

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

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

v.

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

and

EAGAN AVENATTI LLP, Appellant

and

LUVERA BARNETT BRINDLEY BENINGER & CUNNINGHAM,
Appellant

BRIEF OF RESPONDENT MOSS ADAMS LLP

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP
Kelly P. Corr, WSBA No. 00555
Steven W. Fogg, WSBA No. 23528
Paul R. Raskin, WSBA No. 24990
Jeff Bone, WSBA No. 43965
1001 Fourth Avenue, Suite 3900
Seattle, WA 98154-1051
(206) 625-8600

Attorneys for Respondent
Moss Adams LLP

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I. INTRODUCTION

Plaintiffs' California counsel Eagan Avenatti LLP and its principal Michael Avenatti led a parade of litigation abuses, culminating with the violation of two trial court orders. They filed a Complaint without inquiry into basic facts regarding Plaintiffs' alleged investments. To avoid summary dismissal, they then misrepresented to the trial court that such information would be forthcoming. When the information was ordered disclosed, they repeated their false promises, first to delay a motion to compel and then again to avoid sanctions on that motion. When Plaintiffs' counsel could delay no longer, after being twice ordered to produce such information and already subject to an order that sanctions would be imposed for continued noncompliance, they filed a forum shopping motion for voluntary dismissal. And when that motion was opposed, defying a signed confidentiality agreement, they disclosed in a public filing, without timely service on Moss Adams, a purported mediation-related settlement offer that was never in fact made.

Rule 41 voluntary dismissal is not holy water absolving Mr. Avenatti's transgressions or curing Plaintiffs' violations of court orders. While the trial court granted Plaintiffs' voluntary dismissal, it also acted well within its discretion and authority when it required Plaintiffs and their counsel to pay Moss Adams' fees and costs incurred in repeatedly seeking

the basic information that Plaintiffs' counsel had repeatedly represented to the trial court and Moss Adams would be provided and that the court twice ordered Plaintiffs to disclose. Those fees and costs were the "minimum" sanction that the trial court had ruled would be issued for continued noncompliance and were expressly found to have been reasonably incurred.

Plaintiff Mark Calvert and his counsel filed suit against Moss Adams in December 2011, alleging \$150M damages arising from investments made by over 600 different individual plaintiffs over a ten-year period relating to 11 different Meridian mortgage and real estate Funds, most of which Moss Adams never audited. Neither Mr. Calvert nor his counsel conducted reasonable diligence before filing suit, as reflected by their Complaint which contained false allegations regarding the scope of Moss Adams' work for the Meridian Funds and failed to identify for any single Plaintiff investor which specific Meridian Fund any Plaintiff invested in, when they invested, how much they invested, or what, if any, Moss Adams audit report any Plaintiff allegedly relied upon when making his or her investment decision. That information was critical because Plaintiffs' claims for fraud, negligent misrepresentation, and negligence all required them to prove justifiable reliance on an alleged misstatement by Moss Adams.

When Moss Adams moved to dismiss or for a more definite statement, Plaintiffs' counsel in open court agreed to provide information about each plaintiff's investments, if they could "get past th[e] pleading stage." The court accepted Plaintiffs' counsel's offer. Instead of dismissing the Complaint, the court ordered Plaintiffs on February 17, 2012 to disclose within 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 report they looked at or relied upon.

Notwithstanding their promises to the trial court and opposing counsel at the February 17 hearing and subsequent promises to counsel for Moss Adams during discovery conferences that the court-ordered investor information would be forthcoming, Plaintiffs failed to comply with the February 17 Order for even one of the 600 plaintiffs. As a result, Moss Adams was forced to file a Motion for Sanctions. In response, Plaintiffs again assured the trial court that more information would be forthcoming, including "fact sheets" from each Plaintiff showing "the specific audit, by fund and date, of each audit each Plaintiff saw or relied upon."

On May 1, 2012, the trial court granted Moss Adams' Motion for Sanctions. It ordered Plaintiffs a second time to produce the same basic information required by its prior February 17, 2012 Order. Again

accepting Plaintiffs' counsel's promises to comply, it granted Plaintiffs an additional 30 days, until May 31, to make the disclosure, and ruled that if they failed to do so, they must produce an even more detailed "Bill of Particulars" by June 15. The trial court also granted Moss Adams' request for sanctions. The May 1, 2012 Order Granting Defendant Moss Adams LLP's Motion for Sanctions For Failure to Comply With Court Order of February 17, 2012 -- issued prior to Plaintiff's motion for voluntary dismissal -- ruled that "[f]ailure to either comply in full with this Court's 2/17/12 order or the Bill of Particulars required in this order by the relevant deadlines set forth in this order will result in an award of sanctions for, at a minimum, all Moss Adams' fees and costs for pursuing this information." *Id.* (emphasis added).

Thereafter, Plaintiffs failed to provide the plaintiff investor "fact sheets" or to identify for a single plaintiff what Moss Adams audit report, if any, was relied upon. Ignoring its repeated promises to the court and Moss Adams and the two prior court orders, Plaintiffs moved for voluntary dismissal on May 21, 2012, in hopes of escaping the trial court's rulings and a judge that they now remarkably claim on appeal to be "biased." Contrary to any suggestion of bias, the record shows that the trial court judge went out of her way to give Plaintiffs repeated opportunities to comply with the trial court's disclosure orders and to brief

relevant issues before the court sanctioned Plaintiffs and their counsel as the court previously indicated it would.

As discussed below, the Judgment awarding fees and costs was a proper exercise of the trial court's discretion and should be affirmed. First, Plaintiffs' violation of two court orders is clear. Plaintiffs' counsel's argument that the court's February 17 and May 1 Orders were vague or not violated is frivolous and underscores Plaintiffs' counsel's contempt of the trial court's authority. The trial court's May 1, 2012 Order Granting Sanctions rejected the very same argument Plaintiffs' counsel makes now, that the court did not intend that Plaintiffs be required to identify what audit reports, if any, they relied upon. Plaintiffs' argument is also belied by their counsel's repeated representations back in March and April, prior to the May 1 Order, that they were sending "fact sheets" to plaintiffs inquiring as to their specific reliance, if any, on any Moss Adams audit report.

Second, Plaintiffs' counsel's argument that a trial court cannot issue a judgment for sanctions following the filing of a voluntary dismissal motion ignores established law, including authorities cited in their own Brief. The cases relied upon by Plaintiffs hold only that the merits of a Rule 41 motion must be judged by the pleadings at the time the motion is filed, and a defendant cannot thereafter file a counterclaim to avoid

dismissal. That rule was not violated by the trial court, which granted the voluntary dismissal. Those cases, however, also make clear that this rule does not prevent the grant of a fee award or other sanctions following the filing of a voluntary dismissal motion.

Third, the sanctions award is justified under CR 37(b), CR 12(e), CR 11 and/or the trial court's inherent powers. The trial court had many tools at its disposal to address Plaintiffs' counsel's misconduct. CR 37(b) expressly authorizes the court to issue sanctions for violations of orders regarding discovery. Here Plaintiffs and their counsel defied two orders requiring disclosure of basic information regarding Plaintiffs' claims. CR 12(e) likewise authorizes the court to issue sanctions where a party violates an order issued on a CR 12(e) motion. And Plaintiffs' violations of court orders, compounded by their repeated misrepresentations to the trial court that such information would be provided, Plaintiffs' forum shopping, Plaintiffs' publication of confidential information without timely service on Moss Adams, and other vexatious conduct by Plaintiffs' counsel is sanctionable under CR 11 and the trial court's inherent powers.

Fourth, the amount of the sanctions imposed was well within the trial court's discretion, and, indeed, was the "minimum" sanction that the court indicated would be appropriate for Plaintiffs' counsel's violations of its orders. The Declaration of Kelly P. Corr set forth all of the information

required to support the fee award. Plaintiffs' counsel submitted no declarations in the court below challenging the reasonableness of the attorney's fees awarded and failed to identify any specific missing information or documentation. They cannot manufacture such issues for the first time now on appeal. Tellingly, Plaintiffs' local counsel has expressly chosen not to join that portion of Eagan Avenatti's Appeal Brief challenging the amount of fees granted.

The rule of law demands that litigants comply with court rules and orders. While "the imposition of sanctions upon attorneys is a difficult and disagreeable task," the Supreme Court of Washington has made clear that "it is a necessary one if our system is to remain accessible and responsible." *Washington State Phys. Ins. Exch. & Assoc. v. Fisons Corp.*, 122 Wn.2d 299, 355 (1993). "[T]he trial court must be accorded wide discretion: '[The trial court] has tasted the flavor of the litigation and is in the best position to make these kinds of determinations.'" *Miller v. Badgely*, 51 Wn. App. 285, 300 (1988) (citation omitted). The Judgment should be affirmed in its entirety.

