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No. 36165-5-II

Court of Appeals
DIVISION II
STATE OF WASHINGTON

WHITE CORAL CORPORATION, a British Virgin Islands Corporation,

APPELLANT,

v.

GEYSER GIANT CLAM FARMS LLC, a Washington Limited Liability Company; **SEATTLE SHELLFISH LLC**, a Washington Limited Liability Company; **JAMES L. GIBBONS**, individually and the marital community comprised thereof; and **TED L. EDWARDS, JR.**, individually and the marital community comprised thereof,

RESPONDENTS.

**SEATTLE SHELLFISH, LLC'S AND JAMES L. GIBBONS'
RESPONSE BRIEF**

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	COUNTERSTATEMENT OF THE ISSUES.....	1
III.	COUNTER STATEMENT OF THE FACTS.....	2
	A. Parties.....	2
	B. The LLC Agreement.....	3
	C. Taylor Seed Production Agreement.....	4
	D. White Coral Defaults	4
	E. Effect of Default	6
	F. Decision to Wind Up Geysler	7
	G. Winding Up of Geysler	10
	H. White Coral Demands Cash.....	11
	I. Cancellation	13
	J. Contact From White Coral’s Attorney.....	13
	K. Complaint.....	15
	L. Motions for Summary Judgment and To Change Venue.....	16
	M. Demand for Posting of Security; Motion for an Order Increasing Security.....	17
	N. Trial Court’s Dismissal of White Coral’s Claim Based on Its Failure to Post Any Security	18
IV.	STANDARD OF REVIEW	18
V.	ANALYSIS.....	20
	A. Because White Coral did not post even the minimum security which RCW 4.84.210 required, the trial court had the discretion to dismiss White Coral’s claims without prejudice.....	20
	B. The trial court acted within its discretion in increasing the amount of security which White Coral would be required to post to \$125,000.00.....	21
	1. RCW 4.84.210 specifically requires out-of-state corporations to post security for both “costs” and “charges.”	22

2.	The trial court reasonably determined that Seattle Shellfish was potentially entitled to recover substantial “costs and charges” under a number of different theories.	24
a.	Costs on motion to change venue	24
b.	"Charge" to White Coral under LLC Agreement.....	25
c.	White Coral's Complaint was frivolous.....	27
d.	White Coral has not shown prejudice	29
e.	The trial court acted within its discretion in increasing the security which White Coral had to post.....	31
C.	Seattle Shellfish was entitled to have the claims White Coral had asserted against it dismissed pursuant to the fully briefed Summary Judgment Motion that had been submitted to the trial court.	31
VI.	CONCLUSION.....	34

TABLE OF AUTHORITIES

Cases

<i>Carlson Bros. & Co. v. Van de Vanter</i> , 19 Wash. 32, 52 P. 323 (1898) ..	21
<i>Dicks v. ICT Group, Inc.</i> , 160 Wn.2d 826, 833, 161 P.3d 1016 (2007) ...	19
<i>Judd v. American Telephone & Telegraph Co.</i> , 152 Wn.2d 195, 202-03, 95 P.3d 337 (2004).....	23
<i>Morris v. Warwick</i> , 48 Wash. 426, 93 P. 905 (1908)	21
<i>Plein v. Lackey</i> , 149 Wn.2d 214, 222, 67 P.3d 1061 (2003)	32
<i>Seaborn Pile Driving Co., Inc. v. Glew</i> , 132 Wn.App. 261, 267-68, 131 P.3d 910 (2006).....	23
<i>State v. Breazeale</i> , 144 Wn.2d 829, 838, 31 P.3d 1155 (2001).....	22

Statutes

RCW 4.12.090(1).....	16
RCW 4.84.185	27, 29
RCW 4.84.210	1, 17, 18, 19, 20, 21, 22, 31, 33
RCW 4.84.230	20, 31
RCW 25.15.040(1)(b)	25
RCW 25.15.235(1), (2)	26

I. INTRODUCTION

Seattle Shellfish, LLC and James L. Gibbons (hereinafter, collectively “Seattle Shellfish”) submit this response brief.

The Court of Appeals should affirm the trial court’s discretionary decision to dismiss White Coral’s claims without prejudice because White Coral did not post the security specifically required by RCW 4.84.210. In addition, the trial court did not abuse its discretion in increasing the amount of the security which White Coral had to post to \$125,000.00.

In the alternative, the Court of Appeals should affirm the trial court’s dismissal of White Coral’s claims based on the Summary Judgment Motion that was fully briefed to the trial court.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the trial court abuse its discretion by dismissing White Coral's claims, without prejudice, after White Coral failed to post any security to ensure the payment of costs and charges awarded against it, as RCW 4.84.210 specifically requires?

2. Did the trial court abuse its discretion by increasing the amount of the security which White Coral had to post to \$125,000, given the multiple

bases on which Seattle Shellfish, LLC demonstrated that it might be entitled to an award of “costs and charges?”

3. In the alternative, based on the fully-briefed Summary Judgment Motion pending before the trial court, should the trial court’s order of dismissal be affirmed on the grounds that White Coral had failed to support any of the claims pled in its complaint with competent evidence?

