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No. 826871

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SUPREME COURT  
OF THE STATE OF WASHINGTON

CLERK

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HUMPHREY INDUSTRIES, LTD.,

Appellants,

v.

CLAY STREET ASSOCIATES, LLC, et al.,

Respondents.

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**RESPONDENTS' ANSWER TO PETITION FOR REVIEW**

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**ORIGINAL**

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## **I. IDENTITY OF ANSWERING PARTY**

The answering parties are respondents/defendants Clay Street Associates LLC (“Clay Street”), ABO Investments, LLC (“ABO”), Scott Rogel, and Joseph and Ann Lee Rogel. In all phases of this litigation, Clay Street, ABO and Scott Rogel have been jointly represented. Joseph and Ann Lee Rogel, an elderly couple who were passive investors in the LLC, have had separate representation.

## **II. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Does the Court of Appeals’ interpretation and application of the substantial compliance component of a fee award under RCW 25.15.480(2)(a) raise an issue of substantial public interest warranting review when that statute gives courts discretion to deny fees with or without substantial compliance? RAP 13.4(b)(4).

2. Does the Court of Appeals’ interpretation and application of the substantial compliance component of a fee award under RCW 25.15.480(2)(a) conflict with other appellate decisions and warrant review when no other state appellate court has addressed that question and the Court of Appeals’ analysis comports with that used in other non-jurisdictional substantial compliance decisions? RAP 13.4(b)(1)-(2).

3. Does the Court of Appeals’ affirmance of the finding that Humphrey Industries, Ltd. (“Humphrey”) acted arbitrarily, vexatiously, and not in good faith raise an issue of substantial public interest

warranting review when the purpose of the fee award statute is to discourage conduct such as Humphrey's? RAP 13.4(b)(4).

4. Does the Court of Appeals' affirmance of the trial court's finding that Humphrey acted arbitrarily, vexatiously, and not in good faith, raise a constitutional question about access to the courts when the trial court identified multiple grounds for that finding based on its review of hundreds of pages of materials submitted by the parties? RAP 13.4(b)(3).

### III. RESTATEMENT OF FACTS

The Court of Appeals' unpublished opinion succinctly summarizes the basic underlying facts. *See* A•1-4.<sup>1</sup> Accordingly, to assist the Court in understanding the circumstances leading to the petition, only key background facts and relevant procedural developments are set forth here.

Humphrey Industries, through its principal, George Humphrey, and respondents were involved in a series of business ventures. The parties created a number of single-asset LLCs that each owned a discrete parcel of commercial real estate. Over time the relationship between Humphrey and the other LLC members fractured and became dysfunctional, culminating in a series of lawsuits. A•1-4; B•3 (FOF 6-8); C•3-7; RP 281.

This particular case, the last of the disputes, involved an LLC (Clay Street) formed to develop an industrial warehouse property in

<sup>1</sup> For the Court's convenience, the Court of Appeals' opinion and the trial court's findings and conclusions are included in the Appendix. The Court of Appeals' opinion is in Appendix A ("A•\_\_"); the trial court's post-trial findings of fact ("FOF") and conclusions of law ("COL") are in Appendix B ("B•\_\_"); and the findings and conclusions ("FOF" and "COL") the trial court entered in connection with its fee award are in Appendix C ("C•\_\_").

Auburn. A•1-2; B•2 (FOF 1). In August 2003, Mr. Humphrey resigned as managing member and Gerry Ostroff, the principal in ABO, took over. B•3 (FOF 6-7). Mr. Ostroff soon concluded the parties could not work together and decided to end the bickering and disfunction by selling Clay Street's property. A•2; B•3 (FOF 8); RP 348-52. However, the Clay Street LLC agreement required unanimous consent for a sale and Humphrey refused to consent. A•2; B•4 (FOF 9); RP 352-53. Mr. Ostroff consulted a lawyer, who recommended merging the LLC into another entity that would have the right to sell the property. A•1-2; B•4 (FOF 10); *see* RP 353-56. Mr. Ostroff relied in good faith on that recommendation and initiated the merger. A•2; B•4 (FOF 10-11).