II. STATEMENT OF ISSUES

1. Did Plaintiffs' failure to identify for any single Plaintiff what Moss Adams audit report such plaintiff relied upon violate the trial court's February 17, 2012 and May 1, 2012 disclosure Orders?

2. Does the filing of a motion for voluntary dismissal deprive the trial court of its authority to issue sanctions under CR 37(b), CR 12(e), CR 11 and/or the court's inherent powers?

3. Did the trial court have discretion under CR 37(b), CR 12(e), CR 11 and/or its inherent powers to issue monetary sanctions against Plaintiffs or their counsel for their repeated misrepresentations to the court and Moss Adams that basic and critical investor information would be disclosed and their violation of two court orders requiring such disclosure and/or for other improper conduct?

4. Did the trial court abuse its discretion by awarding fees and costs in the amount that Moss Adams incurred seeking to obtain the court-ordered information from Plaintiffs, where Moss Adams provided a detailed supporting declaration, there was no opposing declaration, and the court found that the fees requested were reasonable?

III. STATEMENT OF THE CASE

A. Plaintiffs' Complaint Contained False Allegations and Lacked Basic Information About Plaintiffs' Claims.

Plaintiffs are a Liquidating Trustee and over 600 individuals who allegedly purchased notes or other interests from eleven different Meridian mortgage and real estate investment funds (the "Funds") that were owned and managed by co-Defendant Frederick Darren Berg. Plaintiffs claimed that

over an almost 10-year-long period, Berg (who is now serving an 18-year prison sentence) fraudulently siphoned off assets from the Funds to finance his own needs and lifestyle. Moss Adams is an independent accounting firm that audited the financial statements of *some* of the Funds during *some* of these years. Plaintiffs' Complaint sought to hold Moss Adams responsible for Berg's fraud, alleging that Moss Adams should have uncovered the fraud during their audits and disclosed it in audit reports. Based on this theory, Plaintiffs asserted claims directly against Moss Adams for fraud, negligent misrepresentation, negligence, and violations of the Consumer Protection Act. *See* Complaint, CP 1-52.

Plaintiffs were well aware that Moss Adams performed a limited amount of audit work for the Funds. Plaintiff Mark Calvert is the Bankruptcy Trustee for the Funds and through that role had access to Moss Adams' audit records demonstrating the limited number of financial statement audits Moss Adams performed for the Meridian Companies. CP 724. Moreover, each individual Plaintiff knows what Funds he or she invested in and what audit reports, if any, he or she received. Nonetheless, Plaintiffs' Complaint falsely implied that Moss Adams performed audit work for *all* Meridian Funds for *all* years between 2001 and 2007. *See* CP 27, Complaint at ¶ 26 ("Berg retained Moss Adams to conduct Audits on MPM and the Meridian Funds for years 2001 through 2007."). The Complaint also failed to include basic

information for each Plaintiff, such as the Fund(s) invested in by each Plaintiff, the dates of the investments, whether each Plaintiff received an audit report, whether each Plaintiff reasonably relied upon the audit report and whether such alleged reliance was the proximate cause of the loss. Instead, Plaintiffs relied on an unsupported, overly broad (and demonstrably false) statement that Moss Adams issued audit reports for all funds for all years between 2001 and 2007 and a blanket statement (also demonstrably false) that Investors “relied on Moss Adams.” CP 28, Complaint at ¶ 31. Plaintiffs employed these broad, false assertions to justify claims for more than 600 plaintiffs, regardless of whether those plaintiffs received, reviewed, or relied upon a Moss Adams audit report, or even invested in a Fund that Moss Adams ever audited.

B. Plaintiffs’ Initial Promises to Provide Basic Information and the Court’s February 17, 2012 Order.

In response to Plaintiffs’ broad brush collective pleading of over 600 individual investor claims, Moss Adams filed a Motion to Dismiss or, Alternatively, For a More Definite Statement. CP 53-66. That motion was heard on February 17, 2012. To avoid dismissal, Plaintiffs’ counsel repeatedly offered to provide information missing from the Complaint.

- “Well – well, Your Honor, my proposed solution would be that I’m – I’m sure that we could fashion something short of serving 6,000 interrogatories that would allow us to provide that information once we get the pleading at issue.” February

17, 2012 Hearing Transcript (copy at CP 206-243) at p. 14.

- “And, Your Honor, we would stipulate – if we can get past this pleading stage, we’ll stipulate to provide this information to counsel.” CP 227.
- “[W]e don’t have a problem providing that. We just don’t think it necessarily has to be in the complaint.” CP 228.

The court accepted Plaintiffs’ promises and stressed the need for prompt disclosure by Plaintiffs:

- “I also think that defendants are most certainly entitled to a lot more information than they’re getting from this complaint **right now**. And I really want them to get that information **now . . .**” CP 240, Tr. at p. 35 (emphasis added).
- “**I will accept the plaintiffs offer provided that it’s done within the next 30 days**, okay, to tell the defendants specifically, as to your 600 plaintiffs, who invested in which fund, when they invested, how much they invested, what audit, if any, by Moss Adams, they looked at or relied upon.” CP 240 (emphasis added).
- “I am requiring this of plaintiffs within 30 days because I’m accepting Mr. Avenatti’s offer.” CP 241.

Following this oral ruling, Plaintiffs’ counsel again assured the court:

“Your Honor, we’ll move forthwith.” CP 243 (emphasis added).

The court’s oral ruling was memorialized in a formal order that same day:

Plaintiffs are ordered to provide 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**.

CP 93-94, Order dated February 17, 2012 (emphasis added).

C. Plaintiffs Fail to Comply with the Court's February 17, 2012 Order.

Plaintiffs requested an extension from Moss Adams until March 20, 2012 to provide the court-ordered information. CP 110. But on March 20, 2012, Plaintiffs provided only very limited information about only some of the Plaintiffs. Plaintiffs' "Submission of Information Pursuant to February 17, 2012 Order," failed to identify for any of the over 600 plaintiffs "what audit they looked at or relied upon," as expressly ordered by the court. Moreover, 47 Plaintiffs were not listed on the submission whatsoever, and for approximately 122 other Plaintiffs, alleged investment dates and amounts were identified but not the Funds from which Plaintiffs allegedly purchased notes. Exhibit B to Plaintiffs' Submission acknowledged Plaintiffs' noncompliance with the court's order, stating: "[i]nvestigation is continuing, and counsel for Plaintiffs is available to meet and confer with counsel for Moss Adams." CP 725-26 (Corr Dec. at ¶¶ 8-10); *see also* CP 110; CP 261-62.¹

Immediately after Plaintiffs provided their belated and incomplete

¹ Names on the submission (which appeared to contain approximately 1330 entries including persons who were not named as Plaintiffs in the Complaint) appeared in a different order than the approximately 600 Plaintiffs in the Complaint caption. Moss Adams and its attorneys and consultants (Navigant Consulting, Inc.) were therefore forced to cross-check the submission with the complaint on virtually a line-by-line basis to determine whether all of the individuals listed in the submission were Plaintiffs and to determine whether any Plaintiffs were not listed in the document. CP 725, 750-51.

Submission, the parties met and conferred about its deficiencies. CP 110, Fogg Dec. ¶ 6. Plaintiffs' counsel acknowledged that the Submission was deficient and agreed to issue a "fact sheet" to each plaintiff to obtain the additional (required) information regarding the fund invested in and any purported reliance of Moss Adams' audit reports to cure the deficiency.

Id. Contrary to Plaintiffs' suggestion to the trial court and again now on appeal that the trial court was somehow vague when it ordered Plaintiffs to identify what, if any, Moss Adams audit report each plaintiff relied upon, the draft "fact sheet" proposed by Plaintiffs' counsel expressly asked:

- Did you see or receive copies of any Moss Adams audit of any Meridan (sic) Fund or of Meridian Partnership Management ("MPM")?
- If your answer to question 4 was "yes," what audits did you see, look at, read and/or receive (i.e. audit for what Meridian entity and date of audit)?

Id. at ¶ 7 and Ex. C (CP 129-30). It was thus clear that, as of March 22, Plaintiffs' counsel understood that the trial court's February 17 Order required Plaintiffs to specify which specific Moss Adams audit report each Plaintiff looked at or relied upon before investing. Plaintiffs' counsel, however, never sent any completed fact sheets to Moss Adams. CP 110-11.²

² Plaintiffs also failed completely to provide this information in response to discovery requests. CP 289-90, 307-324.