III. COUNTER STATEMENT OF THE FACTS

A. Parties

This case involves claims arising out of the parties’ formation of and participation in a limited liability company, Geysers Giant Clam Farms LLC (hereinafter “Geysers”). CP 90 (Gibbons Declaration, ¶ 2).

White Coral, the appellant, is a corporation that was formed in the British Virgin Islands by Elmer Yuen, who is a resident of Hong Kong. CP 91 (Gibbons Declaration, ¶ 8). Seattle Shellfish is a Washington limited liability company. James L. Gibbons and Ted L. Edwards, Sr. are two of its principals. CP 92 (Gibbons Declaration, ¶¶ 10, 14).

B. The LLC Agreement

White Coral and Seattle Shellfish formed Geysler as a Washington limited liability company on July 8, 1998. CP 94, 108-09 (Gibbons Declaration, ¶ 23 and Exhibit A). The LLC was operated pursuant to a written LLC Agreement. CP 94, 110-173 (Gibbons Declaration, ¶¶ 24 & 25 and Exhibits B & C).

Geysler was formed to “engage in the business of raising, planting, cultivating, marketing and selling of geoduck clams and other shellfish”. CP 94, 116 (Gibbons Declaration, ¶ 26 and Exhibit B (LLC Agreement, ¶¶ 2-6(a))). The business and affairs of the company were to be conducted by a board of managers, consisting of four persons, two of whom were to be designated by White Coral and two of whom were to be designated by Seattle Shellfish. CP 94-95, 117-18 (Gibbons Declaration, ¶ 27 and Exhibit B (LLC Agreement, ¶ 4.1)).

White Coral and Seattle Shellfish each agreed to make capital contributions to Geysler. White Coral agreed to contribute \$3,000,000.00 cash, in specified installments, for which it was to receive a 65% interest in Geysler. CP 95, 129-30 (Gibbons Declaration, ¶ 28 and Exhibit B (LLC

Agreement, ¶ 6.1)). Seattle Shellfish agreed to contribute its existing geoduck clam production and distribution operations, all geoduck clam seeds planted by Seattle Shellfish that existed as of the date of the Agreement, and all of its leasehold rights with respect to the tidelands used by Seattle Shellfish for geoduck clam planting and cultivation, for which Seattle Shellfish was to receive a 35% interest. Id.

C. Taylor Seed Production Agreement

In January, 1999, Geysler entered into a seed production agreement with Taylor Shellfish Farms. CP 451-52, 454-56 (Carlson Declaration, ¶ 14-16 and Exhibit A). The agreement called for Geysler to pay Taylor \$400,000.00 in installments, which Taylor was to use to help pay for the cost of expanding geoduck seed production at Taylor's facility. Id. In exchange, Taylor agreed to provide Geysler with 50% of the geoduck seed produced by the facility at cost. Id. Taylor agreed to provide the seed to Geysler for free until \$400,000.00 of seed had been delivered. Id.

D. White Coral Defaults

Shortly after Geysler entered into the Seed Production Agreement, White Coral stopped paying its Initial Capital Contribution. In particular,

White Coral made only \$100,000.00 of the \$300,000.00 payment that was due on February 28, 1999, and made no further payment thereafter. CP 95 (Gibbons Declaration, ¶ 29).

White Coral had the ability to make the payments specified by the agreement. White Coral intentionally chose to default on its contractual obligation to make these payments because it felt it could invest its funds more profitably elsewhere. CP 493 (White Coral's Answer to Second Interrogatory No. 3).

Seattle Shellfish notified White Coral that it was in default of its obligation to make the Initial Capital Contribution payments required by the LLC Agreement, and advised White Coral that it had 30 days within which to cure the default. CP 96, 175 (Gibbons Declaration, ¶ 30 and Exhibit D). See CP 130 (LLC Agreement, § 6.1.1). When White Coral still did not make its payment, on July 13, 1999, Seattle Shellfish notified White Coral that the period within which White Coral had the opportunity to cure the default had expired. CP 96, 177 (Gibbons Declaration, ¶ 31 and Exhibit E).

E. Effect of Default

Pursuant to the LLC Agreement, the fact that White Coral defaulted in its Initial Capital Contribution payment meant three things. First, White Coral's/Seattle Shellfish's respective ownership interests were automatically adjusted pursuant to a formula set forth in ¶ 6.1.1 of the LLC Agreement. CP 96, 130 (Gibbons Declaration, ¶ 32). White Coral thereafter had a 28.18% interest in Geysler, and Seattle Shellfish held the remaining 71.82% interest. Id. (Gibbons Declaration, ¶ 33). Elmer Yuen, White Coral's principal, subsequently acknowledged that "there is no dispute in that." CP 97, 193 (Gibbons Declaration ¶ 33 and Exhibit I (Elmer Yuen e-mail dated October 7, 2005)).

Second, pursuant to § 6.1.3 of the LLC Agreement, White Coral's default caused the termination of White Coral's right to have the managers that it had appointed participate in the management of the company. CP 97, 130-31 (Gibbons Declaration, ¶ 34). As Mr. Gibbons advised White Coral in his July 13, 1999 letter to it, in light of White Coral's default, "the managers appointed by Seattle shall be deemed to be the sole Managers of the Company." CP 97, 177 (Gibbons Declaration, ¶ 35 and Exhibit D).