Humphrey dissented from the merger. That dissent afforded Humphrey certain rights under RCW 25.15., including the right to a buyout of its LLC interest within 30 days of the merger's December 7, 2004 effective date. RCW 25.15.460(1). However, the LLC had no money to fund a buyout, and would not have any money until the property sold. The LLC's attorney advised respondents they could satisfy the LLC Act by paying Humphrey the amount due, plus interest, when the property sold. When the property did sell a few months later, the LLC promptly paid Humphrey the amount its attorney had determined represented the value of Humphrey's share on December 7, 2004, plus interest. A•2, 9-10; B•5-6, 11-12 (FOF 17, 18, 43); RP 361-63, 380, 384, 386, 390-92, 425-26; Ex. 252.

Humphrey demanded a substantially higher payment based on the personal determination by its manager, Mr. Humphrey, that Clay Street's value on December 7, 2004 was \$4.1 million. Since the property had sold for \$3.3 million in March 2005 after an open and arms-length marketing and sales process, respondents rejected Humphrey's demand. They did, however, offer an additional payment that would have given Humphrey a significantly larger share of the sale proceeds (by almost \$80,000) than any other LLC member received. They made that offer hoping to avoid yet another round of costly and acrimonious litigation with Humphrey. A•2-3; B•8, 11-12 (FOF 28, 43-44); C•3-5; RP 293, 398-401, 412-14.

Humphrey rejected respondents' offer and chose to pursue yet another lawsuit. Its suit was consolidated with the LLC's petition for a judicial valuation. The cases proceeded to a one-week bench trial that resulted in the trial court finding the property's fair value on the effective date of the merger to be \$3.15 million, exactly what respondents had proposed. B•1, 13, 15 (FOF 49, Ex. A). The trial court further found Humphrey's \$4.1 million valuation "to be well outside the mainstream of reasonably-based valuations," B•10 (FOF 39); and lacking "substantial or credible evidence to support it," B•10 (FOF 40). After trial, both sides moved for a fee award under RCW 25.15.480. CP 1682-1911, 1934-2012, 2070-89, 3155-3397, 3423-3796. The trial court denied Humphrey's motion and granted respondents'. C•1-13.

Humphrey appealed both the value determination and the fee awards. Its appeal suffered from multiple flaws. Humphrey failed to

effectively assign error to the findings of fact entered in the valuation proceeding, *see* A•4-5; and failed to assign error to any finding made in connection with the fee award. *See* Appellant’s Revised Br. at 1-3. The Court of Appeals still reached the merits and affirmed the trial court’s valuation and its fee award. A•1-16. Humphrey’s petition challenges only the fee award affirmance. It, too, is flawed. Most glaringly, Humphrey repeatedly cites to its own complaint and briefs as support for its assertions of fact. *E.g.*, Pet. at 3, 5-6, 8-9, 16-20.

#### **IV. ARGUMENT WHY REVIEW SHOULD BE DENIED**

##### **A. Humphrey Fails to Articulate a Tenable Reason Why This Court Should Review the Court of Appeals’ Affirmance of the Trial Court’s Denial of Humphrey’s Motion for Attorneys’ Fees**

###### **1. Facts Relevant to Humphrey’s Attorneys’ Fee Request**

Although Humphrey does not say so in its petition, its first challenge is in effect a continued effort to appeal the trial court and Court of Appeals’ decisions denying Humphrey’s own request for attorneys’ fees. A•4, 7-13; C•7-8. Humphrey sought a fee award on the ground that Clay Street did not “substantially comply” with the dissenters’ rights statute in several different ways, including by failing to meet the statutory payment deadline. *Id.* The statute on which Humphrey relied as the basis for its fee request states in relevant part:

The court **may** also assess the fees and expenses of counsel and experts for the respective parties, in amounts the court finds equitable:

(a) Against the limited liability company and in favor of any or all dissenters if the court finds the limited liability company did not **substantially comply** with the requirements of this article[.]

