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**SUPREME COURT  
OF THE STATE OF WASHINGTON**

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**CERTIFICATION FROM THE  
NINTH CIRCUIT COURT OF APPEALS IN**

J&J CELCOM, et al.,

Plaintiffs-Appellants,

v.

AT&T WIRELESS SERVICES, INC., et al.,

Defendants-Appellees.

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**APPELLEES' ANSWERING BRIEF**

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## I. INTRODUCTION AND SUMMARY OF ARGUMENT.

The Ninth Circuit Court of Appeals certified the following question:

Does a controlling partner violate the duty of loyalty to the partnership or to dissenting minority partners where the controlling partner causes the partnership to sell all of its assets to an affiliated party at a price determined by a third-party appraisal, when the appraisal and the parties to the transaction are disclosed and the partnership agreement allows for sale of assets upon majority or supermajority vote, but the partnership agreement is silent on the subject of sale to a related party?

\_\_\_ F.3d. \_\_\_, 2007 WL 676007 \*4 (9<sup>th</sup> Cir. 2007) (copy attached as Appendix A). Critically, the Ninth Circuit ruled that the asset sale transactions at issue were based on prices that were fair as a matter of law. *Id.* \*3. Thus, the minority partners (“plaintiffs”) are now left to advocate a novel and untenable theory: that the sale of partnership assets at a fair price – which would have been unremarkable if made to a third party – amounted to a breach of the duty of loyalty because it was made to an affiliate of the majority partner.

Plaintiffs’ contention fails as a matter of clear Washington law. The Washington Revised Uniform Partnership Act (“RUPA”) authorizes partners to transact business with the partnership and makes plain that “a partner does not violate [the duty of loyalty] merely because the partner’s conduct furthers the partner’s own interest.” RCW 25.05.165(5),(6).

Here, the AT&T Wireless entities (collectively "AWS") used their voting power to cause the partnerships' assets to be sold to an AWS affiliate. AWS did so to put an end to accounting and administrative costs totaling over \$1 million annually that the partnerships were incurring solely to benefit a few partners who held very small fractional interests.

Plaintiffs assert that AWS violated the fiduciary duty of loyalty because it acted on behalf of related parties that "took away" the partnership assets and failed to account for profits purportedly gained from the transactions. Brief of Appellants (Plaintiffs' Brief), at 17 and 22. AWS did not "take away" the partnership assets; its subsidiaries purchased those assets at prices that the Ninth Circuit has held were fair as a matter of law. Nor was there any reason to account for profits. AWS did not receive any more or any less than plaintiffs received for their interests; instead, like all the partners, AWS received its pro rata share of the sale price.

In sum, AWS did not breach the duty of loyalty by transacting business with the partnership through an affiliate (as it was allowed to do so under RUPA), by doing so for its own benefit (also allowed under RUPA), by purportedly acting adversely to the partnerships (as the prices were fair as a matter of law and the transactions rid the partnerships of substantial costs), or by purportedly failing to account for profits (because

AWS received only its proportionate share of the sale proceeds).

Accordingly, the answer to the certified question is “no.”

## II. STATEMENT OF THE CASE.

### A. Relevant Facts.

The Ninth Circuit described the parties and their partnership history as follows:

The minority owners [plaintiffs] acquired fractional interests in nine regional cellular telephone partnerships through a lottery . . . The key asset in each was the right to own licenses for various frequencies and the customer base and call volume in each market served. At the time of the forced asset sales, the minority partners owned less than five percent of each partnership, and AWS owned the remainder. AWS provided wireless service to the partnerships' customers and all technical and administrative services related to the partnerships.

2007 WL 676007 \* 1.

Although plaintiffs held very small fractional interests, the partnerships were obligated to perform “detailed accounting of costs and revenues attributable to the minority partners.” *Id.* Every year, a team of AWS accountants analyzed all revenue and expense categories and compiled financial statements in an effort to reasonably present the financial results of each partnership. SER 354-58 (¶¶ 2, 5-6, 8-10). AWS sometimes retained consultants to audit and correct errors in the underlying data. *Id.* (¶¶ 10, 11).

The Ninth Circuit noted that these procedures were costly:

In 2001, AWS estimated that the administrative and accounting costs totaled about \$150,000 annually for each of the partnerships with minority interests, and that the net present value of servicing all the partnerships with minority interests amounted to \$9.6 million.

*Id.* Because AWS did not generally prepare stand-alone financial statements or conduct annual meetings with the same detail and procedures for markets that it wholly owned, the above-described costs – well over \$1 million per year for the nine partnerships at issue – were incurred solely for the benefit of individuals who held fractional interests. ER 247, 250; SER 97-98 (¶¶ 9, 10); SER 355 (¶ 4).

In order to eliminate these large expenses, AWS decided to invoke its majority interest in each partnership to buy out the minority owners.

Describing that process, the Ninth Circuit explained:

AWS retained Arthur Anderson (“AA”) to prepare appraisals of four partnerships as of September 30, 2001. After AA disbanded, AWS retained Kroll, Inc. to prepare appraisals of the remaining five partnerships as of certain dates in 2002. Initially, AWS offered to buy out the minority partners at a price slightly higher than the AA/Kroll appraised values. AWS sent letters to the minority partners offering a last opportunity to sell voluntarily. The letters stated that, if any minority owner declined the offer, the AWS subsidiary would vote to sell the assets of its partnership to an affiliated entity at the appraised value, dissolve the partnership, and pay the minority partners their pro rata share of the purchase price.

2007 WL 676007 \*1.<sup>1</sup>

Several minority partners accepted the offer but, because some declined, AWS proceeded with the asset sales in July 2002 and February 2003. SER 3 (¶ 4), 4-5 (¶ 11). The agreements governing the partnerships were all substantially similar. 2007 WL 676006 \*1.<sup>2</sup> All of them allowed for the sale of partnership assets upon a majority or super-majority vote. See § III.B.3, below. The Ninth Circuit described the sale transactions as follows:

Before each asset sale, AWS established a new partnership to buy the assets of the old partnership. This new partnership was wholly owned by the AT&T Wireless Group. Partnership formalities were followed. When each old partnership received an offer for the purchase of its assets, it conducted a partnership meeting and the relevant AWS subsidiary voted its entire interest in favor of the sale. As a result of the asset sales, plaintiffs received about \$3.5 million in total for their fractional interests.

2006 WL 676007 \*2. Plaintiffs were treated fairly in this process. In addition to concluding that the prices paid were fair, the Ninth Circuit also noted that the amount paid “represented a compound annual return ranging

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<sup>1</sup> The four partnerships valued as of September 30, 2001, were Boise, Fort Collins, Greeley, and Yakima. SER 99 (¶ 15); *see, e.g.*, ER 255-304 (Boise Appraisal). The five partnerships valued as of dates in 2002 were Redding, Rochester, Texarkana, Wheeling, and Yuba City. *Id.* Because all of the appraisals are substantially similar, not all of them are included in the Excerpts of Record.

<sup>2</sup> *See* ER 32 (Boise), 52 (Fort Collins), 87 (Greeley), 504 (Redding), 137 (Rochester), 150 (Texarkana), 186 (Wheeling), 209 (Yakima), and 225 (Yuba City).

from 17.1% to 25.1% for the approximately fifteen years over which they held their interests.” *Id.*

**B. Procedural History.**

Some of the minority partners who opposed the asset sales filed suit in federal district court in Seattle. As the Ninth Circuit noted, these partners alleged “breach of contract, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duties, and claims of misrepresentation, tortious interference, and unjust enrichment. After fifteen months of discovery, AWS moved for summary judgment. The minority owners cross-moved for partial summary judgment on liability. The district court granted AWS’s motion and denied the minority owners’ motion.” *Id.*

The minority owners appealed. The Ninth Circuit issued a Memorandum Opinion affirming the grant of summary judgment on all but one of the issues and claims that were the subject of appeal. 2006 WL 3825343 \*4 (9th Cir. slip op., Dec. 26, 2006) (copy attached as Appendix B). Notably, the Ninth Circuit held that the asset sale transactions did not breach either the partnership agreements or the implied covenant of good faith and fair dealing. *Id.* at \*1-2. As to the one remaining claim – for alleged breach of the duty of loyalty based on the non-voluntary acquisition of plaintiff’s partnership interests – the Ninth Circuit deferred

decision pending the outcome of the certified question that is now before this Court. *Id.* at \*2.

The district court rejected plaintiffs' claim that the asset sale prices were too low, observing that plaintiffs presented "no coherent opinion of what the fair value of the partnerships as [of] the Asset Sales dates should have been. As such, plaintiffs have presented no coherent evidence that the values should have been materially different." ER00407. The Ninth Circuit affirmed, stating, "the price paid was fair at the time, as a matter of law." 2007 WL 676007 \*3. As shown in § III.B.2 below, those rulings cannot be revisited here.