Finally, pursuant to § 6.3.4 of the LLC Agreement, White Coral became liable for damages arising out of White Coral's default. CP 97 (Gibbons Declaration, ¶ 36).

F. Decision to Wind Up Geyser

Because White Coral had materially breached the LLC Agreement by failing to pay Geyser the Initial Capital Contribution specified by the Agreement, Ted Edwards and James Gibbons, the two remaining managers of Geyser, decided to wind up Geyser. Because Geyser's assets consisted of immature geoducks, Geyser's management recognized that the shareholders would maximize their returns only if those geoducks were first allowed to mature and only then were harvested. CP 97-98 (Gibbons Declaration, ¶ 37).

Moreover, because White Coral failed to pay its Initial Contribution to Geyser, Geyser in turn was unable to pay Taylor the amounts it had committed to pay pursuant to the geoduck Seed Production Agreement. Therefore, Taylor terminated that Agreement. CP 452, 457 (Carlson Declaration, ¶ 17-18 and Exhibit B). In order to put the seed which Geyser had purchase, but not received, to some use, Geyser's management authorized

Seattle Shellfish to purchase the seed still to be supplied by Taylor at its face value. CP 452 (Carlson Declaration, ¶¶ 19-22).

Geyser's management notified White Coral of its decision to wind up Geysler, and of the actions it would be taking to effectuate the wind up, by letter mailed to White Coral on August 26, 1999:

I am taking this opportunity to update you on our plan for the continued operations of Geysler Giant Clam Farms LLC.

We plan to grow-out the existing planted inventory at July 9, 1999 until harvestable size is obtained at which time the product will be harvested and sold in the normal course of business. We do not plan to plant any additional geoduck or Kumamoto oysters in Geysler. Once all of the planted geoduck and Kumamoto oysters existing as of July 9, 1999 are sold (estimated for the fiscal year ending September 30, 2003), we will wind-up the affairs of Geysler and Geysler Marketing Ltd. in accordance with the limited liability and shareholder agreements between Seattle Shellfish LLC and White Coral Corporation.

In consideration of the foregoing, we will implement the following interim processes:

- We will contract with Seattle Shellfish for the continued growth management of the existing geoduck. Seattle will be reimbursed for actual direct labor costs and for indirect overhead costs allocated on the basis of Geysler related direct labor costs to total Seattle incurred direct labor costs. This includes the allocation of any administrative overhead.

- The annual salaries of the President and Chief Financial Officer will be reduced 25% to \$45,000 and \$30,000, respectively, effective August 1, 1999.
- All operating assets of Geysler (e.g., vehicles, marine equipment and operations equipment) to be purchased by Seattle Shellfish at Geysler's net book value (\$61,772 at July 9, 1999). Proceeds from this transaction will be used to reduce the intercompany debt (\$101,445 at June 30, 1999) between Seattle and Geysler. Seattle will be reimbursed for the usage of said equipment by Geysler during the interim grow-out phase through the monthly depreciation charges included in Seattle's indirect overhead.
- As a result of Geysler being unable to complete payment on the Taylor Hatchery Agreement, Taylor terminated the Agreement on July 30, 1999. As a condition of Seattle Shellfish entering into a new agreement with Taylor, Seattle proposed, and Taylor agreed, to Seattle assuming responsibility for repaying Geysler for the unused seed credit of \$149,825. These proceeds will be used to fully repay the intercompany debt between Seattle and Geysler and provide additional working capital to contribute to the interim operations of Geysler.
- Geysler will not generate sufficient cash flow for operations until the fourth quarter of fiscal 2000 when the first geoduck harvest is scheduled to begin. Until that point, management estimates that Geysler will need additional working capital of approximately \$100,000.

As an investor and business partner, management respects your right to remain informed of the interim operations of Geysler until its final dissolution. We will

provide quarterly financial statements to PK Cheung via e-mail communication or such other designee of your choice.

CP 98, 179-80 (Gibbons Declaration, ¶ 38 and Exhibit F)

G. Winding Up of Geyser

Over the next several years, Seattle Shellfish in fact supplied the labor and equipment and advanced Geyser the funds necessary to pay for the maintenance and harvest of Geyser's immature geoducks. This meant that Seattle Shellfish had to abandon other investments including, but not limited to, an investment of over \$600,000.00 in a shellfish project in the Philippines.

CP 98 (Gibbons Declaration, ¶ 40).

Seattle Shellfish treated all of the funds which it had used in order to pay for the maintenance and harvest of Geyser's immature geoducks subsequent to White Coral's default as loans made by Seattle Shellfish to the LLC, as § 7.10 of the LLC Agreement specifically empowered it to do.

CP 98-99 (Gibbons Declaration, ¶ 41).

Throughout the wind-up process, Geyser sent White Coral periodic accountings. CP 449 (Carlson Declaration, ¶ 4-5). White Coral did not contemporaneously object to either Geyser's actions, or the accountings which Geyser provided.

H. White Coral Demands Cash

In the summer of 2002, Elmer Yuen, White Coral's principal, contacted Mr. Gibbons and advised him he had an acute need for cash. Therefore, Mr. Yuen wanted Geysler to begin repaying White Coral's capital contribution immediately. CP 99 (Gibbons Declaration, ¶ 42).

