P.2d 1263 (1992) (motion made day before summary judgment hearing was proper).

Submission" on June 18 claiming the investors had not adequately complied with the trial court's orders, yet again demanding sanctions including dismissal with prejudice and the revocation of Eagan Avenatti's pro hac vice status. CP 485-86. The investors moved to strike this tardy pleading. CP 487-90. Moss Adams responded, demanding sanctions. CP 491-99.

On July 3, 2012, the trial court issued an order denying Moss Adams' motion to strike the plaintiffs' reply, the motion to revoke Eagan Avenatti's pro hac vice status, and the investors' motion to strike Moss Adams' supplemental submission for sanctions, but directing Moss Adams to "file a pleading which notifies this court what information ordered by this Court on February 17, 2012 and May 1, 2012 has allegedly not been provided, documents what costs and fees Moss Adams has expended to obtain that information, and provides a proposed judgment for any requested monetary sanction." CP 711.

Moss Adams then filed a further motion for sanctions in response to the July 3 order, CP 712-23, which the investors opposed. CP 896-907.

Without articulating the grounds for sanctions in the judgment or otherwise analyzing the issues, the trial court on July 25, 2012 entered Moss Adams' proposed judgment against the investors and their counsel for sanctions in the amount of \$74,086.50. CP 927-30. The investors'

counsel satisfied the judgment. CP 933-35. Then, and only then, on July 26, 2012, did the trial court grant the investors' long-pending CR 41(a)(1)(B) motion to dismiss without prejudice. CP 931. This timely appeal followed.

D. SUMMARY OF ARGUMENT

Under CR 41(a)(1)(B), the investors had a mandatory, absolute right to dismissal of its action without prejudice, fixed on the day of the filing of the motion. Any pending matters were rendered a nullity once that dismissal motion was filed. The trial court, therefore, erred in failing to immediately grant such dismissal, in hearing and deciding subsequent Moss Adams motions, and in effectively conditioning dismissal on the investors' obedience of its discovery-type rulings issued in conjunction with the denial of Moss Adams' motion to dismiss arising out of Moss Adams' CR 12(e) motion.

If the Court reaches the validity of the July 25, 2012 sanctions judgment, the trial court erred in its entry. The investors did not violate the trial court's February 17 or May 1 orders. The trial court neglected procedurally to identify the precise basis in law for its imposition of sanctions, nor did it articulate a factual basis for the judgment. Any of the possible legal grounds for sanctions are inapplicable here.

Finally, the amount of the sanctions judgment was outrageously high representing an effort by the trial court to unjustifiably shift Moss Adams' attorney fees and expert consultant fees to the investors. The trial court failed to properly tailor the sanction amount to the actual allegedly sanctionable conduct by the lodestar or other appropriate methodology for calculating reasonable attorney fees and costs as a sanction.

E. ARGUMENT

(1) The Investors Had a Right to an Immediate Order of Dismissal Without Prejudice Under CR 41(a)(1)(B)

CR 41(a)(1)(B) states:

- (1) *Mandatory*. Subject to the provisions of rules 23(e)<sup>6</sup> and 23.1, any action shall be dismissed by the court:
- (A) By Stipulation. When all parties who have appeared so stipulate in writing; or
- (B) By Plaintiff Before Resting. Upon motion of the plaintiff at any time before plaintiff rests at the conclusion of his opening case.

By its terms, dismissal under the rule is *mandatory*.<sup>7</sup>

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<sup>6</sup> CR 23(e) and CR 23.1 require court approval before dismissal of any class action or shareholder derivative action. This is not a class action and those rules are inapplicable. In any event, nothing in those rules authorizes a court to condition dismissal in the fashion undertaken by the trial court here.

<sup>7</sup> Nowhere in CR 41(a) is authority conferred upon a trial court to delay entry of a voluntary order of dismissal or to condition its entry upon the plaintiff's performing certain acts.

Only CR 41(d) addresses costs against a plaintiff who voluntarily dismisses his/her complaint and then re-files it. That rule states:

- (d) **Costs of Previously Dismissed Action**. If a plaintiff who has once dismissed an action in any court commences an action based upon or

Washington case law construing that rule is unambiguous. Our Supreme Court and this Court have repeatedly held that a trial court does not have discretion to delay or deny an order to dismiss under CR 41(a)(1)(B); the order to dismiss must be granted without prejudice<sup>8</sup> so long as the motion to dismiss is filed before the plaintiff rests at trial.

In case after case, our Supreme Court has made it clear that the plaintiff's right to voluntarily dismiss his/her case is "absolute." This concept first found expression in *Herr v. Schwager*, 133 Wash. 568, 570-71, 234 Pac. 446 (1925) where the Court stated that the counterpart statute to CR 41(a)(1)(B) "left no discretion with the trial court; that it vested an *absolute right* in the plaintiff to dismiss his action which the trial court was not at liberty to ignore." (emphasis added). In *In re Archer's Estate*, 36 Wn.2d 505, 508, 219 P.2d 112 (1950), the Court addressed the predecessor rule to CR 41(a)(1)(B) stating that "a plaintiff is entitled to a

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including the same claim against the same defendant, the court may make such order for the payment of taxable costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

A *subsequent* court hearing the plaintiff's refiled case would be the proper court to address costs under that rule. *Cork Insulation Sales Co. v. Torgeson*, 54 Wn. App. 702, 706 n.2, 775 P.2d 970, *review denied*, 113 Wn.2d 1022 (1989). Such costs do not include attorney fees. *Hall v. Stolte*, 24 Wn. App. 423, 425-26, 601 P.2d 967 (1979); *Wright v. Dave Johnson Ins., Inc.*, 167 Wn. App. 758, 781 n.14, 275 P.3d 339, *review denied*, 175 Wn.2d 1008 (2012).