### III. ARGUMENT.

#### A. The Answer To The Certified Question Is "No."

##### 1. **Under RUPA, A Partner May Pursue A Self-Interested Transaction With The Partnership Provided That It Does Not Act Adversely To The Partnership's Interests And That It Accounts For Any Profits Derived From The Transaction.**

The rights and duties of partners are defined in the Washington RUPA, which states in relevant part:

(1) *The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subsections (2) and (3) of this section.*

(2) A partner's duty of loyalty to the partnership and the other partners is limited to the following:

(a) To account to the partnership and hold as trustee for it any property, profit, or benefit *derived by the partner in the conduct and winding up of the partnership business* or derived from a use by the partner of the partnership property, including the appropriation of a partnership opportunity; [and]

(b) To refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership.

\* \* \* \* \*

(4) A partner shall discharge the duties to the partnership and the other partners under this chapter or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

(5) *A partner does not violate a duty or obligation under this chapter or under the partnership agreement merely because the partner's conduct furthers the partner's own interest.*

(6) *A partner may lend money to and transact other business with the partnership, and as to each loan or transaction the rights and obligations of the partner are the same as those of a person who is not a partner, subject to other applicable law.*

RCW 25.05.165(1),(2)(a-b), (4), (5), and (6) (emphasis added).

Neither RCW 25.05.165(b)(2) nor Washington case law has defined the duty of loyalty so as to prevent partners from engaging in a

self-interested transaction with the partnership. To the contrary, as the above text makes clear, a partner may lawfully transact business with the partnership and further its own interest in doing so (RCW 25.05.165(5),(6)), as long as two requirements are met: first, a partner cannot pursue such transactions “as or on behalf of a party having an interest adverse to the partnership” (RCW 25.05.165(2)(b)) and, second, the partner must account for any profit derived from the transactions. RCW 25.05.165(2)(a).

Based on those clear provisions of RUPA, a partner does not violate the duty of loyalty by causing the partnership to sell its assets to an affiliate, because a partner may lawfully transact business with the partnership and may further its own interests in doing so. Neither the certified question nor the statement of related facts cites any evidence that the asset sale transactions were pursued by a partner “as or on behalf of a party having an interest adverse to the partnership” or that the transactions yielded profits for which an accounting would be required. Accordingly, the answer to the certified question is “no.”

**2. RUPA Has Been Applied To Uphold The Sale Of Partnership Assets To A Related Party.**

As the above discussion shows, the certified question can be answered by straightforward application of the Washington RUPA. In

addition, two recent cases reinforce the conclusion that the answer to the certified question is “no.”

In *Welch v. Via Christi Health Partners, Inc.*, 281 Kan. 732, 133 P.3d 122 (2006), a majority limited partner, Via Christi, exercised its voting power to cause the limited partnership to be merged into a limited liability company formed by Via Christi. The plaintiff limited partners were paid for their interests at a price based on a valuation obtained by Via Christi. Plaintiffs claimed that the transaction violated RUPA § 404(b)(2), as codified at K.S.A. 56a-404(b)(2), which is identical to the Washington statute at issue – RCW 25.05.165(2)(b). 133 P.3d at 140-41. The Kansas Supreme Court affirmed dismissal of this claim on summary judgment, stating:

[N]o question exists that the interests of the plaintiff limited partners were adverse to both Via Christi and the new investors of MRI, LLC [the acquirer]. However, the defendants rightly point out that the question is whether Via Christi acted as or on behalf of a party with an adverse interest to the *partnership* under this statutory provision. Although Via Christi, as the majority owner of both entities, represented both sides of the transaction, no evidence was presented that Via Christi itself possessed adverse interests to the limited partnership, nor was there evidence that its presence on both sides of the transaction actually harmed the limited partnership in any way.

*Id.* at 142 (emphasis original). The acquirer had existed only for two weeks before the merger and was not competing with or appropriating

business from the limited partnership. *Id.* at 143. Absent evidence that Via Christi was acting as or for an adverse party or that its actions harmed the limited partnership, summary judgment dismissal of the claim under RUPA § 404(b)(2) was appropriate. *Id.*

In *Bishop of Victoria v. Corporate Business Park, LLC*, 137 Wn. App. 50 (2007), an individual, Finley, and the Bishop of Victoria Corporation (BV) formed a limited liability corporation, Corporate Business Park, LLC (CBP), to purchase a parcel of property in foreclosure and hopefully sell it for a profit. *Id.* at 53-54. Finley contributed his labor and expertise and BV financed the purchase. *Id.* at 54. Efforts to sell the property failed, resulting in refinancing, greater debt, and ultimately receivership for CBP. *Id.* at 54-57. Finley sued, claiming that BV had breached the CBP operating agreement and its fiduciary duties. *Id.* at 58. After a jury trial, judgment was entered for Finley. *Id.* The court of appeals reversed, holding that BV had no contractual or fiduciary duty to continue making payments on CBP's indebtedness. *Id.* at 63. The court also ruled that BV did not violate its fiduciary duty by finding a potential buyer willing to pay \$7.5 million (an amount that would have extinguished the debt owed by Finley, BV, and CBP) because "the offer was not adverse to CBP." *Id.* at 64.

Although the *Bishop of Victoria* case involved a dispute between members of an LLC, the court likened the parties' relationship to that of partners in a general partnership and cited the same RUPA provisions that apply here. *Id.* at 62. The result is instructive for two reasons. First, just as BV was not subject to a fiduciary duty to continue making mortgage payments for the benefit of CBP (and derivatively for the benefit of Finley), AWS was entitled to act in its own interests and was not obligated to continue incurring indefinitely the vast majority of large costs that were being incurred for the sole benefit of passive minority partners. Second, just as BV did not act adversely to the LLC by finding a party to make an offer for the LLC's property, AWS did not act adversely to the partnerships by facilitating the sale of partnership assets to an affiliated party.

The reasoning and results in *Welch* and *Bishop of Victoria* reinforce the conclusion that the answer to the certified question under Washington law is "no." A partner does not breach the duty of loyalty by causing the sale of partnership assets to a related party, absent evidence that the partner acted as or on behalf of a party whose interests are adverse *to the partnership* and provided that the partner does not profit from the transaction. Because no such evidence exists in this case – in the record or

as stated in the certified question – the foregoing cases confirm that this Court should answer “no” to the Ninth Circuit’s inquiry.<sup>3</sup>

**3. The Duties Described In The *Karle* And *Bassan* Cases Are Consistent With The Later-Enacted Provisions Of RUPA, But The Holdings In Those Cases Are Not Relevant Or Controlling.**

Plaintiffs discuss the *Bassan* and *Karle* cases at some length, rejecting *Karle* as an irrelevant “fraud” case and embracing *Bassan* as “on all fours” with this case. Plaintiffs’ Brief, at 15-16 and 20. The certified question can and should be answered by straightforward application of the later-enacted RUPA, which defines the rights of partners as well as the exclusive duties owed by them. The duties of partners as articulated in *Karle* and *Bassan* are consistent with RUPA, but the holding in neither case is controlling because the facts here are much different.

In *Karle v. Seder*, 35 Wn.2d 542 (1950), this Court held that a partner may lawfully purchase partnership assets from another partner, provided that he or she acts in good faith, pays fair consideration, and

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<sup>3</sup> See also *Baltrusch v. Baltrusch*, 83 P.3d 256, 262-63 (Mont. 2004) (partner’s transfer of partnership interests, namely farm leases, to his sons without remaining partner’s consent was not a breach of fiduciary duty); *Lightfoot v. Hardaway*, 751 S.W.2d 844, 850 (Tenn. Ct. App. 1988) (partner committed no actionable breach by purchasing partnership property without offering other partners opportunity to participate in construction of hotel); compare *Slingerland v. Hurley*, 388 So.2d 587 (Fla. App. 1980) (remanding for determination whether fair value was paid for partnership property by corporation majority-owned by managing partner and his wife, where no appraisal was obtained and evidence indicated that sale price was substantially below market value).

discloses material information. 35 Wn.2d at 550. Those three requirements are consistent with later-adopted provisions of RUPA. First, good faith is required under RCW 25.05.165(4)). Second, a failure to pay fair consideration could trigger an obligation to account for profits (*i.e.*, the amount of the underpayment) under RCW 25.05.165(2)(a). Finally, a disclosure obligation could arise under RCW 25.05.160, and/or as part of the obligation to act in good faith (RCW 25.05.165(4)), and/or under RCW 25.05.165(2)(a), which could expose the acquiring partner to liability for secretly appropriating a partnership opportunity.

While the duties articulated in *Karle* are consistent with the later-adopted provisions of RUPA, the holding does not assist the Court in answering the certified question because the facts there were obviously much different from the situation here. There, two partners, Karle and Seder, decided to sell the partnership asset, the Bubble Inn Tavern, and listed it with Pacific Realty. 35 Wn.2d at 544. Seder accepted an offer from third parties, the Chamberlains, to buy the tavern for \$25,000 plus the value of inventory. He did not show Karle the offer, which had been obtained by Pacific Realty. *Id.* at 545. Before the Chamberlains executed that purchase agreement, Pacific Realty submitted another purchase agreement to Karle, with an offer by the Chamberlains to pay \$20,000 *including* the value of the inventory. *Id.* Karle signed the agreement and

Seder later signed it as both the purchaser and as one of the sellers. *Id.* at 546. At the closing, Karle asked why the bill of sale showed Seder as the buyer. He was told that the Chamberlains were having difficulty raising funds and that Seder was going to carry part of the contract. *Id.* Karle later learned from the Chamberlains that Seder had sold them the tavern for \$25,000 instead of \$20,000. *Id.* at 547. Until then, Karle had never been told that Seder had arranged to sell the tavern to the Chamberlains for \$25,000. *Id.* at 546. This Court affirmed the trial court judgment that Seder had committed fraud by failing to disclose his agreement to sell the tavern for \$25,000 (plus the inventory value) while Karle was advised only of an agreement to sell for \$20,000 (including inventory). *Id.* at 551 and 553.