In response to Mr. Yuen's demand for payment, Mr. Gibbons advised Mr. Yuen that his sampling of the geoduck clams showed that the first crop had not yet reached optimal size. Mr. Gibbons told Mr. Yuen that if Geysler harvested early, Geysler would make less money than if it allowed the geoducks to mature. CP 99 (Gibbons Declaration, ¶ 43).

Mr. Yuen nevertheless insisted that Geysler proceed with harvest. CP 99 (Gibbons Declaration, ¶ 44). Lacking the funding to continue to maintain and harvest Geysler's clams and to pay for the defense of Mr. Yuen's threatened lawsuit, Seattle Shellfish reluctantly acceded to Mr. Yuen's demands and began harvesting Geysler's not-fully-mature geoducks in order to generate cash to pay White Coral. CP 99 (Gibbons Declaration, ¶ 45).

After repaying loans made after White Coral defaulted, Geysler applied the funds generated from the sale of Geysler's geoducks, first to repay White

Coral's Initial Capital Contribution, and then to repay Seattle Shellfish's Initial Capital Contribution, as provided for in § 10.3.2(iv)(2) of the LLC Agreement. CP 99 (Gibbons Declaration, ¶ 46).

Specifically, Geysler paid White Coral the sum of \$1,300,363.93, the exact amount of the Initial Capital Contribution White Coral had paid into Geysler before White Coral had defaulted. CP 100 (Gibbons Declaration, ¶ 47). Geysler then paid Seattle Shellfish a portion of the \$1.6 million initial contribution Seattle Shellfish had made to Geysler. CP 100 (Gibbons Declaration, ¶ 48).

However, because Mr. Yuen had insisted on harvest before the geoducks had fully matured, the funds obtained from the sale of Geysler's geoducks proved sufficient to reimburse Seattle Shellfish for only \$1,146,000.00 of Seattle Shellfish's \$1.6 million Initial Capital Contribution. The balance of Seattle Shellfish's Initial Capital Contribution, in the amount of approximately \$454,000.00, remained unpaid. CP 100 (Gibbons Declaration, ¶ 49).

In addition, Geysler owed Seattle Shellfish additional sums for operating expenses. CP 100 (Gibbons Declaration, ¶ 50). Including these

sums, at the time of its dissolution, Geysler still owed Seattle Shellfish a total of \$589,405.00. CP 100 (Gibbons Declaration, ¶ 51). Pursuant to the LLC Agreement, Seattle Shellfish was entitled to be paid these amounts in full before White Coral would be entitled to receive another penny from Geysler. CP 100 (Gibbons Declaration, ¶ 52).

I. Cancellation

Geysler sold the last of the geoducks that it owned, filed its final tax return, and made its final distributions, at the end of 2005. As provided for in § 10.4 of the LLC Agreement, Geysler then submitted a Cancellation Certificate to the Washington Secretary of State in order to terminate Geysler's corporate existence. CP 101 (Gibbons Declaration, ¶ 53).

The Washington Secretary of State filed the Cancellation Certificate on February 16, 2006. CP 101, 182 (Gibbons Declaration, ¶ 54 and Exhibit G). Upon the filing of the Cancellation Certificate, Geysler ceased to exist. CP 101 (Gibbons Declaration, ¶ 55).

J. Contact From White Coral's Attorney

In February 2006, Mr. Gibbons received a letter from George Kargianis, an attorney representing White Coral. In that letter, Mr. Kargianis

advised Mr. Gibbons that White Coral was invoking its right under § 7.13 of the LLC Agreement to have a certified public accountant conduct an audit of Geysler's records. CP 104, 202 (Gibbons Declaration, ¶ 67 and Exhibit J).

Mr. Gibbons responded to Mr. Kargianis by letter dated February 14, 2006. In that letter, Mr. Gibbons advised Mr. Kargianis that Geysler's files would be made available for audit by the CPA. CP 104, 204 (Gibbons Declaration, ¶ 68 and Exhibit K).

Mr. Kargianis replied by letter dated February 15, 2006. Mr. Kargianis said that his CPA would contact Mr. Gibbons to schedule a time to conduct the audit. CP 104, 206 (Gibbons Declaration, ¶ 69 and Exhibit L).

Some time thereafter, Mr. Gibbons did receive a telephone call from the CPA. Mr. Gibbons advised the CPA that, in compliance with § 7.13 of the LLC Agreement, the CPA would be given "access to the books and records of the Company at the principal office of the Company during normal business hours." The CPA told Mr. Gibbons he would call him back to schedule a time to come down to Olympia to conduct the audit. CP 104-05 (Gibbons

Declaration, ¶ 70). However, Mr. Gibbons did not hear back from the CPA. CP 105 (Gibbons Declaration, ¶ 71).

Mr. Gibbons wrote to Mr. Kargianis by letter dated February 28, 2006, again confirming that Mr. Yuen and/or his attorney was welcome to obtain copies of books and records upon reasonable notice, and that White Coral was entitled to have its CPA conduct an audit. CP 105, 208 (Gibbons Declaration, ¶ 72 and Exhibit M). However, Mr. Gibbons still did not hear back from White Coral's attorney or CPA to schedule a time to conduct the audit. CP 105 (Gibbons Declaration, ¶ 73).