<sup>8</sup> *Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 187, 69 P.3d 895 (2003) ("A trial court's discretion under CR 41(a)(4) to order dismissal with prejudice should only be exercised in limited circumstances where dismissal without prejudice would be pointless.").

voluntary nonsuit at any time before he rests at the conclusion of his opening case. His right is *absolute* and involves no element of discretion on the part of the trial court." (emphasis added). *See also, King County Council v. King County Personnel Board*, 43 Wn. App. 317, 318, 116 P.2d 322 (1986); *McKay v. McKay*, 47 Wn.2d 301, 304, 287 P.2d 330 (1955); *Krause v. Borjessan*, 55 Wn.2d 284, 285, 347 P.2d 893 (1959); *Dellit v. Perry*, 60 Wn.2d 287, 290, 373 P.2d 792 (1962); *Goin v. Goin*, 8 Wn. App. 801, 802, 508 P.2d 1405 (1973).

The plaintiff's absolute right to dismissal under CR 41(a)(1)(B) becomes *fixed* upon the filing of the motion to dismiss, freezing further activities in the case as of that date. *McKay*, 47 Wn.2d at 305-06; *Paulson v. Wahl*, 10 Wn. App. 53, 57, 516 P.2d 514 (1973); *Elliott v. Peterson*, 92 Wn.2d 586, 588-89, 599 P.2d 1282 (1979).

The significance of these rules is that upon the filing of the motion for voluntary dismissal under CR 41(a)(1)(B), the trial court is obligated to grant the dismissal. That dismissal renders the proceedings a nullity, leaving the parties "as if the action had never been brought." *Beckman v. Wilcox*, 96 Wn. App. 355, 359, 979 P.2d 890 (1999), *review denied*, 139 Wn.2d 1017 (2000); *Wachovia SBA Lending v. Kraft*, 138 Wn. App. 854, 861, 158 P.3d 1271 (2007), *aff'd*, 165 Wn.2d 481, 200 P.3d 683 (2009);

*Morris v. Swedish Health Servs.*, 148 Wn. App. 771, 777, 200 P.3d 261 (2009), *review denied*, 170 Wn.2d 1008 (2010).<sup>9</sup>

Washington courts look askance at efforts by the nonmoving party to manipulate their pleadings to avoid a voluntary dismissal. *McKay*, 47 Wn.2d at 305-06 (attempt to file a cross-complaint and seek affirmative relief thereby preventing a voluntary dismissal under CR 41(a)(3)).<sup>10</sup>

Washington courts have often dealt with the significance of CR 41(a)(1)(B) on pending matters. A plaintiff may dismiss his/her case even where a motion for summary judgment is pending so long as the motion has not been submitted to the court for a decision. *Paulson*, 10 Wn. App. at 57. Division II's decision in *Greenlaw* is also instructive. There, the defendant filed a summary judgment motion. After the time had passed for the plaintiff to oppose the summary judgment motion, but before the hearing, the plaintiff moved for voluntary dismissal under CR 41(a). The trial court refused to rule on that motion for voluntary dismissal, and instead granted the defendant's summary judgment motion. The court reversed, directing the trial court to dismiss the case without prejudice,

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<sup>9</sup> Consistent with this effect of voluntary dismissal, a CR 41(a) motion tolls applicable limitations periods. *Elliott*, 92 Wn.2d at 588-90; *Morris*, 148 Wn. App. at 776-77.

<sup>10</sup> The fact that a record in a certiorari proceeding had been certified, *King County Council*, 43 Wn. App. at 318, or that requests for admissions of fact were submitted, *Dellit*, 60 Wn.2d at 290, similarly did not constitute the seeking of "affirmative relief" by the nonmoving party sufficient to preclude voluntary dismissal.

stating "where a motion for voluntary nonsuit is filed and called to the attention of the trial court before the hearing on a summary judgment motion has started, the motion must be granted as a matter of right." 64 Wn. App. at 499.

This issue has also arisen in the context of fees. In *Beckman*, the court upheld a fee award to a condemnee in a condemnation action where the trial court ruled in favor of the condemnor on a private right of necessity, but dismissed the action voluntarily before just compensation could be adjudicated. The court articulated the rule to be followed: "Where a party seeking fees meets the conditions of the statute allowing for fees, the trial court may award fees even after a voluntary dismissal." 96 Wn. App. at 362. However, in *In re Archer's Estate, supra*, the executrix could not recover fees preparing for a will contest that was avoided due to the voluntary dismissal, 36 Wn.2d at 508-09, and in *Wachovia SBA Lending*, the court held that fees were not recoverable under RCW 4.84.330 because a voluntary dismissal was not a final judgment, a necessary condition to recovery of such statutory fees. 138 Wn. App. at 862. Where a party's entire action is frivolous, a court retains jurisdiction after a voluntary dismissal to impose sanctions under CR 11 or RCW 4.84.185. *Escude v. King County Hosp. Dist. No. 2*, 117 Wn. App. 183, 192-93, 69 P.3d 895 (2003).

The trial court here did not specify the basis for its imposition of a judgment against the investors and their counsel,<sup>11</sup> but merely because a party is seeking sanctions does not allow a trial court to deny dismissal under CR 41(a)(1)(B). Even in the face of alleged contempt by a party, this Court in *Goin* refused to deny a party the right to a voluntary dismissal, where the party was not actually found by the trial court to be in contempt and that party's violation of certain ancillary preliminary orders was not sufficient to prevent the dismissal. 8 Wn. App. at 803.

In this case, when the investors filed their CR 41(a)(1)(B) motion on May 21, 2012, CP 270-73, trial in this matter was not scheduled until June 2013. No depositions had been taken. No dispositive motions had been filed. Discovery was just starting. *See* n.3, *supra*. Most critically, there was no affirmative ruling that the investors or their counsel had violated the trial court's May 1, 2012 order. Under such circumstances, applicable Washington law *required* that the trial court grant the investors' motion to dismiss *without prejudice*.

A trial court may not, as here, manipulate the process to deny a plaintiff the right to a voluntary dismissal. Our Supreme Court's decision in *Ashley v. Lance*, 75 Wn.2d 471, 451 P.2d 916 (1969), *appeal after remand*, 80 Wn.2d 274 (1972) is critical on that point. There, the trial

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<sup>11</sup> There is no basis in CR 11, CR 37, or any other rule for such sanctions, as will be discussed later.

court refused to allow the plaintiff to voluntarily dismiss his case after interjecting an accounting into the plaintiff's conspiracy claim. The trial court's sua sponte action on the accounting was an improper basis to deny the plaintiff a voluntary dismissal. *Id.* at 477.