D. Moss Adams *Again* Sought and Obtained An Order Compelling Basic Disclosures and Obtained an Order Granting Sanctions.

Moss Adams was, therefore, forced to prepare and file a motion for sanctions (and incur further expense) in an attempt to obtain the basic information previously ordered by the trial court. In opposition and to avoid relief against them, Plaintiffs again assured the trial court “Plaintiffs have made clear to Moss Adams repeatedly over the last weeks, Plaintiffs is [sic] willing to provide Defendant more information . . . Plaintiffs are in the process of compiling additional information.” *See* CP 194, Opposition to Motion for Sanctions at 2. Plaintiffs’ counsel promised the trial court that the “fact sheets” would be provided that would, along with other information, show “the specific audit, by fund and date, of each audit each Plaintiff saw or relied upon.” *Id.*

On May 1, 2012, the trial court entered an Order Granting Defendant Moss Adams LLP’s Motion for Sanctions for Failure to Comply with Court Order of February 17, 2012. CP 268-69. That Order required Plaintiffs to produce the required information by May 31. CP 268, May 1 Order (“Plaintiffs are ordered to produce materials compliant with this Court’s Order of February 17, 2012 (“February Order”) within thirty (30) days of this order”). The May 1 Order further required: “Plaintiffs shall provide a ‘full bill of particulars’ which at a minimum

makes the disclosures required by the prior order by June 15, unless the required disclosure was made in thirty days.” CP 269.

The May 1, 2012 Order also granted Moss Adams’ request for sanctions for, at a minimum, all Moss Adams’ fees and costs for pursuing this information, if Plaintiffs’ noncompliance continued:

Failure to either comply in full with this Court’s 2/17/12 Order for the Bill of Particulars required in this order by the relevant deadlines set forth in this Order will result in an award of sanctions for, at a minimum, all Moss Adams’ fees and costs for pursuing this information.

CP 269, May 1, 2012 Order at p. 2.

E. Plaintiffs Again Failed to Comply with the Court’s Orders.

The Court’s May 1 Order Granting Sanctions ruled in no uncertain terms that the failure to provide the information twice ordered disclosed would result in monetary sanctions. That information was never provided. Instead of complying with the trial court’s Orders, as Plaintiffs’ counsel had promised, Plaintiffs filed a Motion for Voluntary Dismissal without Prejudice on May 21, clearly in the hopes that they could re-file their case in some other venue with a different judge who would issue more favorable rulings.³ CP 270-73. Notably, this is not the first time

³ Plaintiffs’ re-filed their claims in federal bankruptcy court four days after the Court granted voluntary dismissal. Plaintiffs’ complaint in federal court, like the state court Complaint found deficient by Judge Shaffer, again pled reliance in a conclusory and collective fashion and without any details regarding their investments. *See Calvert v. Berg*, No. 10-17952, Adversary Proc. No. 12-01649-KAO (United States Bankruptcy Court W.D. Wash.).

Plaintiffs' counsel has engaged in such abusive litigation tactics. In May 2009, Plaintiffs' counsel, Mr. Avenatti, appeared on behalf of an individual named Scott Blum in the U.S. Tax Court. *See* CP 505. On November 10, 2010, the Tax Court entered an order granting a motion to compel production of documents against Mr. Blum and stated that it would "be inclined to impose sanctions" if there was not full compliance with the Order. CP 512. The court further noted that "petitioners have failed to respond to respondent's information requests It is unacceptable for petitioners to object to each request stating that the request is vague, burdensome and overly broad. This Court will not tolerate grandstanding." *Id.* Mr. Avenatti filed a motion to withdraw from that case within a month of the November 10 order. CP 507.

At the same time as the Tax Court's November order, Mr. Avenatti was representing Mr. Blum in a related suit against an auditor in California state court. CP 514. On November 1, 2010, a discovery referee found that Mr. Blum had failed to comply with a prior court order to produce numerous documents, noting that he "has failed to provide specific facts supporting his legal claims, and documents evidencing those facts." CP 539. On November 23, 2010, the superior court judge adopted the referee's recommendation. CP 541. On March 25, 2011, the referee issued a report stating that he "was tentatively inclined to grant" sanctions

against Mr. Blum due to his failure to produce documents. CP 545. Two business days later, on March 29, Mr. Avenatti moved for voluntary dismissal without prejudice. CP 547-48. He thereafter re-filed the case in the federal district court in California. CP 551.

The facts just set forth are nearly identical to what Mr. Avenatti sought to do in this case, and show a pattern of bad faith litigation tactics. As a result of Plaintiffs' motion for voluntary dismissal, Moss Adams filed an Opposition and Cross-Motion for Sanctions on May 25, 2012. CP 274-287. On May 29, Plaintiffs filed a reply and supporting declaration, in which Mr. Avenatti made a false statement about a settlement offer (described further below) that was not made and was in violation of a Confidentiality Agreement he signed. CP 345-46 and 349-50.⁴ Moss Adams was therefore forced to file a Motion to Strike and For Sanctions on May 31, 2012. CP 357-63.

F. Plaintiffs Failed to Provide Any Reasonable Excuse for Their Noncompliance.

Plaintiffs did not provide any further information by May 31, 2012. On June 18, 2012, Moss Adams submitted a Supplemental Submission Regarding Plaintiffs' Continued Noncompliance with Court Orders. CP

⁴ The reply was a public filing, and Mr. Avenatti made the false representations without any prior notice to Moss Adams, and exacerbated his misconduct by failing to timely serve the reply on Moss Adams. As a result, the supposed settlement offer was disclosed to the media before Moss Adams could take steps to have the reply filed under seal or stricken from the record. CP 386-88.

465-486. On June 15, Plaintiffs responded with what purported to be a “Bill of Particulars,” but the so-called Bill of Particulars did not include any identification of what audit report any individual plaintiff looked at or relied upon. CP 728, 766-770. Instead, Plaintiffs’ so-called Bill of Particulars stated again in the same conclusory and collective fashion for all Plaintiffs: “Plaintiffs look[ed] at or relied upon Moss Adams’ audits in connection with each of their investments.” CP 769; *see also* CP 728-729. This was no different than Plaintiffs’ Complaint, which was previously deemed inadequate by the trial court.

Further, rather than provide the court-ordered information in a reasonable format, Plaintiffs’ Bill of Particulars was essentially a data and document dump, which necessitated further work by Moss Adams and its consultants at Navigant. The June 15 submission contained five exhibits (one of which was a compact disc) and contained over 16,000 pages. The June 15 Submission again contained information for numerous other investors who were not Plaintiffs and did not identify the Plaintiffs in the order they appeared in the Complaint. Moreover Plaintiffs’ counsel refused Moss Adams’ requests to provide the spreadsheets in a more workable electronic format.⁵ As a result of the size of the June 15

⁵ Notably, Plaintiffs’ Exhibits 1 and 2 to the Bill of Particulars purportedly refer to all investors who have filed bankruptcy claims, rather than limiting the disclosure to Plaintiffs, further suggesting that Plaintiffs’ counsel made no effort to follow up with

submission, its lack of any sort of order, and Plaintiffs' counsel's refusal to provide the materials in electronic format, Moss Adams was forced to have Navigant again review the various components and cross-check them with each other and the Complaint in order to determine whether all of the information required by the trial court was present. CP 728-29 and 890-95 (Corr Dec. ¶¶ 20-22 and Ex. 12).

Plaintiffs' noncompliance was willful. No reasonable excuse was ever provided. Plaintiffs instead argued to the trial court in April (and continue to argue here) that the February 17, 2012 order to identify what audit report each Plaintiff relied upon must be disregarded for isolated statements made during oral argument. *See* CP 195, Opposition to Motion for Sanctions at 3. That argument ignored the plain meaning of the trial court's written order, which controlled over any oral statements made at the hearing. *See Grundy v. Brack Family Trust*, 151 Wn. App. 557, 571 (2009) (“[W]ritten findings control where they conflict with an oral decision”). It was contrary to Plaintiffs' representations that the “fact sheets” would be provided. And it was flatly rejected by the trial court which confirmed its prior ruling in its May 1, 2012 Order: “Plaintiffs are

Plaintiffs. Further, the investors are not identified in alphabetical order, or by the order that they appeared in the Complaint, making the spreadsheets very difficult to evaluate and of limited use. Counsel for Moss Adams twice requested by email that the spreadsheets be provided in electronic form. Mr. Avenatti refused this reasonable request. *See* CP 728-29, 888-89.

ordered to produce materials fully compliant with this Court's Order of February 17, 2021," and "Plaintiff's shall provide a full Bill of Particulars which at a minimum makes the disclosures required by this court's 2/17/12 order." If the Complaint's conclusory and collective allegations were sufficient, the order to disclose "what they reviewed or relied upon" would not have been needed; nor would the court have twice confirmed and restated its order to provide this information.