On April 12, 2006, without ever having followed up on Mr. Gibbons' repeated offers to permit the CPA to conduct an audit, White Coral had Mr. Gibbons served with its Summons and Complaint in this lawsuit. CP 105 (Gibbons Declaration, ¶ 74).

K. Complaint

White Coral's complaint alleged three causes of action. First, White Coral's complaint alleged, quite falsely, that Seattle Shellfish had refused to permit White Coral to conduct the audit specified by § 7.13 of the LLC Agreement. CP 316-17. Second, White Coral alleged, again quite falsely,

that Seattle Shellfish was about to destroy Geysers' records, and asked the Court to restrain it from doing so. CP 317. Third, White Coral alleged that Seattle Shellfish had, in some not-specifically-described manner, breached fiduciary duties which it owed White Coral in conducting wind up of Geysers. CP 318.

L. Motions for Summary Judgment and To Change Venue

On June 1, 2006, Seattle Shellfish filed a Motion asking the King County Superior Court to grant Seattle Shellfish summary judgment dismissing the case. CP 267-285. Seattle Shellfish also filed a motion to change venue. CP 213-20.

The King County Superior Court entered an order determining that venue did not properly lie in King County, and ordered that venue be transferred to Thurston County. CP 7-9. The King County Superior Court also awarded Seattle Shellfish attorney fees pursuant to RCW 4.12.090(1). Id. The Thurston County Superior Court subsequently entered a judgment in Seattle Shellfish's favor for \$4,062.75 for costs associated with the change of venue. CP 495-97.

Because of the change of venue, the King County Superior Court did not address Seattle Shellfish's motion for summary judgment. After the case had been transferred to Thurston County, Seattle Shellfish renoted its motion and the motion was fully briefed. See CP 448-70. However, the Thurston County Superior Court never addressed that motion.

M. Demand for Posting of Security; Motion for an Order Increasing Security

Meanwhile, on August 21, 2006, Seattle Shellfish filed with the Court a demand that White Coral post security as specified by RCW 4.84.210. CP 347-348. Seattle Shellfish also moved the Court for the entry of an order increasing the amount of security White Coral would be required to post. CP 338-43.

On September 22, 2006, after briefing, the Thurston County Superior Court entered an order increasing the amount of security which White Coral would be required to post pursuant to RCW 4.84.210 to \$125,000.00. CP 412-413.

N. Trial Court's Dismissal of White Coral's Claim Based on Its Failure to Post Any Security

More than 90 days went by, and White Coral did not post **any** security, even for the base amount specified by RCW 4.84.210. White Coral having failed to post even the minimum security required by statute, Seattle Shellfish moved the Court for the entry of an order dismissing White Coral's claims without prejudice. CP 415-419. On January 26, 2007, the trial court entered an order dismissing White Coral's claims without prejudice. CP 427-429.

White Coral did not attempt to appeal from either the trial court's order increasing the amount of security, or the trial court's order dismissing White Coral's claims, within thirty days from the date of those orders' entry. However, White Coral filed a notice of appeal after Seattle Shellfish voluntarily dismissed its counterclaim against White Coral. CP 433-434; 435-444.

IV. STANDARD OF REVIEW

RCW 4.84.210 has two components. First, that statute requires an out-of-state corporate plaintiff, upon demand filed by a defendant, to post security to secure payment of costs in the amount specified by the statute. Although Seattle Shellfish filed a statutory demand, White Coral did not post security

even for the amount specified by the statute. White Coral's failure to post security gave the trial court discretion to dismiss White Coral's claims. Therefore, the trial court dismissal on this basis should be reviewed only for an abuse of discretion.

RCW 4.84.210 goes on to provide that the trial court "may" increase the amount of security which a foreign corporate plaintiff is required to post as a condition for proceeding with its cause of action. Again, the statute grants the trial court discretion. This Court should review the trial court's decision only for abuse of discretion.

A trial court abuses its discretion only if its decision is manifestly unreasonable, or based on untenable grounds. *Dicks v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007). White Coral has the burden of showing that the trial court abused its discretion. White Coral has not made that showing.

V. ANALYSIS

- A. Because White Coral did not post even the minimum security which RCW 4.84.210 required, the trial court had the discretion to dismiss White Coral's claims without prejudice.

RCW 4.84.210 requires a foreign corporate plaintiff, upon demand, to post security. White Coral did not post even the minimal security which the statute required. Because White Coral did not post even the minimal required security and because White Coral has never paid the judgment entered against it for costs associated with the change of venue, the trial court acted within its discretion in dismissing White Coral's claims without prejudice.

RCW 4.84.210 provides, in pertinent part:

When a plaintiff in an action ... is a foreign corporation ..., security for the costs and charges which may be awarded against such plaintiff may be required by the defendant or garnishee defendant. When required, all proceedings in the action or proceeding shall be stayed until a bond, executed by two or more persons, or by a surety company authorized to do business in this state be filed with the clerk, conditioned that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action or proceeding, not exceeding the sum of two hundred dollars. A new or additional bond may be ordered by the Court or judge upon proof that the original bond is insufficient security....

RCW 4.84.230 provides:

After the lapse of ninety days from the service of notice that security as required or of an order for new or additional security, upon proof thereof, and that no undertaking as required has been filed, the court or judge may order the action to be dismissed.