RCW 25.15.480(2)(a) (emphasis added).

Humphrey's effort to obtain a fee award under this statute was misplaced. Based on the evidence presented at the valuation trial, the trial court found that Clay Street substantially complied with the requirements of RCW 25.15. Specifically, the court made the following finding:

At the time of the merger on December 7, 2004, the LLC did not have any liquid assets with which to make a payment to George Humphrey pursuant to the dissenters' rights provisions of the LLC Act. Mr. Cowan [the LLC's attorney] advised the LLC that it could satisfy the LLC Act by paying Mr. Humphrey the amount due, plus interest, at the time the property was sold. As previously determined by Judge Hayden, the delay in payment to Humphrey until the property was sold constituted a violation of the statute. **However, given that Clay Street lacked any funds to make the payment to Humphrey, that it could not obtain the requisite funds without a sale of the property, and that it was willing to pay the statutorily required interest during the period of delay, the Court finds that, notwithstanding the delayed payment, the LLC substantially complied with the LLC Act.**

B•11 (FOF 43) (emphasis added).

The trial court cited and incorporated this substantial compliance finding in its denial of Humphrey's fee request. C•7-8. The court also reiterated:

[T]hat Clay Street, despite having erred in the timing of its payment to Humphrey ... was in substantial compliance with RCW 25. The late payment by Clay Street to Humphrey was caused by a lack of funds by the LLC at the

time and did not ultimately result in financial prejudice to Humphrey....Therefore, fees and expenses are not assessed against Clay Street.

C•7-8.

Although it failed to assign error to any aspect of the fee award, on appeal Humphrey attacked the trial court's substantial compliance determinations on multiple grounds. A•7-13; Appellant's Revised Br. at 12-26. The Court of Appeals rejected Humphrey's arguments for two reasons. First, the Court pointed out that because RCW 25.15.480(2)(a) provides that a court "may" award fees, it is a permissive fee statute. Thus, "[t]he court may decline to award fees even where there is no substantial compliance with the statute." A•8. Presumably the Court of Appeals then found that whether or not Clay Street substantially complied with the statute, the trial court did not abuse its statutory discretion in deciding that Humphrey was not entitled to recover its fees.

Second, the Court of Appeals held that a substantial compliance analysis under RCW 25.15.480(2)(a) allows courts to consider the circumstances at issue and whether the LLC's conduct satisfied the objectives of RCW 25.15. A•8-10. Given Humphrey's role in forcing the merger and sale and the LLC's financial inability to pay Humphrey until the property sold, the Court upheld the trial court's finding of substantial compliance. A•8-13.

**2. No Issue of Substantial Public Interest is Implicated by the Court of Appeals' Decision Affirming the Denial of Humphrey's Fee Request**

Humphrey seeks review of the Court of Appeals' affirmance of the denial of its request for fees on the ground the decision raises an issue of "substantial public interest" that warrants review under RAP 13.4(b)(4). Pet. at 8. The apparent basis for this claim is that the Court of Appeals' unpublished opinion is the first Washington decision to interpret substantial compliance in the dissenters' rights context. Pet. at 10-11. Humphrey is at a loss to explain how that uncitable decision has any impact on the public. In particular, Humphrey fails to explain how a decision confirming that RCW 25.15.480(2) is a permissive fee statute which allows courts to "decline to award fees even where there is no substantial compliance with the statute," can possibly implicate a "substantial public interest." A•8.

