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NO. 57938-0-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

GERALD KINGEN, et ux., and SCOTT SWITZER, et ux.,

Appellants,

vs.

MORGAN, et al., individually and on
behalf of a Class of Employees,

Respondents/Cross-Appellants.

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REPLY BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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I. INTRODUCTION

The Court abused its discretion by not awarding Plaintiffs a fee multiplier to compensate their counsel for the contingent risk of this case and the quality of representation. Specifically, the Court abused its discretion by denying a multiplier based on irrelevant factors.

In addition, the court abused its discretion by cutting Plaintiffs' primary fee request by **one third** including a two thirds reduction (totaling \$17,744.42) in Plaintiffs' fees for the summary judgment briefing that actually resolved this case, and unwarranted reductions for reasonable fees spent opposing Defendants' motion to set aside a default judgment and updating Class records.

Finally, the Court abused its discretion when it reduced Plaintiffs' supplemental fee award by \$15,040.05 but failed to provide any explanation or justification for this reduction. Such an unsubstantiated reduction in fees cannot be upheld.

Accordingly, this Court should reverse and remand for a determination of reasonable fees and a multiplier based on the contingent nature of this case and the quality of work performed.

II. FACTS

On December 17, 2004, the Plaintiff Class filed a motion for reasonable attorneys' fees and costs with a multiplier of 1.5 to compensate

for the contingent nature of the case and the results obtained. CP 556-566.

On April 5, 2005, the Court issued a letter ruling that constitutes the only stated "opinion" with respect to the attorneys' fees and costs. CP 1396-

1411. In it, the Court states:

Since I don't know if there will actually be a trial it is premature to make the final decision on attorney fees or to make a decision on the issue of a lodestar multiplier. I will indulge another observation, however, about the multiplier, and that is that this was a law suit in which the basic core fact of unpaid wages was clear, in some amount, and the defendants being pursued for this statutory remedy were easily determined (plaintiffs' counsel checked their financial status out) to be well capable of collecting a judgment from in terms of their personal wealth. It would seem the usual risk factor of a contingent fee in a personal injury or medical malpractice is absent in this case.

CP 1410. Later, based on additional post summary judgment briefing, the Court awarded additional attorneys' fees (CP 2414-2415) and entered an Amended Judgment with respect to attorneys' fees and costs. CP 2411-2413. But there was never any further explanation from the Court regarding its failure to award a multiplier.

III. ARGUMENT

A. The Trial Court Abused Its Discretion by Not Awarding a Multiplier.

In cases where the attorneys' compensation is contingent on success, the court may consider the necessity of adjusting the lodestar figure. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 589-99,

675 P.2d 193 (1983), The contingency adjustment is designed to compensate for the possibility that the litigation would be unsuccessful and that no fee would be obtained. *Van Pham v. Seattle City Light*, 124 Wn. App. 716, 721, 103 P.3d 827 (2004).

The circumstances meet the tests set forth in *Bowers*, where Washington case law supports a contingency adjustment to the lodestar. *Van Pham*, 124 Wn. App. at 723. There are two alternative categories through which an increase to the lodestar can be justified: (1) the contingent nature of success; and (2) the quality of the work performed. *Bowers*, 100 Wn.2d at 598. In adjusting the lodestar for the contingent nature of success, the court must assess the likelihood of success at the outset of the litigation as well as whether the hourly rate underlying the lodestar fee already compensates for the risk of non-payment. *Bowers*, 100 Wn.2d at 598, 599. Additional subjective factors that the courts consider are the level of skill required by the litigation, the amount of potential recovery, time limitations imposed by the litigation, the attorney's reputation, and the undesirability of the case. *Bowers*, 100 Wn.2d at 581.

Under federal law, the same contingent nature of success justification for adjusting the lodestar applied. *See Fischel v. Equitable Life Assur. Society of U.S.*, 307 F.3d 997, 1008 (9th Cir. 2002). Under this

case-law, which applies the same test for adjusting the lodestar as *Bowers*, courts abuse their discretion if they fail to apply a risk multiplier where: (1) attorneys take a case with the expectation that they will receive a risk enhancement if they prevail; (2) their hourly rate does not reflect that risk; and (3) there is evidence that the case was risky. *Id.*

In assessing whether to award a multiplier, a court abuses its discretion if it takes irrelevant factors into account. *Van Pham v. Seattle City Light*, 124 Wn. App. at 723-725 (the plaintiffs' inability to supply their attorney with compelling evidence at the outset of the case was an irrelevant factor in determining the risk their attorney assumed in taking the case and the court's reliance on this fact to deny a multiplier was an abuse of discretion.)