See also *Morris v. Warwick*, 48 Wash. 426, 93 P. 905 (1908); *Carlson Bros. & Co. v. Van de Vanter*, 19 Wash. 32, 52 P. 323 (1898).

Here, Seattle Shellfish demanded that White Coral, a foreign corporation, post the security required by this statute. CP 347-48 Once Seattle Shellfish filed its demand, White Coral had, at a minimum, the affirmative duty to post security for at least the amount required by the statute within 90 days. White Coral never posted that security, as RCW 4.84.210 positively required. Therefore, the trial court clearly had the discretion to dismiss White Coral's claims without prejudice.

The Court of Appeals should affirm for this reason alone.

B. The trial court acted within its discretion in increasing the amount of security which White Coral would be required to post to \$125,000.00

In addition, the trial court's order dismissing White Coral's claims without prejudice should be affirmed for the second separate reason that the

trial court acted within its discretion in increasing the amount of security which White Coral would be required to post to \$125,000.00.

1. RCW 4.84.210 specifically requires out-of-state corporations to post security for both “costs” and “charges.”

By its plain language, RCW 4.84.210 requires an out-of-state corporation which begins an action or proceeding in the courts of this State to post security “for all the costs and charges which may be awarded against such plaintiff.”

The policy reflected by this statute is clear. A foreign corporate plaintiff should not be entitled to come into our State, and to avail itself of the jurisdiction of our courts, unless it is prepared to provide assurance, enforceable in this state, that it will pay all the costs and charges which may be awarded against it should it be determined to have asserted a non-meritorious claim.

This statute is remedial. The Legislature enacted this statute in order to ensure that persons sued by foreign corporations would have an effective remedy. Therefore, this Court should liberally construe it. See, e.g., State v. Breazeale, 144 Wn.2d 829, 838, 31 P.3d 1155 (2001).

The statute clearly gives the trial court broad discretion to increase the amount of the security a foreign corporate plaintiff is required to post. Moreover, the trial court will necessarily have to exercise its discretion to determine the appropriate amount of security *before* the trial court has actually decided whether it will, in fact, award any “costs or charges.” Therefore, the trial court must look to what costs and charges the foreign corporate plaintiff *might* ultimately be required to pay. Because the trial court is making a forward-looking determination, it should be the rare case indeed in which the trial court is found to have abused its discretion in setting the amount of security to be posted.

The statute, by its explicit language, requires the posting of security sufficient to ensure the payment of both “costs” and “charges.” The Court should construe each of these words as having independent significance. See, e.g., *Judd v. American Telephone & Telegraph Co.*, 152 Wn.2d 195, 202-03, 95 P.3d 337 (2004).

Here, the natural reading of the phrase “costs and charges” is that it includes any cost or expense that a defendant may be entitled to recover in the case, including any attorneys’ fees that may be recoverable. See *Seaborn Pile*

Driving Co., Inc. v. Glew, 132 Wn.App. 261, 267-68, 131 P.3d 910 (2006)
(contractual language authorizing recovery of “all reasonable costs and charges incurred in collection” permitted recovery of attorneys’ fees.)

2. The trial court reasonably determined that Seattle Shellfish was potentially entitled to recover substantial “costs and charges” under a number of different theories.

Here, the trial court could have reasonably determined that Seattle Shellfish was potentially entitled to recover substantial “costs and charges” under a number of different theories.

- a. Costs on Motion to Change Venue.

First, Seattle Shellfish had already established that it was entitled to an award of \$4,062.75 in costs as a result of the motion to change venue from King County to Thurston County. CP 495-97. Although the trial court entered judgment for these costs, White Coral never satisfied that judgment. That judgment remains unsatisfied to this day.

Seattle Shellfish was entitled to have the court require White Coral either to pay the costs that it awarded in full, or at a minimum to post security to ensure that White Coral would pay these costs at the conclusion of the case.

b. “Charge” to White Coral under LLC Agreement.

Second, the trial court could reasonably have concluded that Geysler and/or Seattle Shellfish would be entitled to “charge” White Coral for the attorneys’ fee for which it was entitled to indemnification from Geysler under the LLC Agreement.

RCW 25.15.040(1)(b) permits LLC agreements to contain provisions that:

Indemnify any member or manager from and against any judgments, settlements, penalties, fines, or expenses incurred in a proceeding to which an individual is a party because he or she is, or was, a member or manager....

Here, the Geysler LLC Agreement required Geysler to indemnify members or managers for expenses which they incurred defending themselves in this legal proceeding as authorized by Washington’s Act:

Each Member’s liability shall be limited, and each Member shall be indemnified by the Company as set forth in this Agreement and to the fullest extent permitted under the Washington Act and other applicable law....

CP 128 (Geysler LLC Agreement, ¶5.2).

The Company shall indemnify the Managers and make advances for expenses to the maximum extent permitted under § 25.15.040(1)(b) of the Washington Act.

CP 126 (Geyser LLC Agreement, ¶ 4.19).

Under the LLC Agreement and the Washington Act, Geysler was in turn entitled to look to White Coral's distributive share for the purpose of satisfying this indemnification obligation:

(1) A limited liability company shall not make a distribution to a member to the extent that at the time of the distribution, after giving effect to the distribution (a) the limited liability company would not be able to pay its debts as they became due in the usual course of business...