Moreover, Plaintiffs' failure to provide separate statements of reliance by those Plaintiffs who can support such claim created the clear inference that Plaintiffs' counsel did not in fact confirm such information with each Plaintiff before filing suit. It strains credulity to believe that every one of the over 600 Plaintiffs reviewed or relied upon a Moss Adams audit report. And Moss Adams, as explained below, has demonstrated that this is not what occurred. CP 470-471, 717-718. Plaintiffs failed to provide any substantive responses to discovery requests, so Moss Adams has virtually no information about Plaintiffs' investment decisions. But allegations in a separate lawsuit asserted by Plaintiffs Deborah Garrett, William Serres, Kristin Jamerson and David Hyink against William Jeude, a Meridian Mortgage Investors Fund II sales agent, make clear that these individual Plaintiffs did not review or rely on any Moss Adams audit report. CP 476-84. To the contrary, they have

alleged that Jeude failed to tell them that Moss Adams had completed audits but ceased doing so before they purchased the Funds. CP 479, Garrett Complaint ¶ 20.

Similarly, Plaintiff Gordon Rockhill testified on June 19, 2012 in yet another suit that (i) he never reviewed any Moss Adams' audit report, (ii) did not know who Moss Adams is, and (iii) did not even know he had been named as a Plaintiff in the state court litigation. *See* CP 728 (Corr Dec. ¶ 20); CP 882-87, *Rockhill Dep. Tr.* at 215:10-16 and 226:14-23. Given Mr. Rockhill's testimony, there was no justification for Mr. Avenatti's filing of the Complaint that alleged that all Plaintiffs, including Mr. Rockhill, relied on a Moss Adams' audit report.

Compliant disclosures from Plaintiffs undoubtedly would have shown that there are many other investors like Garrett, Serres, Jamerson, Hyink and Rockhill that never reviewed or relied upon any Moss Adams audit report.

G. The Court's July 3 Order and the Parties' Submissions Regarding Fees Incurred.

By Order dated July 3, 2012, the Court directed Moss Adams to "file a pleading which notifies this [trial] 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 708-711, at ¶ 11. The trial court also ruled that Plaintiffs could respond to this pleading and Moss Adams could reply. *Id.* On July 16, 2012, Moss Adams submitted its Motion for Judgment Awarding Monetary Sanctions Filed in Response to Court’s July 3, 2012 Order. CP 712-22. That Motion clearly identified the submissions made by Moss Adams in an effort to obtain compliance with the trial court’s Orders and the fees incurred preparing them. CP 720. The motion was supported by the Declaration of Kelly P. Corr, which identified for each submission the persons who prepared each submission and the amount of time spent and fees billed by those persons. CP 723-33. This was set forth separately for each submission and each attorney and paralegal who worked on it. CP 730-32. The fees and costs requested were reasonable and, in fact, only a portion of what Moss Adams was entitled to under the Court’s May 1, 2012 Order Granting Sanctions. Moss Adams, for example, did not seek fees associated with its initial Motion to Dismiss, fees associated with sending out discovery requests for the information the court had ordered disclosed, or fees for the preparation of that Motion for Judgment and supporting declaration. CP 729. Tellingly, no declarations were submitted by Plaintiffs or their counsel challenging the reasonableness of the fees claimed; nor did Plaintiffs or

their counsel specifically identify any required information or documentation that was missing from Moss Adams' request.

The Motion and supporting declaration also identified the amount of time incurred by Moss Adams' litigation consultant Navigant reviewing Plaintiffs' purported submission of information pursuant to the Court order to determine what had been provided and what was missing. This work was necessitated by the lack of any discernable order to the information provided by Plaintiffs, a document dump of bankruptcy claim forms made as part of the submission, and Plaintiffs' counsel's refusal to provide its submission of information in an electronic format. CP 725, 728-29, 748-751, and 890-895.

H. Plaintiffs' Counsel's Wrongful Disclosure of Settlement Negotiations.

Plaintiffs' counsel's sanctionable conduct was not limited to its misrepresentations to the court or Moss Adams that information would be forthcoming, its failure to comply with repeated court orders, or its forum shopping voluntary dismissal. Plaintiffs' counsel also willfully violated a confidentiality agreement by disclosing (falsely) an alleged mediation settlement communication in opposition papers filed with the court.

On April 6, 2012, Plaintiffs and Moss Adams participated in

a mediation in an effort to settle their dispute. As part of that mediation, all parties, including Mr. Avenatti, signed a confidentiality agreement which provided that “[t]his mediation is to be considered settlement negotiations for the purposes of all state and federal rules protecting disclosures made during such process from later discovery and/or use in evidence.” CP 387-88 and 395-41, Fogg Dec. ¶ 5 and Ex. C at ¶ 1. Notwithstanding this fact, in the course of briefing on Plaintiffs’ motion for voluntary dismissal, Mr. Avenatti disclosed, in a publicly filed pleading, what he alleged was a settlement offer Moss Adams made during this mediation. CP 349-50, 386-388. Not only was this allegation incorrect (as Moss Adams never made such an offer) (*see* CP 387), it was in direct violation of the confidentiality agreement Mr. Avenatti had personally signed, the rules of evidence, and the rules of professional conduct. CP 387-88.

Compounding matters, Plaintiffs’ counsel did not seek to file his brief under seal; instead, he publicly filed the brief, then waited for three hours before serving the brief on Moss Adams. CP 386-87. By the time Moss Adams received the brief, local media had already picked up on the allegation concerning the alleged settlement offer. *Id.* The state court later noted that it had “**serious concerns** about

plaintiff's failure to timely serve Moss Adams" and "viewed the allegations about statements in settlement discussions as **extremely inappropriate.**" CP 711, July 3 Order at ¶ 10 (emphasis added).

IV. ARGUMENT

A. **Plaintiffs Violated the Court's February 17 and May 1 Disclosure Orders.**

The Court's February 17, 2012 Order was clear. The Order, which was handwritten by counsel and submitted jointly following the hearing on the Motion to Dismiss, specifically directed disclosure within 30 days by Plaintiffs to Moss Adams of "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." CP 93-94.

Plaintiffs did not dispute that they failed to fully comply with the February 17 Order, necessitating Moss Adams Motion for Sanctions and the trial court's May 1, 2012 Order. CP 192-200. Nor can they dispute their failure thereafter to identify for a single Plaintiff what, if any, Moss Adams audit report they looked at or relied upon.

Plaintiffs' continuing argument that the Court did not intend that Plaintiffs be required to comply with subsection (d) of its Order should not be well taken. The plain meaning of the language in the court's written orders is clear. To the extent there was any conflict

with the court's oral statements at the hearing, the written Order controlled. *See Grundy*, 151 Wn. App. at 571. And Plaintiffs' counsel obviously knew that the Order required more than just a bald, collective statement that each plaintiff relied upon a Moss Adams audit report when they prepared the draft fact sheet to be distributed to each plaintiff, inquiring as to what audit reports did each plaintiff "look at, read and/or receive," and advised the court that such fact sheets would be forthcoming to show "the specific audit, by fund and date, of each audit each Plaintiff saw or relied upon." CP 194; *see also* CP 110 and 130.

Moreover, when Moss Adams moved for sanctions in April 2012, Plaintiffs made the very same arguments that they do now, pointing to the court's oral statements at the February 17, 2012 and arguing that subsection (d) did not require them to identify which Moss Adams audit report, if any, each plaintiff relied upon. CP 193-194. Erasing any possible doubt, the trial court rejected Plaintiffs' argument, finding that Plaintiffs had failed to comply, reiterating its February 17, 2012 Order, and ruling that sanctions would be issued if Plaintiffs' failure to comply continued. CP 268-269.

Plaintiffs' counsel's continuing argument that subsection (d) of the February 17, 2012 Order did not require Plaintiffs to identify for each

plaintiff the audit report that he or she relied upon -- in the face of its own proposed fact sheets and the trial court's May 1 Order Granting Sanctions which rejected this argument -- is frivolous.

B. Plaintiffs' Counsel's Authority That Rule 41 Dismissal Is "Mandatory" and "Fixes" the Pleadings Does Not Affect the Trial Court's Discretion to Issue Sanctions.