There is nothing about the present case that remotely resembles those facts. There is no evidence that a higher purchase offer was in hand and that AWS failed to disclose it. Plaintiffs suggest such a scheme in their passing reference to the Cingular merger, which took place long after the asset sale transactions. Plaintiffs' Brief, at 11. Plaintiffs concede, however, that there is no evidence that the October 2004 Cingular merger was under consideration when the asset sale transactions occurred in 2002 and early 2003. 2007 WL 676007 \*2. Because no such evidence exists – either in the record or in the certified question – *Karle* is anapposite.

The same is true with regard to *Bassan v. Investment Exchange Corp.*, 83 Wn.2d 922, 927-28 (1974), where this Court held that a general partner was required to account for its profits on the sale of real property to the partnership because the amount of profit was not disclosed and the partners had not consented to the transaction. The duty to account for profits derived in conducting or winding up partnership business existed under the partnership statute that applied when *Bassan* was decided (*see id.* at 925, citing RCW 25.04.210(1)), and that same duty appears in RUPA as well. RCW 25.05.165(2)(a).

Plaintiffs summarily describe *Bassan* as “on all fours” with this case (Plaintiffs’ Brief, at 20) but their discussion ends there. *Bassan* is clearly distinguishable because the defendant partner was selling its own real property to the partnership for a profit of \$167,500. *Id.* at 924. Here, in contrast, AWS was not selling anything to the partnership, much less at a profit. Moreover, like all the partners, AWS received only its pro rata share of the proceeds – nothing more. 2007 WL 676007 \*1. To the extent plaintiffs cite the October 2004 Cingular merger as evidence of alleged profits received by AWS, again, there is no evidence or finding that that merger was under consideration when the asset sale transactions occurred in 2002 and early 2003. *Id.* \*2. By definition – and unlike the situation in *Bassan* – AWS cannot be faulted for having not disclosed hypothetical

profits on a hypothetical future merger that was not anticipated when the subject transactions occurred. *Bassan*, like *Karle*, does nothing to assist the Court in answering the certified question. Nor does it support plaintiffs' argument that AWS breached a duty of loyalty under RUPA.

**B. Plaintiffs' Suggestions That AWS Breached The Fiduciary Duty Of Loyalty Are Factually And Legally Unsupported.**

As shown above, the answer to the certified question is "no," based on straightforward application of the Washington RUPA. In their opening brief, plaintiffs make scattered, unsupported arguments that AWS acted adversely to the partnerships or profited from the asset sales. This Court should reject those arguments for the reasons outline below.

**1. AWS Did Not Act As Or On Behalf Of An Entity With Interests Adverse To The Partnerships.**

AWS did not act "as or on behalf of a party having an interest adverse to the partnership" when it caused the asset sale transactions. RCW 25.05.165(2)(b). The sum of Plaintiffs' argument to the contrary is the following statement: "[AWS] acted as or on behalf of the "new" partnerships which took away the assets of the old partnerships, and the minority parties." Plaintiffs' Brief, at 22. That assertion is wrong as a matter of undisputed fact. AWS did not "take" the partnership assets – it purchased the assets at a conclusively fair price. 2007 WL 676007 \*3. As a result, plaintiffs profited enormously, receiving a "compound annual

return ranging from 17.1% to 25.1% for the approximately fifteen years over which they held their interests.” *Id.*, at \*2.

Plaintiffs appear to imply that AWS acted adversely to the partnerships’ interests because it caused the assets to be sold to an AWS affiliate rather than a stranger. Plaintiffs’ Brief, at 22. This argument is contrary to the plain language of RUPA. Under Washington law, words in a statute must be given their common meaning. *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 555 (2000). Here, the common meaning of “adverse” in RCW 25.05.165(2)(b) is “acting against or in a contrary direction.” Webster’s Third New Inter’l Dictionary (2002). Thus, reading RCW 25.05.165(2)(b) together with RCW 25.05.165(6), a partner “may lend money to and transact other business with the partnership,” provided that in doing so it does not act in a manner that is contrary to the partnership’s interests. The mere fact that the assets were sold to an affiliate, instead of a stranger, does not establish that the sales were contrary to the partnerships’ interests.

Moreover, plaintiffs selectively rely on the provisions of RUPA that suit them, rather than giving effect to all the relevant RUPA provisions. AWS was expressly allowed to transact business with the partnership under RCW 25.05.165(6). If adversity within the meaning of RCW 25.05.165(2)(b) could be shown simply by pointing to a partner’s

business transaction with the partnership, then the right to transact business with the partnership under RCW 25.05.165(6) would be illusory. Such a result would violate the settled rule that “[s]tatutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546 (1996).

The undisputed evidence conclusively establishes that AWS was not adverse to the partnerships as that term is used in RUPA. First, the sale prices were not dictated by AWS or based on adverse negotiations. Instead, it was decided in advance that the prices would be based on independent appraisals. 2007 WL 676007 \*1. No discount was applied for lack of control or marketability. SER 0185. In fact the opposite was true: the price was based on the full appraised value, plus a *premium* if all partners accepted.

Second, all partners received their share of the appraised value – nothing more. *Id.* at \*2. Thus, the buyers did not harm the partnerships by taking assets without fair compensation. By definition, AWS cannot be deemed to have acted adversely to the partnerships when AWS received only its proportionate share of the proceeds. The holding in *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 721-22 (Del. 1971) is on point. There minority stockholders of the Sinclair Venezuelan Oil Company (“Sinven”)

sued its parent corporation, Sinclair Oil Corporation, alleging that by virtue of its domination of the Sinven Board of Directors, Sinclair had forced Sinven to declare excessive dividends. *Id.* at 720-21. The court, however, rejected the minority stockholders' characterization of the dividend declarations as "self-dealing" since the parties benefited equally.

*Id.* at 721-22. It reasoned:

The declaration of dividends resulted in great sums of money being transferred from Sinven to Sinclair. However, a proportionate share of this money was received by the minority shareholders of Sinven. Sinclair received nothing from Sinven to the exclusion of its minority stockholders. As such, these dividends were not self-dealing.

*Id.* The same reasoning, and result, applies here. Plaintiffs received cash for their pro rata share of the purchase price, which reflected the appraised net present value of the assets as of the transaction dates. As a result, all of the partners received the same benefit from the asset sales.

Third, while plaintiffs perceive the asset sales to be adverse to *their* individual interests, the buyers were not acting adverse to *the partnerships' interests* because the purchase offers presented a fair means of eliminating fractional interests that were causing the partnerships to

incur large accounting and administrative expenses. *See* § II.B, above.<sup>4</sup>

As in *Welch*, there is no evidence that the new partnerships were adverse to the old partnerships, or that their purchase of the assets harmed the old partnerships in any way.

In sum, AWS did not breach its fiduciary duty of loyalty because it did not act in a manner that was opposed or contrary to the partnerships' interests. Instead, the transactions were based on independent appraisals, AWS received only its proportionate share of the proceeds, and the transactions enabled the partnerships to eliminate large costs. Plaintiffs' unfounded characterizations of adversity do not change the conclusion that RCW 25.05.165(2)(b) was not breached and that the answer to the certified question is "no."

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<sup>4</sup> The sale of partnership assets to an affiliated entity is consistent with the routine use of short-form mergers by corporations to eliminate minority interests. All states authorize a parent corporation, owning the majority of shares in a subsidiary, to merge the subsidiary into itself or another subsidiary. *See* Model Bus. Corp. Act § 11.05 (Supp. 1998/99). Such mergers can greatly reduce costs incurred for annual reports, transfer agent fees, auditing, and legal work, and can eliminate conflicting goals between minority and majority owners. *Cross v. Communication Channels, Inc.*, 456 N.Y.S.2d 971, 973-74 (N.Y. Sup. Ct. 1982); *see also* Lipton, Martin & Erica H. Steinberger, Takeovers and Freezeouts § 9.01[2] (Supp. 2004) (discussing reduced costs and fewer administrative burdens as reasons for short form mergers). The fact that the entities here were partnerships, not corporations, does not convert otherwise valid, good-faith transactions into actions adverse to the interests of the partnerships.

**2. AWS Did Not Fail To Account For Profits In Violation Of RCW 25.05.065(2)(a).**

Plaintiffs do not coherently explain how they believe AWS failed to account for profits from the transactions in violation of RCW 25.05.165(2)(a), but they make four scattered characterizations that imply as much. These arguments should be rejected for the reasons outlined below.