Moss Adams did not seriously address this extensive *Washington* authority below. Instead, it cited *federal* rules and two cases involving failure to comply with discovery orders (*Rivers v. Wash. State Conf. of Mason Contractors*, 145 Wn.2d 674, 41 P.3d 1175 (2002) and *Johnson v. Horizon Fisheries, LLC*, 148 Wn. App. 628, 201 P.3d 346 (2009)). CP 278-82. But neither of those cases involve or discuss a motion for voluntary dismissal under CR 41(a). Rather they involve a CR 41(b) motion for *involuntary* dismissal (*Johnson*) and dismissal under CR 37 for discovery abuse (*Rivers*). As will be noted *infra*, there was no CR 37 order in this case.

The counterpart federal rule differs from CR 41(a)(1)(B). In specific, the federal rule, unlike the state rule, does not purport to make any voluntary dismissal mandatory. Fed. R. Civ. P. 41(a)(2) provides that with the exception of certain voluntary dismissals undertaken by notice by the plaintiff or on stipulation by the parties, all dismissals must be the subject of court orders and the district court has the authority to set “terms

that the court considers proper for dismissal.”<sup>12</sup> That was the genesis, for example, for the Fifth Circuit’s decision in *Manshack v. Southwestern Electric Power Co.*, 915 F.2d 172 (5<sup>th</sup> Cir. 1990), cited below by Moss Adams, where the court articulated the purpose of the federal rule as being to “prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions.” *Id.* at 174 (emphasis added.) The authority arising under the federal rule is distinctly inapplicable where the counterpart federal rule does not reflect the state rule’s *mandatory* dismissal imperative. The authorities arising under the federal rule are not controlling in the face of a distinctly different Washington rule. *Griffin v. Allstate Ins. Co.*, 108 Wn. App. 133, 139, 29 P.3d 777 (2001), *review denied*, 146 Wn.2d 1005 (2002).

Thus, the trial court erred in failing to immediately grant the investors' motion to dismiss without prejudice under CR 41(a)(1)(B) upon its filing. Any proceedings such as those relating to production of further information or sanctions were in abeyance upon that filing. The trial court was not at liberty to invite and decide additional motions filed by Moss Adams *after* the investors had moved to dismiss. If the Court agrees with the investors on this interpretation of CR 41(a)(1)(B), the trial court's

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<sup>12</sup> This authority parallels that of a state trial court under CR 41(a)(2) pertaining to permissive motions to dismiss filed by a plaintiff after resting the plaintiff’s opening case. In such circumstances, the plaintiff must show good cause and the court may impose “such terms and conditions as the court deems proper.”

sanctions judgment must then be reversed and the Court need not reach any further issues on appeal.

(2) The Investors Did Not Violate the Trial Court's February 17 and May 1 Orders and the Trial Court Erred in Imposing Sanctions

If this Court reaches the issue of compliance with the trial court's February 17 and May 1, 2012 orders, it is clear the trial court erred in concluding that the investors violated the orders. First, it is difficult to discern the basis for the trial court's entry of the February 17 and May 1, 2012 orders as neither Moss Adams nor the trial court have specified a rule authorizing such orders. These are not discovery proceedings within the meaning of CR 26 and neither order references CR 37(b).

On February 17, 2012, the trial court denied Moss Adams' motion to dismiss and the court found the investors stated claims for professional negligence, negligence misrepresentation and fraud. CP 93-95. The court then ordered the investors, outside of the discovery process, to turn over extensive information to Moss Adams. CP 93-94. The trial court's May 1, 2012 order is based on CR 12(e),<sup>13</sup> which authorizes a trial court to

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<sup>13</sup> That rule states:

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, or if more particularity in that pleading will further the efficient economical disposition of the action, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out

require a plaintiff to provide a more definite statement of its claims against a defendant. Motions for a more definite statement were more critical in the era of code pleading than in today's notice pleadings. But motions under CR 12(e) are still valuable in that they allow a defendant notice of the facts underlying a party's claim. *Hough v. Stockbridge*, 152 Wn. App. 328, 336, 216 P.3d 1077 (2009), *review denied*, 168 Wn.2d 1043 (2010). In *Hough*, Division III concluded that a party properly pleaded an abuse of process claim and the trial court did not abuse its discretion in denying a CR 12(e) motion. Nothing in that rule, however, suggests that it is a substitute for discovery, precisely the nature of the relief ordered in the trial court's February 17 and May 1, 2012 orders.

Thus, the trial court's orders below exceeded the scope of its authority under CR 12(e). But even if the orders were valid, the investors did not violate them. The investors provided Moss Adams with all four categories of information required by the trial court's February 17 and May 1, 2012 orders. The "bill of particulars" that was timely filed by the investors on June 15, 2012 provided the first three categories of information: (a) who invested in what fund; (b) when they invested; and

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the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after the notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(c) how much they invested. Moss Adams' only complaint regarding the bill of particulars related to the fourth category of information – what audit each plaintiff looked at or relied on. CP 767-895. At the February 17, 2012 hearing, the trial court stated that the pertinent data were the information "as to which fund did they look at or rely on Moss Adams' audit." RP 34. The investors, the trial court noted, were not required to "state whether or not they relied on audit for the particular funding which they invested." *Id.* The investors complied with that directive by stating in the bill of particulars that they "looked at or relied on Moss Adams' audits in connection with each of their fund investments ... and would not have made their investments but for Moss Adams issuing clean audit opinions." CP 769.<sup>14</sup> The investors further complied by producing information as to the fund in which they invested in while relying on a Moss Adams audit, CP 772-832, and submitting numerous documents reflecting Moss Adams' consent to Meridian Funds' use of the audit to raise money for specific funds. CP 833-81.

(3) The Trial Court's Sanctions Judgment Was Improper

The trial court did not state in its July 25, 2012 sanctions judgment the rule that justified it. It entered no findings of fact or conclusions of

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<sup>14</sup> The investors noted that such a bill of particulars was unnecessary under Washington notice pleadings principles, CP 766-67, and improper in light of the filing of their CR 41(a)(1)(B) dismissal motion. CP 767-68.

law. It did not cite to CR 11, CR 37, or some other basis for sanctions. This is true because Moss Adams was not exactly precise and consistent regarding the basis for a sanctions award; Moss Adams' final sanctions motion did not cite to a single statute authorizing the trial court to award monetary sanctions. CP 712-21. Its reply brief on sanctions was equivocal, asserting that CR 37(b) applied, but if it didn't, the trial court should have invoked its "inherent powers." CP 922.