Plaintiffs' counsel cites to multiple cases holding that dismissal under Civil Rule 41 (a)(1)(B) is "absolute" or "mandatory." *See* Appellants Br. at 10-11. Those cases, however, are not instructive here for the simple reason that the trial court in this case granted Plaintiffs' Rule 41 dismissal. There was no violation by the trial court of any rule requiring dismissal.⁶

Plaintiffs' counsel also argues that the right to voluntary dismissal "becomes fixed" as of the time the motion is filed. That is correct only with respect to the merits of a request for a voluntary dismissal. Courts hold that once a Rule 41 (a)(1)(B) motion is filed, the defendant may not prevent the voluntary dismissal by filing counterclaims or a cross-complaint that would take the facts outside of the rule. Thus, in *McKay v. McKay*, 47 Wn.2d 301 (1955) (Pl. Br. at 11-12), for example, the Court

⁶ Plaintiffs' counsel asserts, for example, that *Ashley v. Lance*, 75 Wn.2d 471 (1969) is "critical" and that a trial court "may not, as here, manipulate the process to deny a plaintiff the right to a voluntary dismissal. Pl. Br. at 14. But the trial court here did not deny Plaintiffs' request for dismissal, or sua sponte raise a new claim as the court did in *Ashley*. *Id.* at 477 ("It was not for the trial court, on its own motion, to interject an accounting action into the conspiracy action and then rely upon the accounting action in refusing to grant the voluntary nonsuit.").

found that “the right to a voluntary nonsuit is fixed at the moment that it is claimed.” *Id.* at 305. “A defendant is not thereafter entitled to claim a set-off or seek affirmative relief so as to prevent the granting of the nonsuit, nor is a party in a divorce action given the right to inject a new issue that would make it prejudicial to the defendant to grant a voluntary nonsuit to the plaintiff.” *Id.* at 305-06. Likewise, in *Krause v. Borjessan*, 55 Wn.2d 284 (1959) (Pl. Br. at 11), the Court found that plaintiff could not prevent a voluntary nonsuit by filing “an answer, setoff, and cross-complaint” after the filing of the motion for voluntary dismissal. *Id.* at 284-85; *see also Dellit v. Perry*, 60 Wn.2d 287, 290-91 (1962) (Pl. Br. at 11) (neither a request for admission nor the taking of a perpetuation deposition constituted a “request for affirmative relief” that would deprive right to voluntary dismissal under predecessor rule entitling plaintiff to voluntary nonsuit “unless the defendant has interposed a set-off or sought affirmative relief ... or set up a counterclaim”).

Similarly, where cases hold that the filing of a Rule 41 (a)(1)(B) motion renders the case a “nullity” as if it had never been brought, the courts were explaining that voluntary dismissal is “without prejudice” to the plaintiff commencing a subsequent action on the dismissed claims. These cases relied upon by Plaintiffs for the right to a voluntary dismissal without prejudice, however, have nothing to do with whether the trial

court can issue sanctions either before or after the voluntary dismissal is granted.⁷ Indeed, the very cases relied upon by Plaintiffs' counsel affirmed grants of sanctions following a voluntary dismissal filing. Thus, in *Beckman v. Wilcox*, 96 Wn. App. 355 (1999) (Pl. Br. at 11), the Court held: "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." *Id.* at 362. The Court explained that the condemnation statute at issue in that case "grant[ed] the trial court discretion to award reasonable fees and costs without regard to whether the condemnee has prevailed in the action or on any particular issue." *Id.* at 363 (citation omitted). The dismissal "without prejudice" therefore did not affect the court's fee award, which was affirmed with an award of fees on appeal. *Id.* at 369. Similarly, in *Goin v. Goin*, 8 Wn. App. 801 (1973) (Pl. Br. at 11), the trial court granted a voluntary nonsuit in a divorce action, even though plaintiff was "delinquent," in responding to a prior "order of the court as to temporary support and attorney's fees." *Id.* at 803. But this

⁷ See also *Elliot v. Peterson*, 92 Wn.2d 586 (1979) (concerning denial of nonsuit; no discussion of sanctions); *King Cnty. Council v. King Cnty. Pers. Bd.*, 43 Wn. App. 317 (1986) (concerning applicability of CR 41(a) to dismissal of a writ of review proceeding instituted by Council; no discussion of sanctions); *Ashley v. Lance*, 75 Wn.2d 471 (1969) (concerning denial of voluntary nonsuit based on court ordered accounting; no discussion of sanctions); *Paulson v. Wahl*, 10 Wn. App. 53 (1973) (voluntary dismissal allowed before summary judgment hearing; no discussion of sanctions); *Morris v. Swedish Health Servs.*, 148 Wn. App. 771 (2009) (voluntary dismissal did not affect plaintiff's statutory right to toll statute of limitations on medical malpractice claim by filing of written, good faith request for mediation under RCW 7.70.110).

Court in *Goin* affirmed the dismissal “conditioned” on payment within 15 days of the amount to be fixed by the trial court “for temporary support, attorney’s fee and costs.” *Id.* at 803-04.

Since a voluntary dismissal is “without prejudice,” courts hold that it does not constitute a “final judgment” within the meaning of RCW 4.84.330, which entitles a prevailing party in an action on a contract containing an attorney fee provision to an award of fees. *Wachovia SBA Lending v. Kraft*, 138 Wn. App. 854, 861-63 (2007); *see also In re Archer’s Estate*, 36 Wn.2d 505, 509 (1950) (fees could not be awarded under will contest statute, Rem. Rev. Stat. § 1389, that required “a trial” as a condition for award of fees). Such dismissal without prejudice, however, does not affect the court’s authority to issue sanctions under statutes or other authority that do not require a “court order having preclusive effect,” or other “formal decision or determination leaving nothing further to be determined by the Court.” *Wachovia SBA Lending* at 861-62 (quotations omitted). Indeed, Plaintiffs’ counsel concedes that the trial court may retain jurisdiction after a voluntary dismissal to impose sanctions under CR 11 or statute. Pl. Br. at 13 (citing *Escude v. King Cnty. Hosp. Dist. No. 2*, 117 Wn. App. 183, 192-93 (2003)).⁸

⁸ *See also, e.g., Hawk v. Branjes*, 97 Wn. App. 776, 783 (1999) (court retains jurisdiction to consider defendants’ motion for fees following CR 41(a)(1) dismissal because “award of attorneys’ fees pursuant to a statutory provision or contractual agreement is collateral

In short, none of the cases cited in Appellants Brief preclude a court faced with a Rule 41 (a)(1)(B) motion from granting sanctions under CR 37, CR 12(e), CR 11 or the court's inherent powers. Rather, the law is clear that the trial court retains the authority to issue sanctions where appropriate, notwithstanding Plaintiffs' efforts to ignore the court orders and flee the forum in hopes of finding more favorable rulings elsewhere.

Moreover, Plaintiffs' counsel's argument that the parties' rights become fixed by the filing of a voluntary dismissal motion ignores that the May 1, 2012 Order Granting Sanctions was issued before Plaintiffs' May 21, 2012 voluntary dismissal motion. Thus, Moss Adams' right to sanctions "for, at a minimum, all Moss Adams' fees and costs for pursuing this information" if Plaintiffs failed to disclose the court ordered information, arose and under Plaintiffs' counsel's theory was "fixed" before Plaintiffs' requested voluntary dismissal. Plaintiffs' counsel could not use a Rule 41 motion like a "get out of jail free card" to escape the

to the underlying proceeding"); *Barnett v. Simmons*, 197 P.3d 12, 13 (Okla. 2008) ("trial court retains jurisdiction to impose sanctions [under CR 37 counterpart] for plaintiffs' violation of court orders entered before plaintiff has voluntarily dismissed the case"); *Jacobson v. Jonathan Paul Eyewear*, 2012 Ohio App. LEXIS 2656, at *10-11 (Ohio June 29, 2012) (following voluntary dismissal, "court had jurisdiction to consider the collateral issue of sanctions under Civ. R.37"); *Ayers v. Patz*, 2002 N.C. App. LEXIS 2093, at *4 (N.C. App. Aug. 20, 2002) ("voluntary dismissal notwithstanding, the trial court retained jurisdiction to rule on the issue of sanctions"); *Brown v. Curtis*, 71 P.3d 34, 40 (Okla. Ct. App. 2003) ("trial court jurisdiction to impose discovery sanctions, like the jurisdiction to impose sanctions under [Rule 11 counterpart], survives a voluntary dismissal"); *Emerson v. The Eighth Judicial Dist. Court of the State of Nevada*, 263 P.3d 224, 226 (Nev. 2011) ("district court retains jurisdiction after a case is dismissed to consider sanctions for attorney misconduct that occurred prior to the dismissal").

consequences of its prior misconduct and pre-existing May 1, 2012 Order Granting Sanctions.