Given the insignificance, if not irrelevance, of Humphrey's arguments concerning substantial compliance, there is clearly no "substantial public interest" warranting review by this Court. Matters of "substantial public interest" concern issues of a recurring nature or that have a wide public impact. *See, e.g., State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005) (issue with potential to affect all Pierce County sentencings and chill policy determinations had substantial public interest); *In re Marriage of Ortiz*, 108 Wn.2d 643, 646-47, 740 P.2d 843 (1987) (retroactivity of rule governing child support escalation clauses had substantial public interest). Whether a court properly exercised its

discretion in declining to award fees in any particular case is not such an issue.

**3. Humphrey Has Not Shown a Conflict Among the Relevant Substantial Compliance Decisions**

Alternatively, Humphrey urges the Court to accept review of the denial of its fee request because the Court of Appeals' substantial compliance analysis allegedly conflicts with other decisions. Humphrey claims that previous substantial compliance decisions required the Court of Appeals to hold that the LLC's delayed payment precluded a finding of "substantial compliance" as a matter of law. Pet. at 8-9.

Leaving aside the court's discretion to deny fees even absent substantial compliance and thus the irrelevance of the substantial compliance inquiry, Humphrey's conflict analysis is without legal basis. As Humphrey concedes, "[t]here appears to be no decision law deciding the 'substantial compliance' standard in context of the dissenters' rights statute's immediate payment deadline." Pet. at 10-11. It takes more than one decision to create a conflict. That, alone, is reason to decline review under RAP 13.4(b)(1)-(2).

As for Humphrey's error as a matter of law analysis, it is mistaken. Humphrey confuses compliance with jurisdictional time and notice requirements<sup>2</sup> (where the substantial compliance doctrine is applied

<sup>2</sup> Each case Humphrey cites in support of its "conflict" argument involves jurisdictional time and notice requirements. See Pet. at 9 nn.37-39. For example, *City of Seattle v. Pub. Employment Relations Comm'n*, 116 Wn.2d 923, 928-29, 809 P.2d 1377 (1991), concerned jurisdictional time limits for appealing a PERC decision. *Petta v. Dept. of Labor & Indus.*, 68 Wn. App. 406, 408-11,

narrowly), with situations where substantial compliance is given a broader application. In the latter case:

Substantial compliance has been defined as actual compliance in respect to the substance essential to every reasonable objective of the statute. It means a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which the statute was adopted. What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case.

*In re Santore*, 28 Wn. App. 319, 327, 623 P.2d 702 (1981) (citations omitted); accord *City of Seattle v. Pub. Employment Relations Comm'n*, 116 Wn.2d 923, 928, 809 P.2d 1377 (1991).

This fact- and statutory-objective-based inquiry is well-established. Indeed, *Black's Law Dictionary* defines the substantial-performance doctrine in terms similar to those used by the *Santore* court:

The rule [is] that if a good-faith attempt to perform does not precisely meet the terms of an agreement or statutory requirements, the performance will still be considered complete if the essential purpose is accomplished[.]

*Black's Law Dictionary* 1470 (8<sup>th</sup> ed. 2004).

The Court of Appeals used the well-settled and oft-cited approach of *Santore* when it considered the factual circumstances in deciding whether the LLC's delayed payment to Humphrey satisfied the reasonable objectives of the dissenters' rights statute. A•8-10 & n.14. The objective

842 P.2d 1006 (1992), involved the jurisdictional time limit for an appeal from the Board of Industrial Insurance Appeals. *Westcott Homes LLC v. Chamness*, 146 Wn. App. 728, 733-36, 192 P.3d 394 (2008), concerned the failure to timely comply with statutory requirements for providing notice of intent to arbitrate.

of affording statutory appraisal rights to dissenters is “to protect the property rights of dissenting shareholders from actions by majority shareholders which alter the character of their investment.” *China Prods. N. Am., Inc. v. Manewal*, 69 Wn. App. 767, 773, 850 P.2d 565 (1993) (quoting 12B W. Fletcher, *Private Corps.* § 5906.10 (rev. perm. ed. 1990)). Or, as the Court of Appeals more broadly concluded, the objective is to avoid oppression of the dissenting member. A•10. Given the circumstances here, where Humphrey received payment (with interest) as soon as the LLC sold its one asset and acquired funds with which to make that payment, and where “the genesis of the entire scenario [was] an irreparable rift among the parties and the fact that the merger was made necessary by Humphrey’s refusal to consent to liquidation,” the Court of Appeals properly held that the LLC had satisfied these statutory objectives. A•10; *see* B•11 (FOF 43); C•5-6. Nothing about that routine, unpublished holding warrants review under RAP 13.4(b)(1)-(2).