The trial court erred in imposing sanctions against the investors and their counsel. First, from a procedural standpoint it erred when it failed to articulate in its July 25, 2012 judgment the legal basis for sanctions and the facts to support them. At a minimum, our Supreme Court has ruled that a trial court must identify the nature of any violation to justify sanctions. *Blair v. Ta-Seattle East No. 176*, 171 Wn.2d 342, 348-49, 254 P.3d 797 (2011).

Second, from a more substantive standpoint, even assuming that any of the ostensible legal grounds for sanctions applies here (and, of course, neither appellants nor this Court can know with any certainty what the trial court's grounds were), they are inapplicable to these facts, particularly where the investors and their counsel complied with the trial court's February 17 and May 1 orders. CR 37, which relates to sanctions for discovery failures, has no application because a "bill of particulars"

under CR 12(e) relates to *pleadings*, not to producing information in the *discovery* process. Further, the information ordered to be produced by the trial court's February 17 and May 1 orders was not "discovery" in the sense of CR 26. By its terms, CR 37(a) relates to *discovery*. Similarly, the sanctions provisions of CR 37(d) relate explicitly to discovery. CR 37 does not apply.

Likewise, CR 11 is inapplicable because the trial court does not reference a pleading not well grounded in fact or law. There is no finding here that the investors' pleadings in response to the trial court's February 17 or May 1 orders met the requirements of CR 11. In the seminal case of *Miller v. Badgley*, 51 Wn. App. 285, 300, 753 P.2d 530, *review denied*, 111 Wn.2d 1007 (1988), this Court articulated the three factors that must be addressed in connection with a CR 11 claim:

(1) the attorney failed to conduct a reasonable inquiry into the facts supporting the paper; (2) the attorney failed to conduct a reasonable inquiry into the law to ensure that the pleading filed is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and (3) the attorney filed the pleading for an improper purpose such as delay, harassment, or to increase the costs of litigation.

*None* is present here.

Sanctions cannot be awarded under the trial court's "inherent powers" where, as here, other more specific rules would be available upon

proper proof. *Wash. State Physicians Ins. Exch.*, 122 Wn.2d at 339 (court cannot issue sanctions under "inherent power" when other more specific sanctions rules apply). Even if this equitable principle were somehow applicable here, Moss Adams failed to meet the test for its application. The exercise of such authority is exercised with restraint and discretion because it is shielded from direct democratic control. *Greenbank Beach & Boat Club, Inc. v. Bunney*, 168 Wn. App. 517, 525, 280 P.3d 1133 (2012) (discussing types of bad faith conduct). In *Greenbank*, this Court stated that a court "may resort to its inherent powers only to protect the judicial branch in the performance of its constitutional duties, when reasonably necessary for the efficient administration of justice." *Id.* The court noted three types of bad faith conduct. The only applicable type is the so-called procedural bad faith. *Rogerson Hill Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 928, 982 P.2d 131 (1999), *review denied*, 140 Wn.2d 1010 (2000). This inherent power to sanction litigation conduct is usually exercised only upon a finding of actual bad faith. *State v. S.H.*, 102 Wn. App. 468, 474, 8 P.3d 1058 (2000). In the absence of such a finding, remand is required. *Id.* at 476. No finding on bad faith conduct by the investors or their counsel was present here.

Moreover, any alleged non-compliance by the investors was *not* willful as what the trial court required was vague, depriving the investors

of adequate notice; the trial court could not sanction it for any non-compliance.<sup>15</sup>

Finally, ordering sanctions here turns the litigation process on its head, as the investors would be punished in a draconian fashion for not turning over information at the pleading stage, even though the discovery process never started and they had a constitutional right to discovery. *See Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 222, 829 P.2d 1099 (1992) ("The notice pleading rule contemplates that discovery will provide parties with the opportunity to learn more detailed information about the nature of a complaint."); *Putman v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wn.2d 974, 983, 216 P.3d 374 (2009); *Lowy v. PeaceHealth*, 174 Wn.2d 769, 280 P.3d 1078 (2012).

The trial court erred in ordering sanctions against the investors and their counsel.

(4) The Amount of Sanctions Was Excessive

Even assuming sanctions were properly awarded against the investors, the trial court abused its discretion in awarding Moss Adams \$74,086.50 in fees and costs related to a case that was *required* to be dismissed without prejudice *nearly two months* prior to the filing of the investors' CR 41(a)(1)(B) motion for. The trial court awarded sanctions

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<sup>15</sup> As the transcript of the February 17 hearing indicates, the trial court's order was vague as to what is precisely meant by an "audit looked at or relied on." RP 34.

for, among other things, (a) work allegedly performed well *after* the filing of that motion, (b) work allegedly performed for the purpose of acquiring information Moss Adams no longer needed because the case was on the verge of dismissal, and (c) work analyzing information for Moss Adams' defense on the merits.

Washington law on sanctions has consistently provided that a trial court must allow sanctions claims to become a "cottage industry" in which parties seek to employ such sanctions a device for fee-shifting. *Wash. State Physicians Ins. Exch.*, 122 Wn.2d at 356. CR 11 specifically is not a fee-shifting statute. *Bryant*, 119 Wn.2d at 220.

In imposing sanctions, the trial court was obligated to document its decision-making, but it failed to do so. Sanctions should be the least necessary to ensure that the policy of deterrence is implemented. *Id.* at 225 (CR 11 case); *Blair*, 171 Wn.2d at 348 (discovery sanctions case).<sup>16</sup>

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<sup>16</sup> In the area of discovery-related sanctions, Washington courts generally follow a three-part test for harsh discovery sanctions under CR 37(b) like dismissal of a claim or exclusion of a witness. *See, e.g., Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997); *Rivers v. Wash. State Conf. of Mason Contractors*, 145 Wn.2d 674, 41 P.3d 1175 (2002); *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 220 P.3d 191 (2009). That test provides:

it must be apparent from the record that (1) the party's refusal to obey the discovery order was willful or deliberate, (2) the party's actions substantially prejudiced the opponent's ability to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction would probably have sufficed.