First, plaintiffs imply that AWS underpaid for the assets, using appraisals that were prepared by “captive” and “spoon-fed” appraisers. Plaintiffs’ Brief at 7. Both the federal district court and the Ninth Circuit, after fully considering the evidence presented, held that the prices paid were fair as a matter of law. ER00407; 2007 WL 676007 \*3. Plaintiffs cannot challenge those holdings before this Court. *See Broad v. Mannesmann Anlagenbau, A.G.*, 141 Wn.2d 670, 676 (2000) (citations omitted) (“The federal court retains jurisdiction over all matters except the local question certified.”)<sup>5</sup> In addition, even if the asset sale prices had

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<sup>5</sup> *Accord Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 577 (1998) (“[T]his court answers only the discrete question that is certified and lacks jurisdiction to go beyond the question presented.”); *Yang v. City of Chicago*, 745 N.E.2d 541, 544 (Ill. 2001) (“This court is not a court of review for federal court decisions. Therefore, we are restricted to the question certified to us.”) Apart from the jurisdictional prohibition against relitigating the holding that the asset sale prices were fair, plaintiffs are also barred from resurrecting that issue under the doctrine of collateral estoppel, which “prevents relitigation of an issue after the party against whom the doctrine is applied has had a full and fair opportunity to litigate his or her case.” *Nielson v. Spanaway General*

(Footnote Continued)

not already been ruled fair as a matter of law, plaintiffs do not cite any supporting evidence showing that the appraisal team was “captive” or “spoon-fed.”<sup>6</sup> No such evidence exists.

Second, plaintiffs claim in a footnote that AWS failed to disclose internal information purportedly showing that the partnership assets were worth more than the appraised values. Plaintiffs’ Brief at 8 n.4.<sup>7</sup> Plaintiffs misleadingly cite an internal AWS document as evidence that, in the words of their expert, AWS believed the value of the partnerships “to be \$554 Per-Pop,” based on transaction prices involving other wireless properties.<sup>8</sup> *Id.*, citing ER00954. In fact, the AWS document states: “We believe that having appraisals performed for each market, per pop values for each market will range from a low of \$200 to a high of \$350.”

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*Medical Clinic*, 135 Wn.2d 255 (1998)(citation omitted). “[T]he doctrine of collateral estoppel is well-known to Washington law as a means of preventing the endless relitigation of issues already actually litigated by the parties and decided by a competent tribunal.” *Id.*

<sup>6</sup> Plaintiffs are poorly situated even to speculate about whether the appraisers were influenced because plaintiffs’ counsel never deposed anyone on the appraisal team.

<sup>7</sup> In the same footnote, plaintiffs note that their expert opined that higher prices could have been obtained through arms-length negotiations. That evidence should be disregarded because the district court and the Ninth Circuit considered this evidence, and the Ninth Circuit found the prices fair as a matter of law. 2007 WL 676007 \*3.

<sup>8</sup> The term “Per-Pop” is a reference to one method of expressing the value of a wireless telecommunications business as a function of the population in the defined service area. To take a simple example, if a defined market had a population of 100,000 and a wireless business in that market was valued at \$10 million, then one would say that that business was worth \$100 “Per Pop.” SER 0173.

ER00250. That estimated range is consistent with the range of values ultimately determined by the appraisal team. SER0186-88.

Third, plaintiffs point to the October 2004 Cingular merger, suggesting that the cash paid for Cingular's nationwide business (including markets such as New York) somehow demonstrates that the appraised values determined in 2002 and early 2003 for the partnerships at issue here (which operated, for example, in Wheeling, West Virginia and Texarkana, Arkansas) were too low. *Id.*, at 11. As the Ninth Circuit observed, however, "[Plaintiffs'] [c]ounsel admitted at argument that there is no evidence that [the Cingular] transaction was under consideration by AWS in 2002 and early 2003, when the buyouts were completed." 2007 WL 676007 \*2. In fact, plaintiffs' own expert admitted that the Cingular transaction should not be considered in determining whether the assets were fairly valued as of the transaction dates. He testified, "[Y]ou would not take into consideration . . . subsequent events, the AT&T [Cingular] transaction . . . [T]hat transaction would not be material because it's unforeseeable from that point in time." SER 0142-43. Thus, by definition, any profits realized from the Cingular transaction cannot have been "derived in the winding up of the partnership business." RCW 25.05.165(2)(a).

Last, plaintiffs allege that AWS failed to disclose the fact that the asset sale transactions would result in cost and tax savings for AWS. Plaintiffs' Brief, at 6 and 8. The federal district court already considered and rejected that argument, stating:

Defendants present evidence that when they made a final offer to Plaintiffs, they sent to Plaintiffs an offer letter indicating that they would vote their majority interest to sell the partnership assets if Plaintiffs did not accept the offer. This letter was accompanied by a letter from Arthur Anderson/Kroll indicating the appraised value of the partnerships and summarizing the valuation report, as well as recent financial statements for the partnership. Plaintiffs do not dispute this fact. *Defendants indicated that the partnerships incurred significant costs in preparing the financial statements and holding annual meetings that were solely for the benefit of the minority partners, and that by selling the partnership assets in the way they did, they would be released from having to incur these costs.* Plaintiffs allege that AWS or its subsidiaries did not disclose the potential cost and tax savings that Defendants expected as a result of the buy-out plan. However, there is no basis to impose on Defendants an obligation to report their cost and tax savings beyond what they already disclosed. In sum, Plaintiffs have not shown that such information was material.

ER00406-07. As noted above, the district court's holding cannot be challenged here. *See Broad*, 141 Wn.2d at 676. Even if this issue could be reopened, plaintiffs' argument would fail because the future cost savings that they characterize as a "benefit" to AWS are more aptly described as the end to many years of incurring large costs solely for plaintiffs' benefit.

In sum, plaintiffs' theories that AWS acted adversely to the partnerships' interests or failed to account for profits from the asset sale transactions are unsupported as a matter of fact and law, and therefore the answer to the certified question is and remains "no."

**3. Plaintiffs' Argument That The Transactions Did Not Meet The Requirements Of RCW 25.05.015(2)(c) Is Wrong.**

Plaintiffs contend that the transactions did not comply with RCW 25.05.015, which states:

(1) Except as otherwise provided in subsection (2) of this section, relations among the partners and between the partners and the partnership are governed by the partnership agreement. To the extent the partnership agreement does not otherwise provide, this chapter governs relations among the partners and between the partners and the partnership.

(2) The partnership agreement may not:

\* \* \* \* \*

(c) Eliminate the duty of loyalty under RCW 25.05.165(2) . . . , but, if not manifestly unreasonable:

(i) The partnership agreement may identify specific types or categories of activities that do not violate the duty of loyalty; or

(ii) All of the partners or a number or percentage specified in the partnership agreement may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty.

As is clear from the text, relations among partners are governed by their agreement; RUPA applies only where the agreement is silent.

Here, the partnership agreements contain clear voting requirements and the Ninth Circuit conclusively determined that the votes approving the asset sales complied with those requirements:

The partnership agreements unambiguously allow for a sale of all assets by either majority or supermajority vote. None of them restricts the parties to whom assets may be sold, and the minority partners cite no authority for their contention that statutory fiduciary duties are incorporated as terms of the contract. Therefore, AWS's sale and acquisition of the partnership assets and subsequent dissolution of the partnerships do not constitute a breach of the partnership agreements.

2006 WL 3825343 \*2 (footnote omitted). Accordingly, the Ninth Circuit affirmed dismissal of plaintiffs' breach of contract claim. *Id.* at \*1.

Although the votes approving the transactions clearly satisfied the contractual voting requirements, plaintiffs contend the votes were insufficient to satisfy RCW 25.05.015(2)(c)(ii) because they were not unanimous. Plaintiffs' Brief, at 25. Plaintiffs are wrong because the provisions of RCW 25.05.015(2)(c)(ii) are triggered only as to transactions that "otherwise would breach the duty of loyalty" and which are not among a category of activities identified in the partnership agreement that do not violate the duty of loyalty. RCW 25.05.015(c)(i).

Plaintiffs seem to believe that the duty was breached, (thus triggering the provisions of RCW 25.05.015(2)(c)), simply because AWS caused the sale of partnership assets to an AWS affiliate. Plaintiffs' Brief, at 25. Again, however, RUPA makes clear that partners may lawfully transact business with the partnership. Moreover, plaintiffs cannot claim that a unanimous vote was required on the ground that AWS failed to account for profits from the transactions, given that (a) the prices were conclusively determined to be fair, and (b) AWS took only its pro rata share. Because there was no breach of the duty of loyalty, a unanimous vote was not required under RCW 25.05.015(2)(c).