**B. Humphrey Fails to Articulate a Tenable Reason Why This Court Should Review the Court of Appeals’ Award of Attorney’s Fees to Respondents**

**1. Facts Relevant to Respondents’ Fee Awards**

Humphrey’s second challenge to the Court of Appeals’ decision concerns its affirmance of the judgment awarding attorneys’ fees to respondents. The trial court made two fee awards. The first was to Clay Street Associates, LLC, ABO/Gerry Ostroff and Scott Rogel (collectively “Clay Street”); the second was to Joseph and Ann Lee Rogel. C•13. The

trial court made its awards under RCW 25.15.480(2)(b), which gives courts discretion to assess fees and expenses against a party “if the court finds that the party ... acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by [the dissenters’ rights] article.” *See* C•9 (COL 1), C•12 (COL 1).<sup>3</sup>

Contrary to Humphrey’s representations, the trial court provided multiple reasons in support of its finding that Humphrey acted arbitrarily, vexatiously, or not in good faith. In support of the fee award to the Clay Street group, the court cited Humphrey’s history of acrimonious and largely unfounded litigation with the remaining members of Clay Street. C•3-6. It cited Humphrey’s adherence to its baseless \$4.1 million valuation and its rejection of Clay Street’s July 2005 \$325,000 buyout offer, an offer that effectively “offered Humphrey a substantial windfall to resolve the case,” C•5; and that exceeded the court’s award by more than \$90,000. B•10, 13, 15 (FOF 39-40, 49-50, Ex. A); RP 293, 412-14. And it cited Humphrey’s rejection of a CR 68 offer of judgment made by Clay Street in September 2006. C•5-6, 8 (FOF 4). That offer exceeded the amount Humphrey ultimately recovered by over \$100,000. C•5-6. The Court then found:

Considering the totality of the trial evidence and the related LLC arbitrations before Mr. Brewer and Mr. Soukup, the court concludes that Humphrey Industries Ltd.,

<sup>3</sup> The trial court denominated its arbitrary, vexatious, or not in good faith determinations as conclusions of law. The Court of Appeals treated those determinations as findings of fact. A•13 n.25.

and George Humphrey acted arbitrarily, vexatiously and not in good faith with respect to the pursuit of this matter against Clay Street Associates LLC, its members and Joseph and Ann Lee Rogel. Accordingly, attorney's fees and expenses should be assessed pursuant to RCW 25.15.480(2)(b).

C•9 (COL 1) (*see supra* n.3).

With respect to Joseph and Ann Lee Rogel, the trial court found that they were retired, passive investors in the LLC, that Humphrey had refused to dismiss them from this lawsuit, and that Humphrey's prior attempts to include the Rogels as defendants in its lawsuits had resulted in dismissals with prejudice. C•6-7, 10-11 (FOF 3, 5-8). The trial court further pointed out that Humphrey had offered no evidence at trial that supported the inclusion of Joseph and Ann Lee Rogel as defendants:

No evidence was admitted at trial showing that the Rogels acted in concert with any officer of Clay Street, including their son. Neither was any evidence admitted at trial showing that the Rogels had any involvement in any alleged misconduct by the Clay Street LLC. Humphrey further stated that the Rogels were merely incidental defendants who held funds in trust from the sale of Clay Street and against whom Humphrey had no claim. However, when the opportunity was presented to dismiss them from the suit, he refused and required Mr. and Mrs. Rogel to defend a case that really did not involve them nor did it require their presence at trial.