There is no evidence here that the trial court undertook this necessary analysis.

While a trial court need not use the lodestar methodology to calculate the amount of attorney fees imposed as a sanction for filing a frivolous case, *Highland School Dist. No. 203 v. Racy*, 149 Wn. App. 307, 315-16, 202 P.3d 1024 (2009), a court must still articulate the basis for the amount of the sanction. The *Racy* court approved the trial judge's employment of the lodestar methodology to calculate the fees imposed as a sanction. *Id.* at 316-17. The court indicated a trial judge's sanction award "should be guided" by that methodology. *Id.* at 316 n.5. It is mandatory, however, that a trial court have "an objective basis" for the fee, and enter findings to explain the court's decision. *Id.* at 316.

Here, Moss Adams failed to provide sufficient evidence and documentation of the fees and expenses allegedly incurred for which it sought recovery. CP 723-33. Moss Adams' counsel did not present contemporaneous time records, but instead simply provided block recitations of hours by timekeepers. CP 730-32. Such a fee request by its counsel and its expert consultants denies this Court the ability to meaningfully examine the legitimacy and reasonableness of the requested

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*Rivers*, 145 Wn.2d at 686-87. This protocol, however, is not applicable to monetary sanctions under CR 26. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 689-90, 132 P.3d 115 (2006).

sums.<sup>17</sup> The trial court here entered no findings on fees. That failing alone is reversible error. *Mahler*, 135 Wn.2d at 435; *Svensen v. Stock*, 143 Wn.2d 546, 560, 23 P.3d 455 (2001).

The record here, essentially the Corr declaration that allegedly identifies the purpose of the hours incurred by Moss Adams' counsel and its consultant's fees, plainly demonstrates that a sanction of nearly \$75,000 in fees was excessive and unwarranted, constituting an effort by the trial court to shift fees to Moss Adams.

First, Moss Adams was not entitled to fees and costs incurred trying to obtain information that the investors admittedly provided to it. At most, Moss Adams could recover fees and costs related to trying to obtain the specific information they claim has not been provided (*i.e.* what audits were looked at or relied on). But Moss Adams never demonstrated what portion of its fees and costs related to information allegedly not provided, as compared to information it admittedly received.

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<sup>17</sup> Washington law requires that a party seeking fees adequately document its fee request. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983). Our Supreme Court has indicated that contemporaneous time records are necessary. *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998). There are few Washington cases addressing block billing, a practice that involves the combination of numerous tasks into a single time entry, thereby preventing appropriate attention to non-compensable hours. *See, e.g., Collins v. Clark Cy. Fire Dist. No. 5*, 155 Wn. App. 48, 102-03, 231 P.3d 1211 (2010). But it is unambiguous under federal lodestar authority that block billing will justify a reduction in an attorney's requested fee. *Mendez v. County of San Bernardino*, 540 F.3d 1109, 1128-29 (9<sup>th</sup> Cir. 2008); *Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942, 948 (9<sup>th</sup> Cir. 2007).

Further, it could not recover fees and costs to analyze the information actually provided by the investors. CP 725. The Corr declaration indicates, for example, that Moss Adams' counsel employed a consultant, Navigant Consulting, Inc. ("Navigant"), to analyze the investors' submissions. CP 725, 729. Moss Adams sought recover of \$29,664 and \$13,887 allegedly incurred for "reviewing" the investors' March 20 submission and the June 15 bill of particulars. CP 730, 731-32. This request includes \$38,319 in block billed fees by Navigant for which there is a July 12, 2012 letter documenting \$27,929 of the fee charged to Moss Adams' counsel. CP 748-51. That fee related to Navigant's analysis of the investors' 29-page spreadsheet and a one-page description related to reliance. There is also a similar letter dated July 12, 2012 with block time entries regarding the \$10,350 charge. CP 890-95.

The tasks performed by Navigant clearly document that its efforts were trial-oriented, rather than focused on the production of information. CP 750, 893. Navigant undertook to compare and validate information provided by the investors with information from other sources, determine which investments made by the investors were made for funds that had been audited by Moss Adams and whether Moss Adams audits had been issued prior to the date of the investments, and perform a comparison of

the investor names shown on the bill of particulars to the bankruptcy claimants shown on bill of particulars. CP 750.

This trial preparation purpose is also evidenced by Moss Adams' counsel's own declaration. The type of painstaking comparison of investors described there, CP 728-29, was obviously for the purpose of trial when Moss Adams *knew* the investors had filed a motion to dismiss the action. That "analysis" again had nothing to do with obtaining information allegedly not provided (*i.e.* what audits were looked at or relied on) but rather related to performing comparisons of the information and trying to identify discrepancies in the submissions.

In any event, Moss Adams should not have recovered any fees or costs incurred trying to obtain information after the investors filed their May 21, 2012 CR 41(a)(1)(B) motion. As of that date, dismissal was *mandatory*. There was no basis for Moss Adams to file additional motions or incur further fees and costs trying to obtain information related to a case on the verge of dismissal. Thus, the \$35,363 sought by Moss Adams for fees and costs incurred *after* the motion should not have been allowed under any circumstances.

Moss Adams also appears to have improperly sought \$6,862 in fees and costs for its opposition to the investors' CR 41(a)(1)(B) motion. CP 731. Even if Moss Adams was entitled to fees and costs on its cross-

motion for sanctions (filed before the trial court's May 1, 2012 order's June 15, 2012 due date for the bill of particulars and before the alternative May 31 due date for supplying the information), Moss Adams could not recover fees and costs related to that entire pleading, rather than limiting the request to the cross-motion portion. Because Moss Adams submitted no breakdown of fees related to that pleading, the entire \$6,862 sought should have been denied. Simply put, Moss Adams should not have recovered *any* fees pertaining to the investors' CR 41(a)(1)(B) motion, a motion that was entirely proper, given the fact that the trial court granted it. The filing of a legitimate motion cannot be sanctionable.

Finally, Moss Adams could not recover fees for its June 19, 2012 submission or any analysis of the bill of particulars. The investors provided the information. There was no sanctionable withholding of information. This fee award only further reflects the trial court's actual intent to improperly shift fees to Moss Adams.