Here, Plaintiffs sought a multiplier award based on the contingent nature of success and the quality of work performed. CP 562. Defendants argued that the Court did not abuse its discretion in refusing to award a multiplier because it considered the relevant factors for making such an award and chose not to give one. In reality, however, the Court abused its discretion by relying on irrelevant facts to deny a multiplier.

1. Contingent Risk.

Under the contingent risk test, the only relevant issue bearing on the appropriateness of a multiplier is whether the plaintiff's counsel, at the

outset of the case, faced a risk that the litigation would be unsuccessful and that they would obtain no fee. *See Bowers*, 100 Wn.2d at 598-599; *Fischel*, 307 F.3d at 1008. In its only discussion on a multiplier, the Court noted that the fact that the Plaintiffs were owed wages was always clear, and that the Defendants were capable of paying any judgment obtained from their personal wealth. CP 1575. Neither of these factors, however, is relevant to determining whether a multiplier should be awarded based on the contingent risk theory.

First, the Defendants' ability to satisfy a judgment against them is not relevant because the analysis for granting a multiplier under the contingent risk theory focuses on the likelihood of the litigation's success, not on whether the plaintiff, if successful in the litigation, will be unable to collect on a judgment. *See Bowers*, 100 Wn.2d at 598-599; *Fischel*, 307 F.3d at 1008. Obviously, a risk multiplier cannot compensate for the possibility of a judgment-proof defendant because, in that case, the plaintiff's attorney will receive no compensation regardless of whether the court awards a substantial multiplier. Rather, a contingent risk multiplier compensates the plaintiff's counsel for representing plaintiff on a contingent basis even where there is a risk that the litigation will not succeed. All cases have some degree of risk; otherwise, the defendants

would have no defenses and the case would not get litigated.¹ Thus, only factors relevant to whether, at the outset, the case involved some risk of non-payment can be considered by the court in determining whether to apply a multiplier. The collectability of a judgment is not such a factor.

Second, that the Plaintiff Class was clearly owed wages is also irrelevant to the risk Plaintiffs' attorneys assumed. In fact, Defendants have never disputed that the Plaintiffs were owed wages. CP 455. Rather, the controversy (and risk for Plaintiffs' counsel that the litigation would not be successful) concerned whether the **individual Defendants** were legally responsible for the Plaintiffs' unpaid wages, rather than, as Defendants contend, just the Funsters' bankruptcy estate. Defendants claim that the Funsters' bankruptcy conversion to a Chapter 7 liquidation removed the individual Defendants from control of the company before Plaintiffs would have received their wages and absolved the individual Defendants from liability. Defendants further argue that this issue involves a matter of first impression for the courts. Thus, under Defendants' own reasoning, there is no question that, at the outset of this litigation, Plaintiffs' counsel assumed a risk that this litigation could be unsuccessful. Therefore, the Court abused its discretion by denying a

¹ The fact that this litigation has been pending for four years and could easily continue on for several more in the appellate courts underscores the risk of non-payment. CP 1-10.

multiplier by considering a factor that had nothing to do with the risk assumed.

Finally, Defendants do not contest that Plaintiffs otherwise qualify for a multiplier. Specifically: (1) Plaintiffs' Class counsel took the case on a contingency fee basis with the expectation of an enhancement, if they prevailed, above their normal hourly fee; (2) the Plaintiffs' Class counsels' hourly rates are reasonable for the work performed and are the rates set by the firm for performing work on a non-contingency basis for an hourly fee paying client; and (3) Plaintiffs' counsel has proceeded at considerable risk and there has been no assurance of recovery as demonstrated by the fact that the lawsuit was filed almost four years ago, in June of 2003, and the appeal process has only just begun. CP 605, ¶ 8. Based on this, Plaintiffs are entitled to a multiplier award.

2. Quality of Representation.

The court may also award a multiplier based on the quality of representation. *Carlson v. Lake Chelan CMTY. Hosp.*, 116 Wn. App. 718, 742-743, 75 P.3d 533 (2003). Here, Plaintiffs' Class counsel succeeded in obtaining **double** the amount of wages due for each class member, plus prejudgment interest. CP 2411-2413. Class counsel obtained this result on summary judgment without the necessity of an expensive or time consuming trial. Yet, the Court refused to award a multiplier without any

explanation other than the "observation" noted in the fact section. This constitutes an abuse of discretion.