C. The Trial Court Had Authority to Issue Sanctions Under CR 37, CR 12(e), CR 11 and/or Its Inherent Powers.

The trial court's sanctions award was a proper exercise of the court's authority under CR 37, CR 12(e), CR 11 and/or the trial court's inherent powers. While "the imposition of sanctions upon attorneys is a difficult and disagreeable task," the Supreme Court of Washington has made clear that "it is a necessary one if our system is to remain accessible and responsible." *Fisons*, 122 Wn.2d at 355.⁹

1. Sanctions Were Proper Under Civil Rules 37(b) or 12(e).

Civil Rule 37 authorizes sanctions for failure to comply with a court order to provide or permit discovery. *See* CR 37(b) (2) ("If a party fails to obey an order to provide or permit discovery ... the court in which the action is pending may make such orders in regard to the failure as are just."). Moss Adams moved for sanctions on this ground in April of 2012, when Plaintiffs failed to provide complete responses to the court's

⁹ Plaintiffs' counsel misses the point when they argue that imposition of sanctions will become a "cottage industry" for lawyers. The Court in *Fisons* did not discourage courts from issuing sanctions where appropriate. Rather, it "encouraged trial courts to consider requiring that monetary sanctions awards be paid to a particular court fund or to court-related funds," to "avoid the appeal of sanctions motions as a profession or profitable specialty of law." While a rule requiring payment of sanctions to court-related funds may avoid appeals taken where the court denies a grant of sanctions, it has no applicability here where sanctions were granted and the appeal has been taken by the offending counsel.

February 17, 2012 Order. Based on Plaintiffs' assurances, the court granted Plaintiffs additional time to make required disclosures, but it also granted Moss Adams Motion for Sanctions at that time. *See* May 1, 2012 Order; *see also* Order dated July 3, 2012. The May 1, 2012 Order Granting Sanctions ordered that failure comply "will result in an award of sanctions for, at a minimum, all Moss Adams' fees and costs for pursuing this information." CP 269.

Plaintiffs' counsel now argues that sanctions could not be issued under Rule 37 because, according to Plaintiffs, the February 17, 2012 and May 1, 2012 Orders do not relate to "discovery." Br. at 20-21. Tellingly, Plaintiffs' counsel provides no authority for this argument. And it should not be well taken. The trial court ordered disclosure of basic facts underlying Plaintiffs' allegations, precisely the type of information contemplated by the discovery process. Moreover, the court ordered that information, at Plaintiffs' behest, to streamline the discovery process. Plaintiffs' counsel volunteered at the February 17 hearing: "I'm sure that we could fashion something short of serving 6,000 interrogatories that would allow us to provide that information once we get the pleading at issue." CP 219, Feb. 17, 2012 Tr. at p. 14; *see also* CP 228 ("we don't – we don't have a problem providing that. We just don't think it necessarily has to be in the complaint.").

Plaintiffs' argument that "the discovery process never started" (Br. at 23) similarly ignores: (i) Mr. Avenatti's statements to the trial court at the February 17, 2012 hearing; (ii) the February 17, 2012 Order; (iii) the meet and confer that occurred following Plaintiffs' initial failure to comply with the February; (iv) Mr. Avenatti's representation to Moss Adams and the Court that "fact sheets" would be produced for each plaintiffs; and (v) discovery requests and responses that were served prior to the date that Plaintiffs moved for voluntary dismissal.

Moreover, even assuming for the sake of argument that CR 37(b) did not apply (and it did), the court would then have had authority to issue its sanctions order under CR 12(e). The February 17, 2012 Order requiring mandating disclosures from Plaintiffs was issued following Moss Adams' motion under CR 12(e) for a more definite statement. In that Motion, Moss Adams pointed out the defects in Plaintiffs' Complaint, including that the Complaint failed to specifically identify the information that the court ordered to be disclosed. CR 12(e) provides for a more definite statement where the complaint 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." The Civil Rule also expressly authorizes the Court to make any order "as it deems just" for failure to comply: "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.” *See* CR 12(e). Plaintiffs appear to be arguing that the February 17 and May 1 Orders were made under CR 12(e) and that Rule 37(b) does not apply. The sanctions may be affirmed under CR 12(e) if that were the case.

Plaintiffs’ counsel’s suggestion that the court did not articulate the basis for its sanctions order (Pl. Br. at 20) turns a blind eye to the court’s statements in the Judgment 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 . . .,” and to the court’s prior May 1 Order Granting Sanctions that expressly stated that the monetary sanctions ultimately imposed would be required if Plaintiffs failure to comply with the February 17, 2012 Order continued.¹⁰ Faced with Plaintiffs repeated and continuing failure to comply with the February 17 and May 1 Orders, the court was authorized

¹⁰ The July 3 Order likewise addressed Plaintiffs failure to comply with the prior court orders and Plaintiffs’ misrepresentations that ordered information would be forthcoming, as well as other conduct raising “serious concerns” and found to be “extremely inappropriate.” In its July 25 Order, the trial court also referred back to the May 1 Order, and held that Plaintiffs failed to comply with both the February 17 and May 1 Orders. It then expressly found that the amount fees Moss Adams incurred in attempting to obtain this information was reasonable.

by either CR 37 or CR 12(e) to levy sanctions.¹¹

2. The Sanctions Also May Be Affirmed Under CR 11.

The sanctions award also may be affirmed under CR 11. As explained by the Court in *Miller*, 51 Wn. App. 285 (Pl. Br. at 21), when it affirmed a Rule 11 sanctions award: “the trial court must be accorded wide discretion: ‘[The trial court] has tasted the flavor of the litigation and is in the best position to make these kinds of determinations.’” *Id.* at 300 (quotation omitted).

a. *Plaintiffs’ Counsel Should Be Sanctioned Under CR 11 for Using CR 41 for Improper Purposes.*

CR 11(a) provides that the signature of a party or of an attorney constitutes a certificate that, to the best of the party’s or attorney’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, the pleading *is not interposed for any improper purpose*, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. Further, the rule provides that if such violation exists, the court may impose sanctions upon the party or attorney “which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal

¹¹ *National Hockey League v. Metro. Hockey Club*, 427 U.S. 639, 643 (1976) (in the absence of vigorously applied and severe sanctions under Rule 37, “other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts”).

memorandum, including a reasonable attorney fee.” See CR 11(a).

It is improper for a party to use CR 41 as a vehicle for judge shopping after receiving unfavorable orders. See *Vaqueria Tres Monjitas, Inc. v.*

Rivera Cubano, 230 F.R.D. 278, 279 (D.P.R. 2005) (analogizing Rule 41 to a request for recusal for the purposes of judge shopping). The court in

Vaqueria explained:

Rule 41 cannot serve the purposes for which the attorneys in this case used it. Simply put, to ignore the probability that the attorneys’ actions in voluntarily withdrawing the case and instantly refile were directed at obtaining a different judge, after the judge decided a major point against them, would be to blink reality Courts cannot afford to spawn a public perception that lawyers and litigants will benefit by undertaking such machinations.

Id. at 279 (citing *In re United Shoe Mach. Corp.*, 276 F.2d 77, 79 (1st Cir. 1960) (“We cannot permit a litigant to test the mind of the trial judge like a boy testing the temperature of the water in the pool with his toe, and if found to his liking, decide to take a plunge.”); *Reilly v. United States*, 863 F.2d 149, 160 (1st Cir. 1988) (expressing that “when a trial judge announces a proposed course of action which litigants believe to be erroneous, the parties detrimentally affected must act expeditiously to call the error to the judge’s attention or to cure the defect, not lurk in the bushes waiting to ask for another trial when their litigatory milk curdles”). Thus, the court held, “although no . . . rule expressly states that attorneys may not use Rule 41 as a

vehicle for judge-shopping, any active litigating attorney would know that judge-shopping is not acceptable and thus sanctionable.” *Id.* at 280 (citations omitted).

Here, the only explanation for Plaintiffs’ actions is as obvious as it is sanctionable. Plaintiffs disliked the court’s rulings requiring them to provide basic information about their case so they promised compliance, delayed responses, and sought their own discovery along the way. When there was no other option than to comply or be held in contempt, they sought to dismiss the case to avoid that result.

b. Plaintiffs’ Counsel Should Be Sanctioned Under CR 11 for the Filing of the Complaint and Their Opposition to Moss Adams’ Motion for Sanctions.