The trial court here granted Moss Adams' entire fee request without the necessary analysis. Trial courts must take seriously their obligation to analyze fee awards; they are not to simply accept counsel's requests at face value. *Mahler*, 135 Wn.2d at 434-35. Moreover, the trial court made no findings and conclusions on the amount of the sanction, as it was obligated to do. *Id.* at 435. It abused its discretion in entering a

judgment for sanctions of nearly \$75,000 against the investors and their counsel.

#### F. CONCLUSION

The trial court erred in failing to immediately enter an order of dismissal without prejudice on the investors' CR 41(a)(1)(B) motion. Thus, the trial court further erred in effectively conditioning the order of dismissal on the investors addressing its discovery-type directives.

If, however, this Court even reaches the discovery issues here, the investors did not violate the trial court's discovery-type orders. The trial court should not have imposed sanctions on the investors or their counsel. Further, the trial court abused its discretion in setting the amount of the discovery sanctions.

This Court should reverse the trial court's sanctions judgment and vacate it. In the alternative, the Court should reverse the judgment and remand the case to another judge<sup>18</sup> to properly calculate any sanction. Costs on appeal should be awarded to the investors.

---

<sup>18</sup> Should remand be necessary here, the Court should remand this case to a different trial judge because the current trial judge has evidence a clear inability to fairly treat the issues in this case. In *Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. Wash. State Human Rights Comm'n*, 87 Wn.2d 802, 557 P.2d 307 (1977), our Supreme Court declared that "[i]t is fundamental to our system of justice that judges be fair and unbiased:"

Our system of jurisprudence also demands that in addition to impartiality, disinterestedness, and fairness on the part of the judge,

DATED this 31<sup>st</sup> day of October, 2012.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973

Talmadge/Fitzpatrick

18010 Southcenter Parkway

Tukwila, WA 98188

(206) 574-6661

Attorneys for Appellants

---

*there must be no question or suspicion as to the integrity and fairness of the system, [i]e., "justice must satisfy the appearance of justice."*

*Id.* at 808 (emphasis added) (citing *Offutt v. United States*, 348 U.S. 11, 14, 75 S. Ct. 11, 13, 99 L.Ed. 11 (1954)).

Since the establishment of the "mere suspicion" test, Washington appellate courts have remanded matters to new judges to ensure the appearance of fairness. *See, e.g., Sherman v. State*, 128 Wn.2d 164, 204-06, 905 P.2d 355 (1996) (judge had *ex parte* contact with physicians charged with monitoring plaintiff's chemical dependency for information about the monitoring process while the judge was considering plaintiff's motion for reinstatement; remand to different judge was "the safest course."); *State v. Sledge*, 133 Wn.2d 828, 845 n.9, 947 P.2d 1199 (1997) (judge expressed views on disposition of juvenile offender; court ordered remand to different judge); *Tatham v. Rogers*, \_\_\_ Wn. App. \_\_\_, 283 P.3d 583 (2012) (judge violated appearance of fairness doctrine).

The same need for impartiality is present here. The Court should remand this case to a different trial judge to make any determinations ordered by this Court and to promote the appearance of fairness.

# APPENDIX

HONORABLE CATHERINE SHAFFER

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SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

MARK CALVERT, as Liquidating Trustee of  
Meridian Mortgage Investor Fund I, LLC, et  
al.

Plaintiffs,

vs.

FREDERICK DARREN BERG, an  
individual, MOSS ADAMS, LLP; and DOES  
1 through 50, inclusive,

Defendants.

NO. 11-2-41738-7 SEA

*ON*  
**ORDER DENYING DEFENDANT  
MOSS ADAMS'S MOTION TO  
DISMISS, OR, ALTERNATIVELY,  
FOR A MORE DEFINITE  
STATEMENT**

~~PROPOSED~~

THIS MATTER having come for hearing before the undersigned Judge on  
Defendant Moss Adams's Motion to Dismiss, or, Alternatively, for a More Definite  
Statement, and the Court having considered the materials filed on this issue, and being fully  
advised; now, therefore

IT IS HEREBY ORDERED that the Motion is DENIED, *without prejudice as to the negligence claim*  
*facts that support*  
// CFA claim. That claim is dismissed w/o prejudice  
as to plaintiffs' ability to later file an amended  
// complaint containing the CFA claim. Plaintiffs are  
// ordered to provide to Defendants within thirty (30) days

~~PROPOSED~~ ORDER *ON*  
~~DENYING~~ DEFENDANT MOSS ADAMS'S  
MOTION TO DISMISS OR, ALTERNATIVELY, FOR  
A MORE DEFINITE STATEMENT - 1

LUVERA, BARNETT, BRINDLEY,  
BENINGER & CUNNINGHAM  
ATTORNEYS AT LAW  
701 FIFTH AVENUE, SUITE 6700  
SEATTLE, WASHINGTON 98104  
(206) 467-6090

the following information: <sup>as to each plaintiff</sup> (a) who invested in which fund; (b) when they invested; (c) how much they invested; (d) what audit they looked at or relied upon. <sup>if this information</sup> \* <sup>and</sup>

DATED 2/17, 2012

  
JUDGE CATHERINE SHAFFER  
King County Superior Court

PRESENTED BY:

LUVERA BARNETT  
BRINDLEY, BENINGER & CUNNINGHAM

\* is not founded  
the Court will consider  
directly a Bill of  
particulars.

JOHN E. GAGLIARDI, WSBA #24321  
Counsel for Plaintiffs

EAGAN AVENATTI, LLP

MICHAEL J. AVENATTI (Pro Hac)  
Counsel for Plaintiffs

~~PROPOSED~~ ORDER *ON*  
DENYING DEFENDANT MOSS ADAMS'S  
MOTION TO DISMISS OR, ALTERNATIVELY, FOR  
A MORE DEFINITE STATEMENT - 2

LUVERA, BARNETT, BRINDLEY,  
BENINGER & CUNNINGHAM  
ATTORNEYS AT LAW

701 FIFTH AVENUE, SUITE 6700  
SEATTLE, WASHINGTON 98104  
(206) 467-6090

JUDGE'S COPY

THE HONORABLE CATHERINE SHAFFER

Noted for: April 17, 2012

Oral Argument Requested

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

MARK CALVERT, as Liquidating Trustee of Meridian Mortgage Investor Fund I, LLC, et al.,

No. 11-2-41738-7 SEA

Plaintiffs,

ORDER GRANTING DEFENDANT MOSS ADAMS LLP'S MOTION FOR SANCTIONS FOR FAILURE TO COMPLY WITH COURT ORDER OF FEBRUARY 17, 2012

v.