3. Failure to Award a Multiplier of 1.5 Was an Abuse of Discretion.

Plaintiffs requested an upward adjustment of 50% based upon the contingent nature of success, the risk of non-payment, and the quality of the work performed. *Carlson, supra*, at 743, approving multiplier of 1.5, or 50% upward adjustment to the lodestar fee award, based upon the contingent nature of success and quality of work, stating:

The court concluded that the case was contingent, Mr. Carlson proceeded at considerable risk, defense counsel granted no concessions, and there was no assurance of recovery.

And see, Smith v. Behr Process Corporation, 113 Wn. App. 306, 342-43, 54 P.3d 665 (2002) (awarding 1.5 multiplier because of risk involved for the class counsel); *Somsak v. Criton Technologies/Heath Teena, Inc.*, 113 Wn. App. 84, 99, 52 P.3d 43 (2002) (superior court did not abuse its decision by applying 1.5 multiplier to the contested fee); *Ethridge v. Hwang*, 105 Wn. App. 447, 461, 20 P.3d 958 (2001) (multiplier of 1.25 because of risk of losing, difficulty of case, and quality of work).

In the instant matter, Plaintiffs' counsels' representation of the class was on a contingency fee which meant that counsel would receive no fee

unless the class prevailed. CP 605. Plaintiffs' counsel proceeded at considerable risk, and there was no assurance of recovery. *Id.* It is quite obvious that an attorney can not afford to represent clients on a contingency fee basis, where the risk of non-payment is present, by charging the same rate and receiving the same compensation for an hour of time, as she would from a client who pays by the hour on a regular monthly basis, where the risk of non-payment is not a factor.

B. The Court Abused Its Discretion by Drastically Reducing Plaintiffs' Initial Fee Award.

By prevailing on their claims, the Plaintiff Class is entitled to recover attorneys' fees for all time reasonably expended on their case multiplied by a reasonable hourly rate. *Bowers v. Transamerica Title Ins.*, 100 Wn.2d 581, 675 P.2d 193 (1983). The statutes authorizing attorneys' fees in this case, RCW 49.48.030 and RCW 49.52.070, are remedial statutes that should be construed liberally. *Fraser v. Edmonds Cmty. Coll.*, 138 Wn. App. 51, 56 (2006). The reasonableness of an award is subject to appellate review. *Allard v. First Interstate Bank*, 112 Wn.2d 145, 148, 773 P.2d 420 (1989). A trial court abuses its discretion when its attorneys' fee award is based on untenable grounds or reasons. *Id.*

Here, the Court abused its discretion when it cut **one third** of Plaintiffs' primary attorneys' fee request—a reduction totaling \$37,654.89.

CP 1396-1411. While the Court justified its ruling on its belief that this case did not involve complex legal issues, this view is misplaced. The Plaintiff Class has had to respond to numerous and ever-changing arguments by Defendants that the bankruptcy's conversion of the corporation to a Chapter 7 liquidation absolved the individual Defendants from liability and their repetitive attempts to delay or set aside entry of judgment. Notably, the Court never inquired as to the amount of fees generated by defense counsel, nor have the Defendants ever submitted anything regarding their total fees or their hourly rates. Clearly, the court should take into account the fee charged by opposing counsel in determining the reasonableness of the requesting party's fees. Here, the Court simply presumed, without any substantiation, that Plaintiffs' Class counsels' fees were too high by almost \$40,000.

Defendants simply argue that the Court's analysis was correct, but given that Plaintiffs succeeded on the merits of their claims and, in fact, doubled the recovery (plus interest) of each class member, this reduction represents an abuse of discretion. Specifically, the Court abused its discretion when reducing Plaintiffs' counsels' fees for work on litigation central to the case.²

² See CP 857-1030 for the detailed analysis presented to the Court in support of Plaintiffs' attorneys' fee requests.

1. Summary Judgment Motion.

The Court improperly cut \$17,744.42 (**two thirds**) from the fees requested for work in preparing a motion for summary judgment and responding to Defendants' cross-motion. CP 1572-1574. These pleadings were dispositive of the case and, ultimately, led to Plaintiffs obtaining a judgment exceeding \$400,000. CP 115-550; 2411-2413. The Court's justification for cutting Plaintiffs' briefing fees by *two thirds*, presumably based on the assumption that Plaintiffs could have produced the same quality of briefing in one third the time actually spent, was not based on any evidence in the record and represents an abuse of discretion.