(2) A member who receives the distribution in violation of subsection (1) of this section, and who knew it at the time of distribution that the distribution violated subsection (1) of this section, shall be liable to a limited liability company for the amount of the distribution...

RCW 25.15.235(1), (2) See also CP 728 (Geysler LLC Agreement at ¶ 5.2)

("A Member who receives a distribution is liable...to the extent now or hereafter provided by the Washington Act.")

Here, White Coral received distributions from Geysler at a time when White Coral knew that it would be bringing a claim against Seattle Shellfish and James L. Gibbons, Geysler's member and manager, respectively, for which they would be entitled to claim indemnification from Geysler. White Coral was not entitled to avoid the indemnification obligation that would pass

through Geysler to it under the LLC Agreement by the expedient of unreasonably delaying the pursuit of its claims until after Geysler had been dissolved.

In summary, Seattle Shellfish showed the trial court that, if it were to prevail in this action, it potentially could be entitled to indemnification from Geysler for the fees and costs that Seattle Shellfish incurred, and that Geysler would be in turn entitled to “charge” the distributions which it had made to White Coral for the purpose of satisfying this indemnification liability. Therefore, there were reasonable grounds for the trial court to require White Coral to post security to ensure that Seattle Shellfish could effectively recover its fees. The trial court acted within its discretion in requiring White Coral to post increased security on this basis.

c. White Coral’s Complaint was frivolous.

Finally, the trial court had a reasonable basis for concluding that it might find White Coral’s complaint was frivolous, thereby giving rise to a liability under either CR 11 or RCW 4.84.185, the frivolous claims statute.

- White Coral’s complaint alleged that Seattle Shellfish refused to provide it with accountings. CP 316-17 (Complaint, ¶ 16-21). In fact, Seattle Shellfish regularly provided White

Coral with accountings. CP 449 (Cathy Carlson Declaration, ¶ 4-5).

- White Coral’s complaint alleged that Seattle Shellfish had refused to permit it to conduct an audit. CP 316-17 (Complaint, ¶ 16-21). In fact, Seattle Shellfish had repeatedly offered to permit White Coral’s Certified Public Accountant to conduct an audit. CP 104-05, 201-08 (Gibbons Declaration, ¶¶ 67-78 and Exhibits J-M). See also CP 221-22, 231-32 (Edwards Declaration, ¶ 2, ¶ 6 and Exhibit B).
- White Coral’s complaint alleged that Seattle Shellfish was about to destroy Geyser records. CP 317 (Complaint, ¶ 22-23). In fact, Seattle Shellfish was not about to destroy Geyser records and there was no basis for White Coral to allege that it was about to do so. CP 291 (Answer, ¶ 23).
- White Coral’s complaint alleged that Seattle Shellfish breached fiduciary duties. CP 318 (Complaint, ¶ 24-27). See also White Coral’s Brief, at page 5 (describing White Coral’s Complaint is alleging that Seattle Shellfish had “redirected the shellfish operations to themselves, for their own gain, and thus deprived Geyser of these profits and benefits.”) However, White Coral, in response to discovery requests, failed to articulate *even a single instance* of such a breach. See CP 258-63 (Edwards Declaration, Exhibit D). (Plaintiff’s “answers” to IRs No. 3-9, asking it to provide specific factual information with respect to the breach of fiduciary duty claims alleged in the Plaintiff’s complaint.)
- To the extent that White Coral articulated any sort of claim, those claims related to actions taken to dissolve Geyser, all of which Mr. Gibbons clearly described to Mr. Yuen in August 1999. See CP 98, 179-80. (Gibbons Declaration, ¶ 38 and Exhibit F). Because more than six years passed before

White Coral filed this case, any claim White Coral may have asserted was clearly time-barred.

- Finally, White Coral had **never begun to explain** how it could possibly obtain a recovery from Geysler that would exceed the \$589,405.00 which Seattle Shellfish was still owed under the LLC Agreement. CP 108 (Gibbons Declaration, ¶ 51).

Based on the fully briefed summary judgment motion which had been filed with it, the trial court had ample grounds based on which to conclude that Seattle Shellfish might ultimately be entitled to recover the fees that it expended in response to White Coral's claims, either under the frivolous claim statute, RCW 4.84.185, or on the grounds that White Coral's complaint was not well grounded in fact and law under CR 11. The trial court accordingly had the discretion to require White Coral to post a bond in an amount sufficient to ensure payment of any award the trial court made on this basis.

d. White Coral has not shown prejudice.

Finally, White Coral has not shown it was in any way prejudiced by the trial court's order.

On this record, both the trial court, and this Court, are entitled to assume that White Coral had the ability to post security. In responding to the motion to increase security, White Coral never claimed it would be unable to

post the \$200,000.00 security requested by Seattle Shellfish. CP 349-57. White Coral had the funds, having been paid over \$1,300,000.00 by Geysler. CP 100 (Gibbons Declaration, ¶ 47).¹

White Coral again had the opportunity to explain what had happened to that money, or to submit evidence that it was in fact presently unable to post security, in response to the motion to dismiss. Even then, White Coral submitted no affidavits or declarations to the effect that it was unable to post the security specified by the trial court. CP 420-21.