CR 11 (a) also provides that the signature of a party or of an attorney constitutes a certificate that, to the best of the party’s or attorney’s knowledge, information, and belief, *formed after an inquiry reasonable under the circumstances*, the pleading is *well grounded in fact*. Both Plaintiffs’ Complaint and their Motion in Opposition to Moss Adams’ Motion for Sanctions failed this standard. Plaintiffs brought suit on behalf of more than 600 investors in the Meridian Funds. At the time of filing, Plaintiffs had access to the Moss Adams documents produced in the bankruptcy discovery (the bankruptcy trustee Mark Calvert is among the listed plaintiffs). These documents clearly showed that Moss Adams audited

only a small subset of the Meridian Funds and only in a small number of years. Plaintiffs could have conducted basic initial inquiries from their own clients to determine which investors purchased notes from funds audited by Moss Adams and which investors actually looked at Moss Adams audit reports in making their investment decisions. These facts are the critical basis of Plaintiffs' negligent misrepresentation and fraud claims. However, Plaintiffs made no such reasonable inquiries, choosing instead to file a vague and overreaching complaint and to then lead the court and Moss Adams on a five-month goose chase to obtain this basic information. And while this information remains to be provided, it is already clear that Plaintiffs' reliance allegations were false as to Plaintiffs Rockhill, Garrett and others. This fails the requirement of reasonable inquiry imposed by CR 11.

Plaintiffs' assertions in their Opposition to Moss Adams' Motion to Compel also violate the rule. In an effort to avoid sanctions, Plaintiffs' counsel told this Court (and Moss Adams) that they would produce the "fact sheets" from every Plaintiff. Plaintiffs' counsel further expressly promised that those fact sheets would include: "the specific audit, by fund and date, of each audit each Plaintiff saw or relied upon." CP 194. This promise, made to delay or deter action by the court, was hollow. Plaintiffs never produced any fact sheets and instead sought to avoid making good on their representations by simply ducking out of the litigation. Their statements in their Opposition,

therefore, could not have been “well grounded in fact.” These actions further justify the imposition of sanctions against them.

3. The Sanctions Can Be Justified By the Court’s Inherent Power.

Finally, the sanctions award is supported by the trial court’s inherent power. “Every court of justice has power ... [t]o enforce order in the proceedings before it, ... [and] [t]o provide for the orderly conduct of proceedings before it” *State v. S.H.*, 102 Wn. App. 468, 473 (2000) (quoting RCW 2.28.010(2)-(3)).

Plaintiffs’ own authority supports sanctions under that power here. The Court in *Greenbank Beach & Boat Club, Inc. v. Bunney*, 168 Wn. App. 517 (2012), recognized that a court may resort to its inherent powers “to protect the judicial branch in the performance of its constitutional duties, when reasonably necessary for the efficient administration of justice.” *Id.* at 525. “Vexatious conduct during the course of litigation,” also “known as procedural bad faith,” will support such sanctions award. *Id.*¹²

Likewise, in *State v. S.H.*, 102 Wn. App. 468 (2000), the Court recognized that procedural bad faith will support the award of attorney’s fees, especially where, as here, it affects the “integrity of the court”:

¹² Ultimately the Court in *Greenbank* did not uphold a fee award because the Respondents “did not disobey the court or thwart its authority.” *Id.* at 528. Here Plaintiffs’ counsel’s disobeying of the court and thwarting its authority could not be more clear.

[W]e hold that a trial court's inherent authority to sanction litigation conduct is properly invoked upon a finding of bad faith. A party may demonstrate bad faith by, inter alia, delaying or disrupting litigation. The court's inherent power to sanction is governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve orderly and expeditious disposition of cases. Sanctions may be appropriate if an act affects the integrity of the court, and, [if] left unchecked, would encourage future abuses.

Id. at 475 (indent quotation marks and citations omitted). The Court reiterated that “a finding of ‘inappropriate and improper’ is tantamount to a finding of bad faith.” *Id.*

Here, it cannot reasonably be disputed that Plaintiffs’ counsel acted inappropriately and improperly,” “disobeyed” the court’s authority, and/or engaged in “vexatious” conduct. To repeat:

- Plaintiffs’ counsel filed a Complaint containing false allegations and missing basic information about each Plaintiff.
- To avoid dismissal of that Complaint, Plaintiffs’ counsel represented that the missing investor information would be provided.
- Plaintiffs’ counsel failed to comply with the court’s February 17, 2012 Order requiring disclosure of that information within 30 days.
- To forestall a motion to compel and for sanctions, Plaintiffs’ counsel again represented that the information would be forthcoming including in “fact sheets” allegedly being sent to each plaintiff.
- To avoid further adverse orders and sanctions, Plaintiffs again assured the Court that the required information would be disclosed, including in “fact sheets.”
- Plaintiffs were again ordered on May 1, 2012, to disclose the

investor information or face sanctions, and Plaintiffs again failed to obey the court's February 17 and May 1 Orders.

- Plaintiffs sought voluntary dismissal to avoid the Court's prior disclosure and sanctions orders.
- In support of its request for voluntary dismissal, Plaintiffs' counsel publicly filed a submission containing an alleged (false) settlement offer in violation of its confidentiality agreement and failed to timely serve Moss Adams thereby precluding it from taking action to have the confidential information timely stricken from the record or filed under seal.
- Plaintiffs' counsel re-filed the very same claims in federal court with the very same pleading defects.

The trial court's Orders also reflect such findings. In response to Moss Adams' Motion to Strike, For Sanctions, and For Revocation of Pro Hac Vice Status, the court found that it had "serious concerns" and "real concerns" about the behavior of Plaintiffs' counsel, which it "view[ed]" "at a minimum" to be "**extremely inappropriate.**" See July 3, 2012 Order at pp. 3-4 (emphasis added). That Order noted, among other things, Plaintiffs' counsel's repeated representations made to the court and Moss Adams that the court ordered information would be provided. *Id.* at ¶¶ 5, 6, and 7. Likewise the Judgment of the trial court expressly found that "Plaintiffs failed to comply with its February 17, 2012 and May 1, 2012 Orders." It granted the sanctions that the court had "expressly stated" in its May 1, 2012 that it would impose "at a minimum." *Id.* (emphasis in original).

In short, Plaintiffs' argument that the trial court lacked authority to issue sanctions ignores the law. And Plaintiffs' argument that it did not engage in "inappropriate" conduct or willfully violate court orders sufficient to warrant sanctions under the court's inherent powers ignores the facts and express trial court finding that counsel's conduct was "extremely inappropriate" and that Plaintiffs repeatedly violated court orders.

D. The Fee Award Was Properly Supported and Within the Trial Court's Discretion.

The standard of review of an award of attorney fees is abuse of discretion. *Greenbank*, 168 Wn. App. at 524. The trial court's award of fees and costs to Moss Adams in the amount of \$74,086.50 was supported by the Declaration of Kelly P. Corr (CP 723-895) and a proper exercise of the trial court's discretion.

Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581 (1983), is instructive regarding the documentation needed to support a fee award. The Court in *Bowers* explained that "attorneys must provide reasonable documentation of the work performed." *Id.* at 597. "This documentation need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of the work performed, and the category of attorney who performed the work." *Id.*

Plaintiffs rely on *Bowers* and other cases repeating its holding, but fail to explain how Moss Adams did not meet *Bowers*' requirements. The Corr Declaration set forth the names and categories of attorneys and paralegals that performed work for the fees requested, as well as their rates. *See* Corr Decl. at ¶¶ 2-3. It set forth the work for which Moss Adams sought to recover fees, *id.* at ¶ 5, and explained precisely why Moss Adams had to incur those fees, *id.* at ¶¶ 6-24. Finally, it broke down the hours and work performed by each attorney in connection with each motion for which Moss Adams sought to recover its fees. *Id.* at ¶¶ 26-32. In short, the Corr Declaration met each of the elements set forth in *Bowers*. Tellingly, Plaintiffs' local counsel, the Luvera Law Firm, filed an amended joinder in which it expressly declined to join the portion of Eagan Avenatti's brief challenging the calculation of the fee award. *See* Luvera Law Firm Revised Joinder In Appellants Calvert, Edwards and Eagan Avenatti LLP's Brief at p. 1.¹³

Plaintiffs' out-of-state counsel appears to argue that it was not enough that Moss Adams provided all of the information required by *Bowers*. Rather, they now claim that Moss Adams also had to submit

¹³ Moss Adams was also conservative in the fees it requested. For example, Moss Adams did not seek fees incurred (i) in briefing the initial motion to dismiss, (ii) in preparing and serving formal discovery requests seeking the information, or (iii) briefing on its July 16, 2012 motion for sanctions.

“contemporaneous time records.” Br. at p. 25. This argument was never made to the trial court and, therefore, cannot be raised on appeal. Further, this argument ignores the Corr Declaration, which was effectively a contemporaneous record documenting the hours worked.