C•7 (citation to record omitted). The trial court then reiterated its finding that Humphrey "acted 'arbitrarily, vexatiously, or not in good faith' in pursuing its dissenter's rights claim against Joseph & Ann Lee Rogel."

C•12 (COL 1) (*see supra* n.3).

On appeal, Humphrey failed to assign error to any of these findings, which are now verities. *E.g., State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Instead, Humphrey argued that the trial court lacked discretion to consider the factual circumstances (or “equities”) in a special appraisal proceeding governed by the dissenters’ rights statute. Appellant’s Revised Br. at 1, 3, 27-28.

The Court of Appeals agreed with Humphrey that the trial court erred in considering Humphrey’s rejection of Clay Street’s CR 68 offer. A•14. Nevertheless, the Court “uph[e]ld the finding that Humphrey acted vexatiously, because the rest of the evidence amply supports it.” *Id.* That evidence included Humphrey’s intransigent and unreasonable objection to selling the property, its demand for payment based on Mr. Humphrey’s wholly unsupported \$4.1 million property valuation, Humphrey’s rejection of Clay Street’s July 2005 “windfall” payment offer, Mr. Humphrey’s unreasonable litigiousness in this and prior cases, and Mr. Humphrey’s role in creating acrimony and the resulting dysfunctional business relationships. A•14-15; *see* C•5.

**2. Humphrey Fails to Identify an Issue of Substantial Public Interest Implicated by the Court of Appeals’ Affirmance of the Trial Court’s Fee Awards**

Humphrey claims that the Court of Appeals’ decision affirming the trial court’s fee rulings raises an issue of substantial public interest. Pet. at 11. Humphrey fails to identify what that issue is, let alone explain how the fee determination made here concerns a recurring issue of wide public impact. *Cf. Watson*, 155 Wn.2d at 577; *Marriage of Ortiz*, 108 Wn.2d at

646-47. Instead, Humphrey seems to argue that its conduct did not rise to the level of being arbitrary, vexatious, or not in good faith. Such fact-driven questions are well beyond the purview of RAP 13.4(b)(4). In any event, as the Court of Appeals found, the trial court's unchallenged evidentiary findings were more than sufficient to support its unchallenged finding that Humphrey's conduct violated the statute's arbitrary, vexatious, or not in good faith standard.

Humphrey's petition spends pages discussing the meaning of vexatious.<sup>4</sup> Although it makes frequent reference to *Black's Law Dictionary*, Humphrey fails to cite that dictionary's definition of the actual statutory term, "vexatious." *Black's* defines "vexatious" as "without reasonable or probable cause or excuse; harassing; annoying." *Black's, supra* at 1596. The findings detailed above provided ample basis for finding Humphrey's conduct to be harassing and annoying, and its pursuit of the valuation litigation to be without reasonable or probable cause.

Humphrey's petition also ignores that the reason dissenter fee statutes such as RCW 25.15.480(b)(2) give courts discretion to award fees for arbitrary, vexatious, or not in good faith conduct, is "to increase the incentives of both sides **to proceed in good faith** under this chapter to attempt to resolve their disagreement without the need of a formal judicial appraisal[.]" WASH. BUSINESS CORP. ACT COMMENT § 13.31 (hereinafter

<sup>4</sup> In so doing, Humphrey appears to challenge the evidentiary bases for the trial court's findings. That it cannot do. Not only is such a challenge improper at this level of review, those findings are unassailable given Humphrey's failure to assign error to them. *Hill*, 123 Wn.2d at 644.

“COMMENT”) (emphasis added) (reproduced in Stewart M. Landefeld, *et al.*, WASH. CORPORATE LAW: CORPORATIONS & LLCs App. A-178 (2002)).<sup>5</sup> Thus it is entirely appropriate for the court to consider whether (as was the case here), the dissenter rejected a reasonable payment offer:

[I]f the dissenter’s supplemental demand is unreasonable, the dissenter runs the risk of being assessed litigation expenses under Proposed section 13.31 [the fees and expenses of counsel provision]. These provisions are designed to encourage settlement without a judicial proceeding.