(PROPOSED)

FREDERICK DARREN BERG, an individual, MOSS ADAMS LLP; and DOES 1 through 50, inclusive,

Defendants.

THIS MATTER having come on for hearing before the Court on Defendant Moss Adams LLP's Motion for Sanctions for Failure to Comply with Court Order of February 17, 2012 ("Motion for Sanctions"), and the Court having considered the materials filed on this issue, and being fully advised; now, therefore,

IT IS HEREBY ORDERED that the Motion is GRANTED:

- Plaintiffs are ordered to produce materials fully compliant with this Court's Order of February 17, 2012 ("February Order") within ~~ten (10)~~ <sup>thirty (30)</sup> days of this order;
- Plaintiffs shall not issue any discovery to Moss Adams until ~~and unless full compliance with the February Order has been made;~~ <sup>for 30 days from the date of this order.</sup>

[PROPOSED] ORDER GRANTING DEFENDANT MOSS ADAMS LLP'S MOTION FOR SANCTIONS - 1

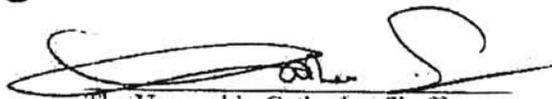
CORR CRONIN MICHELSON BAUMGARDNER & PREECE LLP 1001 Fourth Avenue, Suite 3900 Seattle, Washington 98154-1051 Tel (206) 625-8600 Fax (206) 625-0900

1 • The deadlines for any discovery already issued by Plaintiffs to Moss Adams shall not  
2 ~~begin to run against Moss Adams until and unless full compliance with the February~~  
3 ~~order.~~ *and tolled*  
4 *Order has been made, and*

5 • Plaintiffs shall ~~pay the costs and reasonable attorneys' fees incurred by Moss Adams~~  
6 ~~at a minimum make or disclose required by~~ *provide a full Bill of Particulars which*  
7 ~~in bringing this Motion for Sanctions in an amount to be submitted to this Court by~~  
8 ~~this Court's 2/13/12 order by 45 days from the~~ *at a minimum makes or discloses required by*  
9 ~~Moss Adams within ten (10) days of this Order.~~ *in bringing this Motion for Sanctions in an amount to be submitted to this Court by*  
10 ~~due of his order (unless the disclosure required by \*~~ *this Court's 2/13/12 order by 45 days from the*

IT IS SO ORDERED.

DATED this 1 day of May, 2012.

  
The Honorable Catherine Shaffer

Presented by:

CORR CRONIN MICHELSON  
BAUMGARDNER & PREECE LLP

/s/ Steven W. Fogg

Kelly P. Corr, WSBA No. 00555  
Steven W. Fogg, WSBA No. 23528  
Paul R. Raskin, WSBA No. 24990  
Christina Dimock, WSBA No. 40159  
1001 Fourth Avenue, Suite 3900  
Seattle, WA 98154-1051  
(206) 625-8600 Phone  
(206) 625-0900 Fax  
kcorr@corrchronin.com  
sfogg@corrchronin.com  
praskin@corrchronin.com  
cdimock@corrchronin.com

Attorneys for Defendant Moss Adams LLP

*at this Court on 2/13/12 is provided within 30 days of the date of his order.*

*• Failure to enter comply in full with his Court's 2/13/12 order on the Bill of Particulars required in of his order by a relevant deadline set forth in his order will result in an award of sanctions on award of minimum, all of Moss Adams' fees and costs for pursuing this information*

[PROPOSED] ORDER GRANTING DEFENDANT MOSS  
ADAMS LLP'S MOTION FOR SANCTIONS - 2

CORR CRONIN MICHELSON  
BAUMGARDNER & PREECE LLP  
1001 Fourth Avenue, Suite 3900  
Seattle, Washington 98154-1051  
Tel (206) 625-8600  
Fax (206) 625-0900

1 THE HONORABLE CATHERINE SHAFFER

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7 SUPERIOR COURT OF THE STATE OF WASHINGTON  
8 IN AND FOR THE COUNTY OF KING

9 MARK CALVERT, *et al.*,

10 Plaintiffs,

Cause No.: 11-2-41738-7 SEA

11 v.

~~PROPOSED~~ JUDGMENT

12 FREDERICK DARREN BERG, an individual,  
13 MOSS ADAMS, LLP; and DOES 1 through  
50, inclusive,

14 Defendants.

15 JUDGMENT SUMMARY

16 Judgment Creditor: Defendant Moss Adams, LLP  
17 Attorney for Judgment Creditor: Kelly P. Corr, Steven W. Fogg, Paul R.  
18 Raskin, Jeff Bone, Corr Cronin Michelson  
Baumgardner & Preece LLP  
19 Judgment Debtor: Plaintiffs and their counsel  
20 Principal Amount of Judgment: \$ 74,086.50  
21 Amount of Interest: ~~N/A~~ 12%  
22 Costs: \$ N/A  
23 Statutory Attorneys' Fees: \$ N/A  
24 TOTAL JUDGMENT: \$ 74,086.50  
25

~~PROPOSED~~ JUDGMENT - 1

COPY  
ORIGINAL

CORR CRONIN MICHELSON  
BAUMGARDNER & PREECE LLP  
1801 Fourth Avenue, Suite 3900  
Seattle, Washington 98154-1051  
Tel (206) 625-8600  
Fax (206) 625-0900

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JUDGMENT

This matter is before the Court on Defendant Moss Adams LLP's ("Moss Adams") Motion for Judgment Awarding Monetary Sanctions. Based on the materials submitted in connection with that motion, the pleadings, prior orders, and evidence, judgment is entered as follows:

1. The Court finds that Plaintiffs failed to comply with its February 17, 2012 and May 1, 2012 Orders, wherein the Court ordered Plaintiffs to provide Moss Adams the following information as to each Plaintiff: (a) who invested in which fund; (b) when they invested; (c) how much they invested; and (d) what audit report they looked at or relied upon.