White Coral could have posted the security ordered by the trial court. Just as it had made the calculated business decision to default on its obligation to make payments to Geysler, White Coral made a calculated business decision not to proceed with this case if White Coral had to put any of its own money into a position where Seattle Shellfish might actually be able to collect it. White Coral simply chose not to post the security ordered by the Court.

¹ Of course, had Mr. Yuen/White Coral made any factual assertions in this regard, Seattle Shellfish should have been given an opportunity to conduct a discovery into this issue. See, e.g., <http://www.bizjournals.com/Seattle/stories/2006/07/10/Story12.html?fromRSS=1>; <http://www.nagital.com/market.htm>; <http://www.gbtwireless.com/about.htm>. See also <http://jgcarlson.com/photos.html> (second photograph).

- e. The trial court acted within its discretion in increasing the security which White Coral had to post.

In sum, the Legislature enacted RCW 4.84.210 precisely in order to preclude foreign corporate plaintiffs from inflicting uncollectible costs and charges upon Washington defendants in the pursuit of speculative claims. In that statute, the Legislature gave trial courts the discretion to increase the security which foreign corporate plaintiffs would be required to post to ensure payment of such costs and charges. Pursuant to RCW 4.84.230, because White Coral did not post the security ordered by the trial court within ninety days of the trial court's order requiring it to do so, the trial court clearly had the discretion to dismiss White Corals' claims against Seattle Shellfish.

The Court of Appeals should affirm the trial court's dismissal of White Coral's claims for this second independent reason.

- C. Seattle Shellfish was entitled to have the claims White Coral had asserted against it dismissed pursuant to the fully briefed Summary Judgment Motion that had been submitted to the trial court.

In the alternative, the Court of Appeals should affirm the trial court's dismissal of White Coral's claims on the grounds that Seattle Shellfish was entitled to have the claims White Coral had asserted against it dismissed

pursuant to the fully briefed Summary Judgment Motion that had been submitted to the trial court.

The Court of Appeals is entitled to affirm the trial court's decision to dismiss White Coral's claims for any reason supported by the record, regardless of whether the trial court actually acted based on that reason. RAP 2.5(a); *Plein v. Lackey*, 149 Wn.2d 214, 222, 67 P.3d 1061 (2003).

Here, Seattle Shellfish had filed a summary judgment motion, and that motion had been fully briefed to the trial court, at the time that the trial court stayed this case pending White Coral's posting of security. CP 267-85, 458-70. As set forth above, Seattle Shellfish demonstrated, in that motion, that it was entitled to have the claims White Coral had asserted in its complaint dismissed with prejudice:

- White Coral complaint alleged that Seattle Shellfish had failed to provide it with accountings, or permit it to conduct an audit. CP 316-17 (Complaint, ¶ 16-21). Seattle Shellfish had demonstrated that it had in fact provided White Coral with regular accountings. CP 449 (Declaration of Cathy Carlson, ¶ 4-5). And Seattle Shellfish had repeatedly offered to permit White Coral's accountant to conduct an audit. CP 104-05, 201-08 (Gibbons Declaration, ¶ 67-78 and Exhibits J-M).
- White Coral's complaint alleged that Seattle Shellfish had threatened to destroy Geyser records. CP 317 (Complaint,

¶ 22-23). But Mr. Gibbons had no such intent. CP 291 (Answer, ¶ 23).

- Finally, White Coral's complaint alleged that Seattle Shellfish had breached fiduciary duties. CP 318 (Complaint, ¶ 24-27). However:
 - White Coral had been unable to even articulate, with specificity, exactly how Seattle Shellfish had allegedly breached its fiduciary duty. CP 258-63 (Edwards Declaration, Exhibit D).
 - To the extent White Coral claims were based on actions taken to dissolve Geysler, those claims, which had accrued in 1999, more than six years earlier, were plainly time-barred. CP 98, 179-80 (Gibbons Declaration, ¶ 38 and Exhibit F).
 - Finally, White Coral had not explained how any claimed breach of fiduciary duty could result in an award of damages in its favor, given that Geysler had **fully refunded** White Coral's initial capital contribution, while Geysler still owed Seattle Shellfish \$589,405.00. CP 99-100. (Gibbons Declaration, ¶ 46-52).

Based on the motion for summary judgment which had been completely briefed to the trial court, Seattle Shellfish was entitled to have White Coral's claims dismissed on the merits. The Court of Appeals should affirm the trial court's dismissal of this case on that third separate, independent basis.

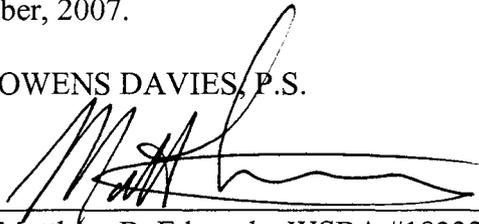
VI. CONCLUSION

The trial court did not abuse its discretion in dismissing White Coral's claims after White Coral failed to post even the minimal security clearly required by RCW 4.84.210. And the trial court did not abuse its discretion by entering an order increasing the amount of security by which White Coral was to post to \$125,000.00. In the alternative, Seattle Shellfish was entitled to the entry of an order dismissing all of White Coral's claims pursuant to the Summary Judgment Motion which White Coral had fully briefed to the trial court.

For any of these three separate reasons, the trial court's order dismissing White Coral's claims should be affirmed.

DATED this 25th day of October, 2007.

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