2. Opposition to Motion to Set Aside Default Judgment.

The court also abused its discretion when it cut \$3,546.30 in attorneys' fees for Plaintiffs' opposition to Defendants' motion to set aside the default judgment Plaintiffs obtained at the onset of this case. CP 1569-1570. The default judgment was important: it demonstrated Defendants' liability and Plaintiffs' entitlement to double damages without the need to incur substantial attorneys' fees and endure lengthy litigation.³ Thus, the motion to vacate presented significant stakes for the Plaintiffs. As a result, Plaintiffs' counsel carefully and thoroughly opposed the motion to vacate, knowing that if they prevailed, this case would be mostly resolved with

³ Both of which have now resulted.

relatively little overall effort. Plaintiffs' fees for this work were appropriate as any other reasonable attorney would have put the same amount of work into the opposition.

The Court in *Woodridge v. Marlene Industries Corp.*, 898 F.2d 1169, 1177 (6th Cir. 1990), explained:

The question is not whether a party prevailed on a particular motion or whether in hindsight the time expenditure was strictly necessary to obtain the relief achieved. Rather, the standard is whether a reasonable attorney would have believed the work to be reasonably expended in pursuit of success at the point in time when the work was performed.

A reasonable attorney would have responded to a motion to set aside a judgment representing, approximately, over \$240,000 in unpaid wages (doubled), plus attorneys' fees and costs. *See, also, Grant v. Martinez*, 973 F.2d 96, 99 (2d Cir. 1992):

The relevant issue, however, is not whether hindsight vindicates an attorney's time expenditures, but whether, at the time the work was performed, a reasonable attorney would have engaged in similar time expenditures.

As explained in *Cabrales v. County of Los Angeles*, 935 F.2d 1050, 1053 (9th Cir. 1991):

If a plaintiff wins on a particular claim, she is entitled to all attorney's fees reasonably expended in pursuing that claim—even though she may have suffered some adverse rulings. . . . Rare, indeed, is the litigant who doesn't lose some skirmishes on the way to winning the war. Lawsuits usually involve many reasonably disputed issues and a lawyer who takes on only those battles he is certain of winning is probably not serving his client vigorously enough; losing is part of winning.

Based on the above, the Court abused its discretion by cutting Plaintiffs' attorneys' fees for this work.

3. Updating Class Records.

In assessing the work performed by Plaintiffs' counsel to keep the Plaintiff Class up-to-date, the Court reduced the hourly rate of paralegal Margaret Moynan from \$145 to \$70 and halved the time incurred. CP 1571-1572. Ms. Moynan's hourly rate was established as reasonable through three separate declarations. CP 604-605; 1744-1745; 1762-1763. No evidence disputing the reasonableness of Ms. Moynan's hourly rate was presented to the Court. And, there is no evidence anywhere in the record that \$70 per hour is a reasonable hourly rate for an experienced paralegal with over twenty years of experience. The Court's reduction and assignment of a new hourly rate representing only 48% of the established rate was completely arbitrary and an abuse of discretion.

The Court also abused its discretion by halving the time spent on this task. Plaintiffs incurred approximately 25 hours over a 14-month period to maintain the class list (less than 2 hours per month). Keeping clients informed and keeping accurate client records is a key part of Plaintiffs' counsels' obligations under CR 23 and the Rules of Professional Conduct. Plaintiffs spent an appropriate amount of time to maintain a list,

and communicate with, class members totaling 182 individuals. Reducing fees for this work was an abuse of discretion.

4. Use of More than One Attorney.

In several instances, the Court cut time because of the use of more than one attorney. CP 1396-1411. As explained in Plaintiffs' previous briefing, use of associate time at a lower hourly rate is more efficient, but such time still needs partner review. CP 858, 863-864. In *Wheeler v. Catholic Archdiocese*, 65 Wn. App. 552 (1992), *reversed in part on other grounds*, 124 Wn.2d 634, 880 P.2d 29 (1994), the court held that the involvement of more than one attorney is not excessive when there are significant legal issues. Defendants have proposed that the legal issues are significant enough to warrant appellate review, and Defendants have used more than one attorney throughout the proceedings. CP 1730-1731. The use of more than one attorney was warranted.