2. The Court's May 1, 2012 Order expressly stated that, if Plaintiffs failed to comply, the Court would impose sanctions, at a minimum, for the fees and costs Moss Adams incurred in attempting to obtain the ordered information.

3. The Court finds that the fees and costs incurred by Moss Adams in attempting to obtain the ordered information were reasonable.

4. Plaintiffs and their counsel are ordered to pay Moss Adams \$74,086.50 within *no later than August 2, 2012 at 4pm. After that* ten (10) days of the date of this order. *time, this judgment will accrue interest at 12% per annum.*

DATED this 25 day of July, 2012.



The Honorable Catherine Shaffer

1 Presented by:

2  
3 CORR CRONIN MICHELSON  
4 BAUMGARDNER & PREECE LLP

5 /s/ Kelly P. Corr

6 Kelly P. Corr, WSBA No. 00555

7 Steven W. Fogg, WSBA No. 23528

8 Paul R. Raskin, WSBA No. 24990

9 Jeff Bone, WSBA No. 43965

10 1001 Fourth Avenue, Suite 3900

11 Seattle, WA 98154-1051

12 (206) 625-8600 Phone

13 (206) 625-0900 Fax

14 kcorr@corrchronin.com

15 sfogg@corrchronin.com

16 praskin@corrchronin.com

17 jbone@corrchronin.com

18 Attorneys for Defendant Moss Adams LLP

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[PROPOSED] JUDGMENT - 3

CORR CRONIN MICHELSON  
BAUMGARDNER & PREECE LLP  
1001 Fourth Avenue, Suite 3900  
Seattle, Washington 98154-1051  
Tel (206) 625-8600  
Fax (206) 625-0900

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies as follows:

1. I am employed at Corr Cronin Michelson Baumgardner & Preece LLP,  
attorneys for Defendant Moss Adams, LLP herein.

2. On this day, I caused a true and correct copy of the foregoing document to be  
served on the following parties in the manner indicated below:

Joel D. Cunningham  
John J. Gagliardi  
LUVERA, BARNETT, BRINDLEY,  
BENINGER & CUNNINGHAM  
701 Fifth Avenue  
Suite 6700  
Seattle, WA 98104  
Attorneys for Plaintiffs  
*Via Email and Hand Delivery*

Michael J. Avenatti  
EAGAN AVENATTI, LLP  
450 Newport Center Dr.  
Second Floor  
Newport Beach, CA 92660  
Attorneys for Plaintiffs (*Pro Hac*)  
*Via Email and First Class Mail*

I declare under penalty of perjury under the laws of the State of Washington that the  
foregoing is true and correct.

DATED this 16th day of July, 2012 at Seattle, Washington.

  
\_\_\_\_\_  
Gina C. Pan

[PROPOSED] JUDGMENT - 4

CORR CRONIN MICHELSON  
BAUMGARDNER & PREECE LLP  
1001 Fourth Avenue, Suite 3900  
Seattle, Washington 98154-1051  
Tel (206) 625-8600  
Fax (206) 625-0900

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HONORABLE CATHERINE SHAFFER

SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

MARK CALVERT, as Liquidating Trustee of  
Meridian Mortgage Investor Fund I, LLC, et  
al.

Plaintiffs,

vs.

FREDERICK DARREN BERG, an  
individual, MOSS ADAMS, LLP; and DOES  
1 through 50, inclusive,

Defendants.

NO. 11-2-41738-7 SEA

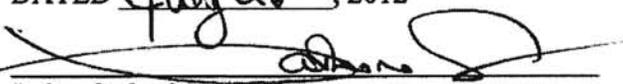
**ORDER GRANTING PLAINTIFFS'  
MOTION FOR VOLUNTARY  
DISMISSAL WITHOUT PREJUDICE  
PURSUANT TO CIVIL RULE 41**

~~(PROPOSED)~~

THIS MATTER having come for hearing before the undersigned Judge on Plaintiffs' Motion for Voluntary Dismissal Without Prejudice Pursuant to Civil Rule 41, and the Court having considered the materials filed on this issue, and being fully advised; now, therefore

IT IS HEREBY ORDERED that the Motion is GRANTED and Plaintiffs' claims are dismissed without prejudice.

DATED July 26, 2012

  
Judge Catherine Shaffer  
King County Superior Court

~~(PROPOSED)~~ ORDER  
GRANTING PLAINTIFFS MOTION FOR  
VOLUNTARY DISMISSAL WITHOUT PREJUDICE  
PURSUANT TO CIVIL RULE 41- 1

ORIGINAL

DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and put in the U.S. Mail for service a true and accurate copy of the following document: Brief of Appellants Calvert, Edwards, and Eagan Avenatti LLP, in Court of Appeals Cause No. 69156-2-I to the following:

Kelly P. Corr, Steven W. Fogg Paul R. Raskin, Jeff Bone Corr Cronin Michelson Baumgardner & Preece LLP 1001 4th Avenue, Suite 3900 Seattle, WA 98154	Michael J. Avenatti, Katherine Mosby Scott H. Sims, Judy K. Regnier Alexander L. Conti, Shea M. Murphy Eagan Avenatti, LLP 450 Newport Center Drive, 2nd Floor Newport Beach, CA 92660
Joel D. Cunningham John J. Gagliardi Luvera, Barnett, Brindley, Beninger & Cunningham 701 5 <sup>th</sup> Avenue, Suite 6700 Seattle, WA 98104	Craig Edwards 8533 NE 13 <sup>th</sup> Street Clyde Hill, WA 98004
Sent by U.S. Mail only Frederick Darren Berg Inmate No. 179850-0896FCI Lompoc – Federal Correctional Institution 3600 Guard Road Lompoc, CA 93436-2705	

Original and a copy filed with:

Court of Appeals, Division I  
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated this 1st day of November, 2012, at Tukwila, Washington.

  
\_\_\_\_\_  
Christine Jones  
Talmadge/Fitzpatrick