Moreover, even if plaintiffs could show that the transactions "otherwise would breach the duty of loyalty," a unanimous vote would still not be required because the partnership agreements authorized the very type of transaction at issue – the sale of partnership assets. Three of the agreements specifically allow the sale of all partnership assets upon a two-thirds vote.<sup>9</sup> The other six agreements authorize all partnership actions to be taken on a majority vote, (except for a few actions that require a two-thirds vote or unanimity), and all of them provided for

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<sup>9</sup> See ER00041 (Boise Agreement, § 6.7: "[N]or shall any MSA Partnership sell all or substantially all of such MSA Partnership's assets except upon a 66.6% vote of the Partners."); ER 00143 (Rochester Agreement, § 5.1; same); ER00159 (Texarkana Partnership Agreement, § 6.7; same).

dissolution of the partnership upon “the sale or assignment of substantially all of the assets of the Partnership.”<sup>10</sup> It would be an anomalous reading if the partnership could be dissolved by a majority vote, but the sale of the partnership assets (which also triggered dissolution) required consent of all the partners.

In sum, if the asset sales to a related party could be deemed a breach of the duty of loyalty (despite the clear right under RCW 25.05.165(6) to transact business with the partnership), then AWS cannot properly be liable under RUPA because (a) the partnership agreements identify a specific category of activity that does not require a unanimous vote, as required by RCW 25.05.015(2)(c)(i), and (b) the votes to sell the assets satisfy the requirement of RCW 25.05.015(2)(c)(ii) because they exceeded the percentages specified in the partnership agreements. For these reasons too, the answer to the certified question is and remains “no.”

#### IV. CONCLUSION

Plaintiffs advocate a tyranny of the minority. They claim to have been entitled to hold their partnership interests for 99 years unless the partners voted to dissolve the partnerships and sell their assets to an

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<sup>10</sup> See ER00069-70, -082 (Fort Collins Agreement, §§ 4.1, 9.1(iii)); ER00103-04, -110 (Greeley Agreement, §§ 4.1, 9.1(iii)); ER00118, 131-32 (Redding Agreement, §§ 4.1, 9.1(iii)); ER00199, -206 (Wheeling Agreement, §§ 4.1, 9.1(ii)); ER00220, -223 (Yakima Agreement, §§ 4.1, 9.1(ii)); and ER00237, -243 (Yuba City Agreement, §§ 4.1, 9.1(ii)).

unrelated third party. In other words, they say, the partners were to be joined for nearly a century and the only way to separate would be for AWS to give up the businesses it had built, with no help from plaintiffs. Until then, plaintiffs contend, AWS was obliged to incur enormous costs to account for and administer the partnerships for plaintiffs' sole benefit. Plaintiffs' theory of partnership duties is illogical and, as shown above, fails as a matter of straightforward application of RUPA. There is no evidence cited in the certified question – and plaintiffs identify no evidence in the record – substantiating the assertion that the asset sale transactions were adverse to the partnerships' interests or that AWS failed to account for profits purportedly derived from the transactions. AWS respectfully requests that the certified question be answered “no.”

DATED this 30th day of April, 2007.

HELLER EHRMAN LLP

FILED AS ATTACHMENT  
TO E-MAIL

By:   
Brendan T. Mangan (WSBA # 17231)  
Leonard J. Feldman (WSBA # 20961)

Attorneys for Defendants-Appellees  
AT&T WIRELESS SERVICES, INC., et al.

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SUPREME COURT  
STATE OF WASHINGTON

2007 APR 30 1 40  
**CERTIFICATE OF SERVICE AND FILING**

I hereby certify that on April 30, 2007, I caused to be served via messenger one copy of the foregoing Appellees' Answering Brief upon:

Philip E. Cutler  
Robert G. Nylander  
Thomas W. Hayton  
Cutler Nylander & Hayton, P.S.  
505 Madison Street, Suite 220  
Seattle, WA 98104

I also certify that on April 30, 2007, I caused to be filed via electronic delivery the foregoing Appellees' Answering Brief with

Supreme@courts.wa.gov

in accordance with the filing procedures described at:

[http://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/clerks/?fa=atc  
supreme\\_clerks.display&fileID=fax.](http://www.courts.wa.gov/appellate_trial_courts/supreme/clerks/?fa=atc_supreme_clerks.display&fileID=fax)

  
Malissa Tracey

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# APPENDIX A

**H**

United States Court of Appeals,  
Ninth Circuit.

J&J CELCOM; Lupe Azevedo; Woodrow W. Holmes, Jr.; Lucille Hoss; Daniel Murray; Rajive Oberoi; Kenneth L. Ramsey; Gary R. Robbins; Joanne Robbins; S & D Partnership; Cell-Cal IX-T9; Nancy Donnelly; Rodger D. Friz; Sid Danny Hoff; Om Parkash Kalra; Ronald Wilson; Delchi Corporation, Plaintiffs-Appellants,

v.

AT&T WIRELESS SERVICES, INC.; McCaw Cellular Interests Inc.; AT&T Wireless Services of Colorado LLC; AT&T Wireless Services of Idaho Inc.; AT&T Wireless Services of Washington LLC; Boise City Cellular Partnership, formerly known as New Boise City Cellular Partnership; Fort Collins-Loveland Cellular Telephone Co., formerly known as New Fort Collins-Loveland Cellular Telephone Company; Greeley Cellular Co., formerly known as New Greeley Cellular Company; Yakima Cellular Telephone Company, Formerly Known As New Yakima Cellular Telephone Company; McCaw Communications of Wheeling, Inc.; McCaw Communications of Texarkana, Inc.; AT&T Wireless Services of California, Defendants-Appellees.

No. 05-35567.

March 7, 2007.

**Background:** Former owners of fractional interests in general cellular telephone partnerships filed suit against holder of majority interest for breach of contract, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duties, and claims of misrepresentation, tortious interference, and unjust enrichment. The United States District Court for the Western District of Washington, 2005 WL 1126924, granted defendants' motion for summary judgment and denied plaintiffs' motion for partial summary judgment. Plaintiffs appealed.

**Holdings:** The Court of Appeals held that:

(1) appraisal report, which set forth no coherent opinion of what the fair value of partnerships was at the time of asset sales or why the price paid by affiliate of owner of majority interest was not fair

market value, was insufficient to create a triable issue as to whether price paid was fair as of the time of the asset sales, and

(2) question was certify to the Supreme Court of Washington as to scope of partner's fiduciary duty of loyalty in self-dealing transaction that was disclosed but not specifically authorized by partnership agreement.

Question certified.

**[1] Federal Civil Procedure**  2546

170Ak2546 Most Cited Cases

Appraisal report, which set forth no coherent opinion of what the fair value of general cellular telephone partnerships was at the time of asset sales or why the price paid by affiliate of owner of majority interest was not fair market value, was insufficient, on majority owner's motion for summary judgment on the minority owners' claim of breach of the fiduciary duty of loyalty, to create a triable issue as to whether price paid was fair as of the time of the asset sales.

**[2] Partnership**  95

289k95 Most Cited Cases

Even if price paid by affiliate of owner of majority interest for minority interests in general cellular telephone partnerships was fair, if the sales violated the duty of loyalty, the minority owners could be entitled to their share of a constructive trust on the partnership assets and any profits made thereupon, under Washington law. West's RCWA 25.05.165(2)(a).

**[2] Trusts**  102(1)

390k102(1) Most Cited Cases

Even if price paid by affiliate of owner of majority interest for minority interests in general cellular telephone partnerships was fair, if the sales violated the duty of loyalty, the minority owners could be entitled to their share of a constructive trust on the partnership assets and any profits made thereupon, under Washington law. West's RCWA 25.05.165(2)(a).

**[3] Federal Courts**  392

170Bk392 Most Cited Cases

Court of Appeals would certify to Supreme Court of Washington question of whether a controlling partner violates the duty of loyalty to the partnership or to dissenting minority partners where the controlling

partner causes the partnership to sell all its assets to an affiliated party at a price determined by a third-party appraisal, when the appraisal and the parties to the transaction are disclosed and the partnership agreement allows for sale of assets upon majority or supermajority vote, but the partnership agreement is silent on the subject of sale to a related party.

**[4] Federal Courts**  **392**  
170Bk392 Most Cited Cases

Court of Appeals could may properly certify a question sua sponte, under Washington law. West's RCWA 2.60.030(1).

John Oitzinger, Helena, Montana, Thomas W. Hayton, Robert G. Nylander, Philip Edgerton Cutler Cutler Nylander & Hayton, Seattle, WA, for the plaintiffs-appellants.

Brendan T. Mangan, Heller Ehrman LLP, Seattle, WA, for the defendants-appellees.

Before PAMELA ANN RYMER, MARSHA S. BERZON, and RICHARD C. TALLMAN, Circuit Judges.

**ORDER**

\*1 In this diversity action, J&J Celcom and other former owners of fractional interests in nine general cellular telephone partnerships ("minority owners") appeal an adverse summary judgment of the United States District Court for the Western District of Washington in favor of AT&T Wireless Services and several of its wholly owned subsidiaries ("AWS"). The minority owners also appeal the district court's denial of their motion for partial summary judgment.

We have jurisdiction pursuant to 28 U.S.C. § 1291. In a Memorandum Disposition filed on December 26, 2006, we disposed of the minority owners' challenge to the district court's order excluding their late-filed expert witness report and grant of summary judgment on their claims for breach of contract, breach of implied duty of good faith and fair dealing, and breach of the fiduciary duty of care as to the service fees.