5. The Amount of Damages and the Fee Agreement Do Not Support a Reduction in Attorneys' Fees.

First, Defendants suggest that the Court's fee reduction was appropriate because Plaintiffs' original damage claim was reduced by the value of cash tips already received, and Plaintiffs' fee award exceeded the principal amount of wages owed. Defendants' argument is wrong because Plaintiffs substantially prevailed, and the facts are wrong because

Plaintiffs' principal recovery amount was \$241,428.96, not \$120,000, which exceeded the amount of attorneys' fees awarded by 52%. CP 2412.

To support their proportionality argument, Defendants cite a contract fee case, *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 859 P.2d 1210 (1993). But in civil rights cases the proportionality of plaintiff's damages to his/her attorneys' fee award is irrelevant. *Travis v. Washington Horse Breeders Assn.*, 111 Wn.2d 396, 409, 759 P.2d 418 (1988); *Martinez v. City of Tacoma*, 81 Wn. App. 228, 236, 914 P.2d 86, review denied, 130 Wn.2d 1010 (1996). The same principle applies in a wage and hour case because the wage statute is a remedial statute that must be liberally construed to effectuate its purpose: to protect employee wages and assure payment. *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 961 P.2d 371 (1998); *Dautel v. Heritage Home Center, Inc.*, 89 Wn. App. 148, 948 P.2d 397, review denied, 135 Wn.2d 1003, 959 P.2d 126 (1997); *Cohn v. Department of Corrections of State of Washington*, 78 Wn. App. 63, 895 P.2d 857 (1995); *Hitter v. Bellevue School District No. 405*, 66 Wn. App. 391, 832 P.2d 130, review denied, 120 Wn.2d 1013, 844 P.2d 435 (1992). Individuals could not obtain representation for unpaid wages if attorneys were not compensated for cases where the fees exceed the amount of wages owed. Otherwise, defendants would have the obvious incentive to litigate rather than pay any unpaid wages.

Second, Defendants allege that Plaintiffs' fee agreement entitled them to less fees than the Court awarded.⁴ The terms of the fee agreement are irrelevant in determining an award of reasonable fees. *See Martinez*, 81 Wn. App. at 241. The measure of fees awarded under a fee statute is the amount customarily charged in the locality for similar services, not the amount actually charged. Thus, even pro bono attorneys can seek fees under the wage and hour statute. So, regardless of the percentage or other arrangement between the plaintiff class and their counsel, plaintiffs are entitled to the lodestar based on reasonable rates times hours, plus a multiplier. *Council House, Inc. v. Hawk*, 136 Wn.App. 153, 160 (2006). Plaintiffs submitted evidence that their hourly rates and fees were reasonable, and there is no contradictory evidence in the record. Yet, the court disregarded this evidence entirely in rendering its ruling on fees.

Regardless, Defendants' statement is incorrect because Plaintiffs' fee agreement entitles Plaintiffs' counsel to one third of the **total recovery** (including a fee award). Finally Defendants, without support, suggest that half of the pleading documents generated in this matter concerned Plaintiffs' fee requests. This is not true, and the trial court properly did not consider this as a factor in awarding fees. Accordingly, the Defendants'

⁴ The fee agreement itself is a confidential attorney-client communication and work product, and therefore, the agreement and the specific terms have not been produced in this litigation.

efforts to further justify the Court's improper reduction of Plaintiffs' fees by raising these additional factors should be disregarded.

C. The Court Abused Its Discretion by Reducing Plaintiffs' Supplemental Fee Award.

To make their fee awards susceptible to review, trial courts must articulate the reasons for their fee awards. *Bowers*, 100 Wn.2d at 595. Because the Court provided no explanation for cutting \$15,040.05 from Plaintiffs' supplemental fee request, this ruling, without more, cannot be upheld. CP 2414-2415. Moreover, as explained below, the work represented in Plaintiffs' supplemental fee requests related to several key tasks: (1) responding to Defendants' motion to vacate Plaintiffs' judgment; (2) determining the precise amount of wages owed the Plaintiff Class; and (3) preparing findings of fact and conclusions of law requested by the Court but never later used. CP 1421-1425. This supplemental work was legitimate, and Plaintiffs' supplemental fee request should not have been reduced.

1. Response to Motion to Vacate.

After Plaintiffs obtained their initial judgment against Defendants, Defendants moved to vacate based on the Court's failure to enter findings

of fact and conclusions of law.⁵ CP 1817-1829. Plaintiffs were seeking to uphold a judgment exceeding \$400,000. CP 1814-1816. Moreover, Defendants did not file a notice of appeal within 30 days of Plaintiffs' initial judgment, and Defendants' CR 60 motion to vacate did not extend the period of time in which a party may file a notice of appeal. Thus, Plaintiffs' opposition to Defendants' motion was crucial because had Plaintiffs prevailed, the judgment would not have been appealable. *See* RAP 5.2(e). Thus, the amount of time Plaintiffs spent on their opposition to this motion was reasonable.