COMMENT § 13.28 (reproduced in Landefeld, at App. A-177). It is also appropriate for the court to consider whether (as Humphrey did here) a party adhered to a baseless valuation figure during the appraisal litigation. *Id.*; see also *Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206, 228 (Del. 2005). A party’s prelitigation conduct is also properly considered (conduct that in this case included a history of Humphrey pursuing baseless and acrimonious litigation against respondents, see C-3-7, 10-11), to determine whether the party pursued the appraisal litigation in good faith or for some other purpose such as to harass or annoy. *Montgomery*, 880 A.2d at 228; see *Black’s, supra* at 1596.

In short, the trial court and the Court of Appeals considered appropriate evidence in their application of RCW 25.15.480(2)(b) to the

<sup>5</sup> The Business Corporation Act Comments are relevant to comparable provisions in the LLC act. The Comments cited herein pertain to RCW 23B.13.310, a Business Corporation Act provision virtually identical to RCW 25.15.480.

instant case. Nothing about their analyses raises an issue of substantial public interest that this Court need resolve.

### **3. This Cases Does Not Involve Constitutional Questions**

Humphrey's final argument is that the Court of Appeals deprived it of the constitutional right of access to the courts when it failed to order a remand of the fee awards. The apparent basis for this argument is the mistaken assertion that the trial court premised its fee award solely on Humphrey's rejection of the CR 68 offer, and the Court of Appeals "comb[ed] the record" to find alternative bases to affirm. Pet. at 14-15. According to Humphrey, the Court of Appeals lacked sufficient information to establish those alternative bases and thus a remand was necessary. *Id.*

This argument lacks factual and legal merit. It lacks factual merit because, as shown above, the trial court did not rest its fee award solely on Humphrey's rejection of Clay Street's CR 68 offer. The trial court awarded fees to Joseph and Ann Lee Rogel for reasons having nothing to do with the CR 68 offer. C•6-7, 10-13. For Clay Street's fee award, the trial court gave multiple examples of Humphrey's arbitrary, vexatious, and not-in-good-faith conduct. C•3-6. While the court did not identify all of those examples as formal "findings of fact," they were tantamount to such findings, or at least to an oral opinion, and the Court of Appeals properly considered them. *See State v. Williams*, 96 Wn.2d 215, 220-21, 634 P.2d 868 (1981) (no matter how denominated, the Court assesses whether findings of fact are supported by the evidence and whether the findings

support the conclusions of law); *see also In re Marriage of Booth*, 114 Wn.2d 772, 777, 791 P.2d 519 (1990) (“[i]n the absence of a written finding on a particular issue, an appellate court may look to the oral opinion to determine the basis for the trial court's resolution of the issue.”); *State v. Ward*, 125 Wn. App. 138, 145, 104 P.3d 61 (2005) (trial court’s oral opinion can be used to interpret written findings and conclusions).

In fact, Humphrey’s appeal brief specifically argued that the trial court should not have considered the alternative grounds for affirmance cited by the Court of Appeals, i.e., Humphrey’s rejection of Clay Street’s July 2005 settlement offer, its unreasonable adherence to a baseless valuation, and the earlier arbitration rulings. Appellant’s Revised Br. at 30-31, 33-36. Respondents addressed these and related contentions. Respondents’ Br. at 36-44. The Court of Appeals considered Humphrey’s arguments and rejected them. A•14-15. In short, the Court of Appeals did not “search the record” looking for alternative grounds to affirm. It instead relied on the trial court’s findings and explanations and the arguments of the parties.