This order certifies to the Supreme Court of Washington the remaining dispositive question of state law, namely, whether the Revised Uniform Partnership Act allows a controlling partner to sell all of the partnership's assets to an affiliated party at a price determined by a third-party appraisal, where the partnership agreement authorizes sale of assets by majority or supermajority vote but is silent on the subject of sale to a related party.

I

Before turning to the issue to be certified, we provide the following summary of facts. [FN1] The minority owners acquired fractional interests in nine regional cellular telephone partnerships through a lottery for the cellular radio frequency spectrum conducted by the Federal Communications Commission. The agreements governing the nine partnerships at issue are substantially similar. The key asset in each was the right to own licenses for various frequencies and the customer base and call volume in each market served. At the time of the forced asset sales, the minority partners owned less than five percent of each partnership, and AWS owned the remainder. AWS provided wireless service to the partnerships' customers and all technical and administrative services related to the partnerships. The latter included detailed accounting of costs and revenues attributable to the minority partners. In 2001, AWS estimated that the administrative and accounting costs totaled about \$150,000 annually for each of the partnerships with minority interests, and that the net present value of servicing all partnerships with minority interests amounted to \$9.6 million.

AWS decided to eliminate those costs by invoking its majority interest in each partnership to buy out the minority owners. AWS retained Arthur Andersen ("AA") to prepare appraisals of four partnerships as of September 30, 2001. After AA disbanded, AWS retained Kroll, Inc. to prepare appraisals of the remaining five partnerships as of certain dates in 2002. Carlyn Taylor, AWS's valuation expert engaged for purposes of this lawsuit, reviewed the AA/Kroll reports. She found that they comported with professional appraisal standards and that the values were reasonable and represented the partnerships' fair value at the time of the asset sales. Charles Walters, the minority owners' valuation expert for the litigation, challenged the inputs and methodology of the AA/Kroll appraisals.

\*2 Initially, AWS offered to buy out the minority partners at a price slightly higher than the AA/Kroll appraised values. AWS sent letters to the minority partners offering a last opportunity to sell voluntarily. The letters stated that, if any minority owner declined the offer, the AWS subsidiary would vote to sell the assets of its partnership to an affiliated entity at the appraised value, dissolve the partnership, and pay the minority partners their pro rata share of the purchase price. Because some minority partners declined (including all but two of the minority owners who are plaintiffs-appellants here), AWS proceeded with the

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involuntary asset sales in July 2002 and February 2003. AWS rejected a suggestion that it retain independent counsel and an investment banking firm to negotiate better terms on behalf of the minority owners.

Before each asset sale, AWS established a new partnership to buy the assets of the old partnership. This new partnership was wholly owned by the AT&T Wireless Group. Partnership formalities were followed. When each old partnership received an offer for the purchase of its assets, it conducted a partnership meeting, and the relevant AWS subsidiary voted its entire interest in favor of the sale. As a result of the sales, the minority owners received about \$3.5 million in total for their fractional interests. This amount represented a compound annual return ranging from 17.1% to 25.1% for the approximately fifteen years over which they held their interests.

In October 2004, Cingular Wireless LLC acquired AT&T's wireless business. According to estimates prepared by the minority owners' expert witness, as of that time, the nine partnerships were valued at approximately \$750 million to \$1 billion. Counsel admitted at argument that there is no evidence that this particular transaction was under consideration by AWS in 2002 and early 2003, when the buyouts were completed.

In the meantime, believing that the asset sales were improper, the minority owners filed suit in the district court against AWS alleging breach of contract, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duties, and claims of misrepresentation, tortious interference, and unjust enrichment. After fifteen months of discovery, AWS moved for summary judgment. The minority owners cross-moved for partial summary judgment on liability. The district court granted AWS's motion and denied the minority owners' motion. As to the asset sales, the minority owners appealed claims of breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duties. On the issue of excessive service fees, the minority owners appealed their claims of breach of the fiduciary duty of care and of the implied covenant of good faith. They also challenged the district court's exclusion of a late-filed expert witness report.

In a previously filed Memorandum Disposition, we affirmed the district court's grant of summary judgment in favor of AWS on the minority owners' claims for breach of contract, breach of implied duty

of good faith and fair dealing, and breach of the fiduciary duty of care as to the service fees. We also affirmed the district court's order excluding the minority owners' late-filed expert witness report. We deferred decision on the minority owners' challenge to the district court's grant of summary judgment on the minority owners' claim of breach of the fiduciary duty of loyalty.

## II

\*3 [1] We first resolve the issue of whether the price paid by AWS represented the fair value of the partnerships at the time of the asset sales. As noted, the minority owners submitted an expert report offering a limited critique of the AA/Kroll appraisals. Because we agree with the district court that the report sets forth no coherent opinion of what the fair value was or why the price paid was not fair market value, we hold that this report was insufficient to create a triable issue as to whether the price paid was fair as of the time of the asset sales. Thus, we must assume that the price paid was fair at the time, as a matter of law.

[2] This does not resolve the appeal, however, because if the sales nevertheless violated the duty of loyalty, *see infra*, the minority owners may be entitled to their share of a constructive trust on the partnership assets and any profits made thereupon. *See Wash. Rev. Code § 25.05.165(2)(a); Bassan v. Inv. Exch. Corp.*, 83 Wash.2d 922, 524 P.2d 233, 236-38 (1974).

## III

[3][4] We now turn to the issue that is the basis of our certification order: [FN2] the scope of a partner's fiduciary duty of loyalty in the context of a self-dealing transaction that was disclosed but not specifically authorized by the partnership agreement. No Washington court has had occasion to harmonize state case law concerning the fiduciary duty of loyalty with the Revised Uniform Partnership Act. *See Wash. Rev. Code §§ 25.05.005-.907*. Whether a trial on the minority owners' fiduciary duty of loyalty claim is necessary depends entirely upon the answer provided by the Supreme Court of Washington to our certified question. The answer to the certified question thus "is necessary ... to dispose of" this appeal. *Wash. Rev. Code § 2.60.020*.

The two Washington cases of which we are aware that are relevant to a partner's fiduciary duty of loyalty in the context of a sale between partners, *Karle v. Seder*, 35 Wash.2d 542, 214 P.2d 684 (1950), and *Bassan v. Investment Exchange Corp.*, 83

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Wash.2d 922, 524 P.2d 233 (1974), seem to point in different directions. *Karle* holds that full disclosure, fair price, and good faith suffice to satisfy a partner's fiduciary duty in the context of a consensual sale of partnership assets. 214 P.2d at 687-88. But *Bassan* holds that, where a partnership agreement is silent as to the specific transaction, a general partner may not sell property to a limited partnership and reap a profit, even where all partners expect that this kind of transaction will occur, the price is fair, and the amount of profit is reasonable. 524 P.2d at 236-38.

Critically, both cases predate Washington revisions to the Uniform Partnership Act, which appear to have made four important, relevant changes. First, the statute now states that the only fiduciary duties owed by a partner to the partnership or other partners are the duties of loyalty and care, as defined in the statute. Wash. Rev.Code § 25.05.165(1). Second, it expands the definition of the duty of loyalty to include "refrain[ing] from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership." *Id.* § 25.05.165(2)(b). Third, the statute clarifies that a partner does not violate a fiduciary duty merely because he furthers his own interest and that he may transact business with the partnership. *Id.* § 25.05.165(5), (6). Fourth, it permits the percentage of partners specified in the partnership agreement to authorize transactions that would otherwise violate the duty of loyalty. *Id.* § 25.05.015(2)(c)(ii).

\*4 In the instant case, we have construed the partnership agreements to allow for sale of all assets by either majority or supermajority vote. [FN3] None of them restricts the parties to whom assets may be sold. However, the partnership agreements do not specifically authorize sale of all assets to a related party as they do, for example, specifically authorize AWS to provide services to the partnership under certain conditions. If the Supreme Court of Washington holds that the asset sales would violate the duty of loyalty, and that the language in the partnership agreements is insufficient to contract around this duty under Wash. Rev.Code § 25.05.015(2)(c)(ii), then we must reverse the district court's grant of summary judgment on this issue. Otherwise, we will affirm.

Because this question of state partnership law is not settled in Washington, and because, if clarified definitively by the Supreme Court of Washington, the answer will have far-reaching effects on those who contract in Washington, or are subject to Washington

law, we have concluded that the appropriate course of action is to certify this issue to the Supreme Court of Washington.

#### ORDER

In light of our foregoing discussion, and because the answer to this question is "necessary ... to dispose" of this appeal, Wash. Rev.Code § 2.60.020, we respectfully certify to the Supreme Court of Washington the following question:

Does a controlling partner violate the duty of loyalty to the partnership or to dissenting minority partners where the controlling partner causes the partnership to sell all its assets to an affiliated party at a price determined by a third-party appraisal, when the appraisal and the parties to the transaction are disclosed and the partnership agreement allows for sale of assets upon majority or supermajority vote, but the partnership agreement is silent on the subject of sale to a related party?