Plaintiffs’ out-of-state counsel also argues that the fee request submitted by Moss Adams was based on improper “block billing.”¹⁴ This too ignores the Corr Declaration, which set forth separately for each person the time spent and fees incurred in connection with each submission by Moss Adams. These records provided sufficient information under *Bowers* to allow Plaintiffs and the court to evaluate the request. Notably, Plaintiffs’ counsel failed in the court below to submit any declaration challenging the reasonableness of any attorney’s fees and failed to identify any specific information or documentation that was missing. They cannot now manufacture such issues for the first time on appeal.

Unable to effectively challenge the Corr Declaration, Plaintiffs argue further that the court erred by failing to enter any findings to support the sanctions award. This ignores the record previously described in

¹⁴ The information provided in the Corr Declaration was not so-called “block billing,” which consists of “lumping multiple tasks into a single entry of time.” *Staggs v. Astrue*, 2011 U.S. Dist. LEXIS 58723, *18 (W.D. Wash. Apr. 28, 2011). The Corr Declaration identified the hours and dollars spent by each attorney in connection with each motion that was filed in the case to obtain the disclosures which the trial court had ordered.

detail, including the May 1 Order granting sanctions if Plaintiffs failed to comply with the February 17 and May 1 Orders and the Judgment “find[ing] that Plaintiffs’ failed to comply with [those orders].” *See supra* p. 35. And it ignores the Judgment “find[ing] that the fees and costs incurred by Moss Adams in attempting to obtain the ordered information were reasonable.” In short, the trial court identified the grounds for the sanctions and found that the fees Moss Adams sought were reasonable. Appellants’ Brief is revisionist history.

Finally, Plaintiffs’ arguments made to whittle down the amount of sanctions awarded lack merit. First, Plaintiffs assert that Moss Adams is not entitled to fees and costs incurred trying to obtain information that Plaintiffs eventually provided. This argument makes no sense since Moss Adams was forced by Plaintiffs’ noncompliance to incur such fees. Much of the information provided came at the end of the day when they provided their deficient Bill of Particulars, and prior to Moss Adams’ submissions, Plaintiffs’ counsel had made clear that it would not be providing the court ordered information because it was dismissing the Complaint. This argument also ignores the court’s May 1, 2012 Order Granting Sanctions, which warned that Plaintiffs failure to comply would result in sanctions, at a minimum, for the fees and costs Moss Adams incurred seeking to obtain the Court Ordered information. It ignores the

effort and expense Moss Adams incurred to obtain the incomplete disclosures provided by Plaintiffs. And it ignores that the fees incurred in connection with obtaining information Plaintiffs eventually provided are inextricably intertwined with the fees incurred in connection with obtaining information Plaintiffs failed to provide.¹⁵

Second, Plaintiffs argue that Moss Adams cannot recover the Navigant costs incurred to analyze the information Plaintiffs provided. This argument completely ignores that Plaintiffs' submissions were a hodgepodge of names and materials (over 16,000 pages in all) that required a line by line review of the information provided (or not provided) for each of the over 600 individual Plaintiffs. This process was complicated because of Plaintiffs' own refusal to provide the materials in a readily reviewable electronic format. The Navigant invoices clearly demonstrate that the fees they charged were for services in determining whether and to what extent Plaintiffs had complied with the trial court's orders, a necessary step to pursuing Plaintiffs' full compliance with the February 17 and May 1 Orders. For example, Navigant's March 2012 work focused on "trying to compare and validate information from [the March Submission] with information from other sources and attempting to cross-walk the 'investor' names with the plaintiff names." Like a plaintiff

¹⁵ *Simpson v. Thorlund*, 151 Wn. App. 276, 289 (2009) (where facts underlying multiple claims are intertwined, fees incurred need not be segregated).

who is obligated to conduct reasonable inquiry before filing suit, Moss Adams and its consultants had to take reasonable steps to evaluate Plaintiffs' lack of compliance with the court's order before Moss Adams could file a motion asserting noncompliance and seeking to obtain further disclosure of the court ordered information. That expense could have been avoided if Plaintiffs provided the ordered disclosures.¹⁶

Third, Plaintiffs fail to cite any authority that Moss Adams cannot recover fees or costs incurred after their filing of the CR 41 motion. Moss Adams had sought and obtained the affirmative relief embodied in the court's prior May 1, 2012 Order Granting Sanctions before Plaintiffs moved for voluntary dismissal. Moss Adams' response to that motion, in which it sought the court ordered disclosure and sanctions, was necessitated by Plaintiffs' motion in the face of it continuing non-compliance. Moreover, even if the court had immediately granted the CR 41 motion,¹⁷ it would have retained the power to award sanctions, and there would have been briefing on the same. *See Beckman*, 96 Wn. App.

¹⁶ The need to examine Plaintiffs' submission in detail was made even more necessary by Plaintiffs' counsel's repeated prior false statements to the court and Moss Adams that they would provide the information ordered disclosed. Moss Adams could not simply take Plaintiffs' representations that their document dump contained all required information at face value.

¹⁷ Plaintiffs were not immediately entitled to a voluntary dismissal without prejudice. Moss Adams opposed the motion for voluntary dismissal and made strong (although ultimately unsuccessful) arguments that Plaintiffs' should be required to comply with the disclosure orders or have their claims dismissed with prejudice.

at 362 (“the trial court may award fees even after voluntary dismissal”). In that regard, the trial court requested that the parties submit briefing on Plaintiffs’ noncompliance and appropriate sanctions. CP 711. If the trial court had issued sanctions or had further mandated disclosure prior to dismissal without further briefing, Plaintiffs would have claimed a violation of due process. Plaintiffs’ counsel should not be heard to complain about the costs flowing from their repeated noncompliance with the courts’ orders, having been warned in advance that continued failure would result in the sanctions that were imposed.

The standard of review of an award of attorney fees is abuse of discretion. *Greenbank*, 168 Wn. App. at 524. “Sanctions need to be severe enough to deter . . . attorneys and others from participating in this kind of conduct in the future.” *Fisons*, 122 Wn.2d at 357. Here, Plaintiffs and their counsel were provided multiple opportunities to comply with the court’s orders and were even given advance notice of the fees and costs that would be awarded if they failed to comply. Further, this is not the first time that Plaintiffs’ counsel has filed a voluntary dismissal motion to avoid unfavorable court rulings, and his conduct in the trial court demonstrated a pattern of abusive litigation practices. The remedy afforded by the trial court was not a harsh sanction of claim or issue preclusion, or even an award to Moss Adams of its total fees and costs

incurred defending Plaintiffs' Compliant prior to dismissal.¹⁸ It was well within the court's discretion and consistent with the practice under the Civil Rules to award fees and costs incurred by a party that brings a successful discovery motion.

V. CONCLUSION

For the reasons stated above, the trial court's Judgment should be affirmed in its entirety.

RESPECTFULLY SUBMITTED this 4th day of December, 2012.

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP



Kelly P. Corr, WSBA No. 00555
Steven W. Fogg, WSBA No. 23528
Paul R. Raskin, WSBA No. 24990
Jeff Bone, WSBA No. 43965
1001 Fourth Avenue, Suite 3900
Seattle, WA 98154-1051
(206) 625-8600

Attorneys for Respondent Moss Adams LLP

¹⁸ Plaintiffs concede that courts do not need to apply the three-part test articulated in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, (1997) when imposing monetary sanctions. Br. at 24-25 n. 16. See *Blair v. TA-Seattle East No. 176*, 171 Wn.2d 342 (2011) ("trial courts do not have to utilize *Burnet* when imposing *lesser* sanctions, such as monetary sanctions, but must consider its factors before imposing a harsh sanction such as witness exclusion").

CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

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

2. On this 4th day of December, 2012, I caused the document to which this certificate is attached, BRIEF OF RESPONDENT MOSS ADAMS LLP, to be filed with the Clerk of the Washington State Court of Appeals, Division I, and served upon counsel of record 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 Appellants
Via Email and Hand Delivery

Philip A. Talmadge
TALMADGE/FITZPATRICK
18010 Southcenter Parkway
Tukwila, WA 98188
Attorneys for Appellants
Via Email and Hand Delivery

Michael J. Avenatti
EAGAN AVENATTI, LLP
450 Newport Center Dr.
Second Floor
Newport Beach, CA 92660
Attorneys for Appellants
Via Email and First Class Mail

Frederick Darren Berg
No. 179850-0896CFI
Federal Correctional Institution
3600 Guard Road
Lompoc, CA 93436-2705
Respondent
Via 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 4th day of December, 2012 at Seattle,
Washington.


Donna Patterson