Moreover, the fact that Plaintiffs' opposition was not successful does not mean that Plaintiffs are not entitled to compensation for the time they spent on this motion. *See Cabrales v. County of Los Angeles*, 935 F.2d 1050, 1053 (9th Cir. 1991) ("If a plaintiff wins on a particular claim, she is entitled to all attorneys' fees reasonably expended in pursuing that claim—even though she may have suffered some adverse rulings[.]"). To the extent the Court reduced Plaintiffs' supplemental fee request based on work opposing Defendants' motion to vacate, the Court abused its discretion.

⁵ Defendants objected despite the fact that they had received Plaintiffs' proposed judgment two weeks before the court entered it and had never objected to it. CP 1923 ¶ 9.

2. Determining the Amount of Wages Owed.

Defendants forced Plaintiffs to expend an inordinate amount of time to determine the appropriate amount of deductions from the gross amount of wages owed the class pursuant to the Court's April 5, 2005 Order. The Defendants did not have documentation for tips already paid to class members and, instead, provided "estimates" as to the amount of wages owed. *See*, CP 1213-1216, table prepared by Defendants. Despite the language of the Court's April 5, 2005 Order, Defendants attempted to include deductions for medical and health care premiums and garnishments that had not actually been made. CP 1194. When Defendants refused to concede this issue, Plaintiffs had to obtain declarations from class members to clarify the issue. CP 1735-1742; 1764-1798; 1812-1813. Defendants critiqued the time Plaintiffs spent on this issue by arguing that the amount of deductions had been "agreed upon" by the parties. But as to the exact amount of tips and what constituted "tips," there was no such agreement. Finally, the information regarding the proper amount of deductions for tips always remained in Defendants' custody and control but were never produced in response to Plaintiffs' discovery requests nor were they mentioned during deposition testimony. CP 1078-1134. Had Defendants produced such information when required, Plaintiffs could have spent less time determining the

proper amounts to deduct from the wage award. Any deductions from Plaintiffs' supplemental fee request based on Plaintiffs' work to determine the amount of wages owed is an abuse of discretion.

3. Findings of Fact and Conclusions of Law.

On August 10, 2005, Defendants moved to set aside the Court's July 29, 2005, Judgment because the Court had not entered findings of fact and conclusions of law. CP 1817-1871. The Court granted Defendants' motion on November 10, 2005, noting that it had not entered any findings of fact or conclusions of law pursuant to CR 52. CP 1389-1392. The parties then agreed to each submit their own proposed findings and conclusions and thereafter, Plaintiffs drafted proposed findings and conclusions and submitted them along with a 10-page declaration explaining the reasons for their proposed findings and conclusions. CP 2108-2404. Defendants apparently realized that findings would not help them on appeal and, through a letter rather than a motion, requested that the Court not enter findings after all. CP 2405-2410. The Court accepted this request and did not enter findings. These facts show that it was not Plaintiffs' fault that they performed work on findings or that the findings they did work on were never used by the Court. As a result, Plaintiffs are entitled to full compensation for the time they spent working on the findings even though the Court ultimately chose not to enter them.

To the extent the Court deducted Plaintiffs' supplemental fees for time spent on findings, this was an abuse of discretion.

Overall, the fees Plaintiffs sought in their supplemental fee request were appropriate and should have been granted. The Court's reduction of these supplemental fees, for which the Court provided no explanation, cannot be upheld.

D. Plaintiff Class Is Entitled to Attorneys' Fees on Appeal.

The Plaintiff Class is entitled to additional attorneys' fees under RCW 49.48.030 and RCW 49.52.070 for all work performed related to the appeal. The Class respectfully requests the Court to make such a determination as to the reasonableness of the Plaintiffs' attorneys' fees on appeal upon submission of a fee application after an opinion is rendered.

IV. CONCLUSION

For the reasons stated above and in Plaintiffs' initial appeal brief, this Court should reverse the trial court's fee award and remand for a

determination of reasonable fees and a multiplier based on the contingent nature of this case.

RESPECTFULLY SUBMITTED this 1st day of March, 2007.

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