We do not intend, by the phrasing of this question, to restrict the Supreme Court of Washington's consideration of this issue. We acknowledge that the Supreme Court of Washington may, in its discretion, reformulate the question. *Broad v. Mannesmann Anlagenbau AG*, 196 F.3d 1075, 1076 (9th Cir. 1999); *Lenhardt v. Ford Motor Co.*, 102 Wash.2d 208, 683 P.2d 1097, 1098 (1984).

If the Supreme Court of Washington accepts review of the certified question, we designate appellants (the minority owners) to file the first brief pursuant to Wash. R.App. P. 16.16(e)(1).

The Clerk of Court is hereby ordered to transmit forthwith to the Supreme Court of Washington, under official seal of the United States Court of Appeals for the Ninth Circuit, a copy of this order and all briefs and excerpts of record pursuant to Wash. Rev.Code § 2.60.010(4), 2.60.030(2), and Wash. R.App. P. 16.16.

Further proceedings in this Court on the certified question are stayed pending the Supreme Court of Washington's decision whether it will accept review, and, if so, receipt of the answer to the certified question. The case is withdrawn from submission, in pertinent part, until further order from this Court. The panel will resume control and jurisdiction upon receipt of an answer to the certified question or upon the Supreme Court of Washington's decision to decline to answer the certified question. When the Supreme Court of Washington decides whether or not to accept the certified question, the parties shall file a

--- F.3d ----, 2007 WL 676007 (9th Cir.(Wash.))  
(Cite as: 2007 WL 676007 (9th Cir.(Wash.)))

joint report informing this Court of the decision. If the Supreme Court of Washington accepts the certified question, the parties shall file a joint status report informing this Court when the Supreme Court of Washington issues its answer.

\*5 It is so **ORDERED**.

FN1. Certain facts remain disputed at the summary judgment phase. The Supreme Court of Washington may supplement this statement of facts with any additional information that it deems important from the certified record in order to resolve the certified question. The parties are obviously free to discuss the factual record in support of their legal positions when they brief the issue before the Supreme Court of Washington.

FN2. Even though this course of action was not suggested by either party, we may properly certify a question sua sponte. See Wash. Rev. Code § 2.60.030(1) ("Certificate procedure may be invoked by a federal court upon its own motion."); Keystone Land & Dev. Co. v. Xerox Corp., 353 F.3d 1093, 1095 n. 2 (9th Cir.2003).

FN3. Three of the nine partnership agreements (Boise, Rochester, and Texarkana) expressly permit the sale of all or substantially all of the partnership's assets upon a 66.6% vote. The remaining six agreements provide for dissolution of the partnership upon the sale or assignment of substantially all of the partnership's assets, and state that every act other than certain listed acts not relevant here may be accomplished by majority vote.

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# APPENDIX B

**H**  
Only the Westlaw citation is currently available.

This case was not selected for publication in the Federal Reporter.

Please use FIND to look at the applicable circuit court rule before citing this opinion. (FIND CTA9 Rule 36-3.)

United States Court of Appeals,  
Ninth Circuit.  
J&J CELCOM; Lupe Azevedo; Woodrow W. Holmes, Jr.; Lucille Hoss; Daniel Murray; Rajive Oberoi; Kenneth L. Ramsey; Gary R. Robbins; Joanne Robbins; S&D Partnership; Cell-Cal IX-T9; Nancy Donnelly; Rodger D. Friz; Sid Danny Hoff; Om Parkash Kalra; Ronald Wilson; Delchi Corporation, Plaintiffs-Appellants,  
v.  
AT&T WIRELESS SERVICES, INC.; McCaw Cellular Interests Inc.; AT&T Wireless Services Of Colorado LLC; AT&T Wireless Services Of Idaho Inc.; AT&T Wireless Services of Washington LLC; Boise City Cellular Partnership, formerly known as New Boise City Cellular Partnership; Fort Collins-Loveland Cellular Telephone Co., formerly known as New Fort Collins-Loveland Cellular Telephone Company; Greeley Cellular Co., formerly known as New Greeley Cellular Company; Yakima Cellular Telephone Company, formerly known as New Yakima Cellular Telephone Company; McCaw Communications of Wheeling, Inc.; McCaw Communications of Texarkana, Inc.; AT&T Wireless Services of California, Defendants-Appellees.  
**No. 05-35567.**

Argued and Submitted Nov. 14, 2006.  
Filed Dec. 26, 2006.

**Background:** Former owners of fractional interests in general cellular telephone partnerships sued telecommunications provider and several of its wholly-owned subsidiaries, alleging provider's non-voluntary acquisition of their interests breached partnership agreements, implied covenant of good

faith and fair dealing, and provider's fiduciary duties of loyalty and care. The United States District Court for the Western District of Washington, Marsha J. Pechman, J., 2005 WL 1126924, entered summary judgment in favor of defendants. Plaintiffs appealed.

**Holdings:** The Court of Appeals held that:

- (1) provider's sale and acquisition of partnership assets and subsequent dissolution of partnerships did not breach of partnership agreements;
  - (2) additional obligations would not be imposed on provider based on the implied covenant of good faith and fair dealing;
  - (3) provisions of partnership agreements were consistent with Washington partnership statute; and
  - (4) exclusion of expert report, which was served on last day of discovery, was not an abuse of discretion.
- Affirmed in part.

West Headnotes

**[1] Telecommunications**  1025  
372k1025 Most Cited Cases

Telecommunications provider's sale and acquisition of assets of general cellular telephone partnerships and subsequent dissolution of the partnerships did not breach of partnership agreements, which unambiguously allowed for a sale of all assets by either majority or supermajority vote and which did not restrict the parties to whom assets could be sold, under District of Columbia, Delaware, and Maryland law.

**[2] Telecommunications**  1025  
372k1025 Most Cited Cases

Additional obligations not found in language of general cellular telephone partnership agreements would not be imposed, regarding sale of acquired interests in partnerships, based on the implied covenant of good faith and fair dealing.

**[3] Telecommunications**  1032  
372k1032 Most Cited Cases

District court properly applied Washington law at the summary judgment stage to minority owners' claims that telecommunications provider breached its fiduciary duty of care by charging excessive service fees for certain roaming and switch-sharing services, where neither party identified a conflict between the law of Washington and the law of another state.

**[4] Partnership** 93

289k93 Most Cited Cases

Provisions of general cellular telephone partnership agreements, specifying that partnerships could contract with a partner or affiliates of a partner for goods or services, so long as such agreements were on terms no less favorable to partnerships than could be obtained if made with a person who was not a partner, were consistent with Washington partnership statute which provided that partner did not violate a duty or obligation under statute or under partnership agreement merely because partner's conduct furthered partner's own interest. West's RCWA § 25.05.165(5).

**[5] Federal Civil Procedure** 1278

170Ak1278 Most Cited Cases

Exclusion of expert report, which minority owners of fractional interests in general cellular telephone partnerships served on the last day of discovery, nearly three months after deadline established by the district court for its disclosure of this expert report, was not an abuse of discretion, in action against telecommunications provider for breach of partnership agreements, where minority owners failed to establish a substantial justification for the late-filed report or harmlessness. Fed.Rules Civ.Proc.Rule 37(c)(1), 28 U.S.C.A.

John J. Oitzinger, Esq., Helena, MT, for Plaintiffs-Appellants.

Brendan Thomas Mangan, Esq., Heller Ehrman, LLP, Seattle, WA, for Defendants-Appellees.

Appeal from the United States District Court for the Western District of Washington, Marsha J. Pechman, District Judge, Presiding. D.C. No. CV-03-02629-MJP.

Before: RYMER, BERZON, and TALLMAN, Circuit Judges.

MEMORANDUM [FN\*]

\*1 In this diversity action, J&J Celcom and other former owners of fractional interests in nine general cellular telephone partnerships ("minority owners") appeal an adverse summary judgment of the United States District Court for the Western District of Washington in favor of AT&T Wireless Services and several of its wholly-owned subsidiaries ("AWS"). The minority owners also appeal the district court's denial of their motion for partial summary judgment and its orders excluding a late-filed expert witness report.

The minority owners assert that AWS's non-voluntary acquisition of their interests breached the partnership agreements, the implied covenant of good faith and fair dealing, and AWS's fiduciary duties of loyalty and care. The minority owners also allege that AWS charged excessive fees for certain roaming and switch-sharing services that failed to take into account its actual costs of providing the services, thereby committing a breach of AWS's duty of care and the implied covenant of good faith.

We have jurisdiction under 28 U.S.C. § 1291. We will provide a full recitation of the facts underlying this case when we file the Order certifying a question to the Supreme Court of Washington.

I

We review a district court's grant or denial of summary judgment de novo. Nw. Envtl. Advocates v. Nat'l Marine Fisheries Serv., 460 F.3d 1125, 1132 (9th Cir.2006). To oppose summary judgment, a party must identify specific facts establishing a genuine issue of material fact for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Conclusions or speculative allegations will not suffice. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888-89, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990). We view the evidence in the light most favorable to the party opposing summary judgment. Downey v. Crowley Marine Servs., Inc., 236 F.3d 1019, 1022 (9th Cir.2001).

We review de novo a district court's interpretation of state law. Salve Regina Coll. v. Russell, 499 U.S. 225, 231, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991). We review an order excluding a proposed expert report under Federal Rule of Civil Procedure 37(c)(1) for abuse of discretion. Yeti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1105-06 (9th Cir.2001).

II

We affirm the district court's grant of summary judgment on the minority owners' claims that AWS's non-voluntary acquisition of the minority owners' interests constituted a breach of the partnership agreements and a breach of the implied covenant of good faith and fair dealing.

A

A federal court sitting in diversity must apply the choice of law rules of the forum state to determine which state's law applies. 389 Orange St. Partners v. Arnold, 179 F.3d 656, 661 (9th Cir.1999).

Washington law provides that "[a]n express choice of law clause in a contract will be given effect, as expressing the intent of the parties, so long as application of the chosen law does not violate the fundamental public policy of [Washington]." McGill v. Hill, 31 Wash.App. 542, 644 P.2d 680, 683 (1982). According to the partnership agreements' choice of law provisions, five of the agreements are governed by the laws of the District of Columbia, three by the laws of Delaware, and one by the laws of Maryland. The parties agree that the choice of law provisions apply to the minority owners' claims of breach of contract and breach of the implied covenant of good faith and fair dealing.

B

\*2 [1] The District of Columbia, Delaware, and Maryland all follow the law of objective interpretation of contracts: when contract language is unambiguous, the court must give effect to its plain meaning. See Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co., 616 A.2d 1192, 1195-96 (Del.1992); Bragdon v. Twenty-Five Twelve Assocs. Ltd. P'ship, 856 A.2d 1165, 1170 (D.C.2004); Gen. Motors Acceptance Corp. v. Daniels, 303 Md. 254, 492 A.2d 1306, 1310 (1985). The partnership agreements unambiguously allow for a sale of all assets by either majority or supermajority vote. None of them restricts the parties to whom assets may be sold, and the minority partners cite no authority for their contention that statutory fiduciary duties are incorporated as terms of the contract. [FN1] Therefore, AWS's sale and acquisition of the partnership assets and subsequent dissolution of the partnerships do not constitute a breach of the partnership agreements.

C

[2] Because a court generally may not impose additional obligations not found in the language of a contract based on the implied covenant of good faith and fair dealing, the district court properly dismissed the minority owners' claim of breach of the implied covenant of good faith and fair dealing. See Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co., 708 A.2d 989, 992-93 (Del.1998); Paul v. Howard Univ., 754 A.2d 297, 310-11 (D.C.2000); Parker v. Columbia Bank, 91 Md.App. 346, 604 A.2d 521, 531 (1992). The minority owners have adduced no evidence to support their contention that their "objectively reasonable expectations ... contemplated an arms length sale to a third party rather than a transfer to a shell entity created by the majority partner," nor do they explain how the asset sale was an artifice or subterfuge designed to

circumvent any rights they had under the agreements.

III

We affirm the district court's grant of summary judgment on the minority owners' claims that AWS breached its fiduciary duty of care and the implied covenant of good faith by charging excessive service fees.

The minority owners also claim that AWS's non-voluntary acquisition of their interests violated its fiduciary duty of loyalty. We are unable to resolve this issue without a definitive ruling from the Supreme Court of Washington on an unresolved issue of state partnership law. Depending on how that court responds to the question we will certify, we will then determine whether the minority owners present a genuine issue of material fact sufficient to require reversal of the district court's award of summary judgment on this claim.

A

[3] The parties dispute which state's law applies to the breach of fiduciary duty claims. Under Washington law, breach of fiduciary duty sounds in tort, Miller v. U.S. Bank of Wash., N.A., 72 Wash.App. 416, 865 P.2d 536, 543 (1994), and contractual choice of law provisions do not govern tort claims arising from the contract, Haberman v. Wash. Pub. Power Supply Sys., 109 Wash.2d 107, 744 P.2d 1032, 1066 (1987). The Washington Supreme Court has held:

\*3 An actual conflict between the law of Washington and the law of another state must be shown to exist before Washington courts will engage in a conflict of law analysis... Absent such a showing, the forum may apply its own law. Burnside v. Simpson Paper Co., 123 Wash.2d 93, 864 P.2d 937, 942 (1994) (internal citations omitted); see also Alaska Nat'l Ins. Co. v. Bryan, 125 Wash.App. 24, 104 P.3d 1, 5 (2004). At the summary judgment hearing, the minority owners' counsel represented that he was unaware of any conflict of law and suggested the absence of a conflict. Indeed, at the argument for this appeal, counsel for both parties asserted that Washington law controls the fiduciary duty claims. Because neither party identified a conflict, the district court properly applied Washington law to the minority owners' fiduciary duty claims.

B

The minority owners claim that AWS breached its fiduciary duty of care by imposing excessive switch-sharing and roaming fees without being duly

informed of "all information reasonably available." They claim that, while "AWS knew its costs per minute of use and knew the costs of providing switches to the minority owned partnerships[, t]here is no evidence ... to indicate that the AWS employees on the executive committees of the partnerships considered any of these facts at the times that they were required to make the determinations of reasonableness [of service fees.]"

[4] Because a party must exercise a duty of care in conducting the business of the partnership, *see* Wash. Rev.Code § 25.05.165(3), the provisions of the partnership agreement necessarily define the scope of the duty. Here, all nine agreements specify that the partnership may contract with a partner or affiliates of a partner for goods or services, so long as such agreements are "on terms no less favorable to the Partnership than could be obtained if it was [sic] made with a person who is not a Partner." Four agreements specify that affiliates contracting with the partnership to provide goods or services may receive "reasonable profit and overhead allowances," and the others specify that the service agreements must be "reasonable." These provisions are consistent with the Washington partnership statute which provides that "[a] partner does not violate a duty or obligation under this [statute] or under the partnership agreement merely because the partner's conduct furthers the partner's own interest." Wash. Rev.Code § 25.05.165(5).

The minority owners have adduced no substantial evidence demonstrating that the partnerships received switch-sharing and roaming services on terms less favorable than those they could have received from a third party, or that AWS's fees were otherwise unreasonably high. [FN2] By presenting no evidence of damages, the minority owners failed to support an essential element of their claim. *Cf. Senn v. Nw. Underwriters, Inc.*, 74 Wash.App. 408, 875 P.2d 637, 639 (1994). Therefore, the district court's grant of summary judgment on this claim was proper. For the same reason, summary judgment as to the implied covenant of good faith and fair dealing was also proper.

#### IV

\*4 [5] The district court did not abuse its discretion in excluding the proposed expert report of the minority owners' expert witness under Federal Rule of Civil Procedure 37(c)(1). Rule 37(c)(1) prohibits the use of an untimely expert report at trial absent a substantial justification and showing of harmlessness. We afford "particularly wide latitude to the district

court's discretion to issue sanctions under Rule 37(c)(1)." *Yeti*, 259 F.3d at 1106.

The minority owners served the expert report on the last day of discovery, nearly three months after the deadline for disclosure of this expert report established by the district court. The minority owners failed to establish a substantial justification for the late-filed report or harmlessness. Therefore, the district court's exclusion of the report under Rule 37(c)(1) was not an abuse of discretion. *See id.* at 1106-07.

#### V

We affirm the district court's grant of summary judgment on the minority owners' claims for breach of contract, breach of implied duty of good faith and fair dealing, and breach of the fiduciary duty of care as to the service fees. We also affirm the district court's order excluding their late-filed expert witness report. Pending the response to the question we will certify to the Supreme Court of Washington, we refrain from ruling on the district court's award of summary judgment on the minority owners' claim of breach of fiduciary duty of loyalty.

**AFFIRMED in part.** The Order inviting the parties to comment on our proposed certified question of state law to the Supreme Court of Washington is filed herewith. The Order certifying the question to the Supreme Court of Washington will be filed in due course, after considering the responses of the parties. This appeal shall remain under submission pending receipt of the response of the state supreme court. **Issuance of the mandate shall be stayed.**

FN\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

FN1. Any default rule imposed by statutory partnership law would not be considered a term of the contract, but rather as a fiduciary duty. *See, e.g., Del.Code Tit. 6, § 15-103(a); D.C.Code § 33-101.03(a); Md.Code Corps. & Ass'ns § 9A-103(a)*. Washington treats alleged breach of statutorily imposed duties as tort claims. *See Hudson v. Condon*, 101 Wash.App. 866, 6 P.3d 615, 619 (2000); *G.W. Constr. Corp. v. Prof'l Serv. Indus., Inc.*, 70 Wash.App. 360, 853 P.2d 484, 486 (1993) ("An action sounds in contract when the act complained of is a breach of a specific term of the contract, without

reference to the legal duties imposed by law on that relationship.").

FN2. Although the minority owners suggest that the burden would be on AWS to produce evidence of the costs incurred or profits gained because AWS breached its duty of care when it determined the rates to be charged, they cite no Washington authority for that proposition.

Slip Copy, 2006 WL 3825343 (9th Cir.(Wash.))

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