The legal premise of Humphrey’s constitutional claim is no more tenable. Humphrey cites no authority for its claim the Court of Appeals’ fee analysis has constitutional implications and none exists. All the constitution requires is that the party against whom fees are awarded have an opportunity to contest the need for the legal services provided and the

reasonableness of the fees claimed. *Reid v. Dalton*, 124 Wn. App. 113, 124, 100 P.3d 349 (2004). Humphrey had that opportunity.

In any event, a fee award remand is necessary only when the record is insufficient for the appellate court to determine the basis of the trial court's ruling. *Leoffelholz v. Citizens for Leaders with Ethics & Accountability Now*, 119 Wn. App. 665, 690, 692-93, 82 P.3d 1119 (2004). Here, the trial court made formal findings that it supplemented with four pages of evidentiary findings describing the parties' litigation history, and it expressly incorporated the findings and conclusions made in connection with the valuation trial. *See* C•3-7, 8 (FOF 1), 10 (FOF 1). The Court of Appeals based its decision entirely on the trial court's explanations and formal findings. No remand is necessary in such circumstances.

Humphrey's related argument – that it was deprived of a full and fair opportunity to litigate – is simply inaccurate. The record submitted to the Court of Appeals included hundreds of pages of post-trial fee award submissions. CP 1682-1911, 1934-2012, 2070-89, 3155-3397, 3423-3796. The fact that the trial court ruled against Humphrey does not mean Humphrey was deprived of its day in court.

#### **V. RESPONDENTS' REQUEST FOR FEES**

Pursuant to RCW 25.15.480(2)(b) and RAP 18.1, the Court of Appeals awarded respondents their reasonable attorney fees and expenses on appeal. A•16. Pursuant to RAP 18.1(j) and RCW 25.15.480(2)(b),

respondents request an award of the additional reasonable attorney fees and expenses they incurred in answering this petition for review.

## VI. CONCLUSION

It is time to end Humphrey's campaign against respondents. Humphrey has failed to establish any basis for granting review under RAP 13.4(b). The relevant law belies its arguments and shows that the Court of Appeals' decision is in accord with applicable statutes and case law, and that this highly fact-specific case does not involve constitutional questions or issues of substantial public interest. For these reasons, and for all the additional reasons stated above, respondents respectfully ask the Court to deny Humphrey's petition for review and award them the reasonable attorney fees and expenses they incurred answering that petition.

DATED this 12<sup>th</sup> day of March, 2009.

McNAUL EBEL NAWROT & HELGREN PLLC

By: Barbara H. Schuknecht

Gregory J. Hollon, WSBA No. 26311

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Attorneys for Respondents Clay Street Associates,  
Gerry Ostroff, and Scott Rogel

JAMESON BABBITT STITES & LOMBARD,  
PLLC

By: Alan Bornstein

Alan Bornstein, WSBA No. 14275

Attorneys for Respondents Joseph & Ann Lee  
Rogel

***APPENDIX A***

DEC 9 2008

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

HUMPHREY INDUSTRIES LTD.,	)	No. 60923-8-1
	)	
Appellant,	)	
	)	
v.	)	
	)	
CLAY STREET ASSOCIATES LLC;	)	UNPUBLISHED OPINION
615 COMMERCE LLC; CLAY	)	
ASSOCIATES PHASE II LLC, SCOTT	)	
ROGEL, LORI GOLDFARB; JOSEPH	)	
ROGEL and LEE ANN ROGEL,	)	
husband and wife; ABO INVESTMENTS	)	
and AVRAM INVESTMENTS,	)	
	)	
Respondents.	)	FILED: December 8, 2008
_____		

ELLINGTON, J. — In this dissenter's rights suit, the limited liability company (LLC) initially paid the dissenting member less than the fair value of its share. But the trial court found that the LLC had substantially complied with the statute, and assessed fees and costs against the dissenting member for acting arbitrarily, vexatiously, or not in good faith. We affirm.

BACKGROUND

Humphrey Industries LLC, through its principal, George Humphrey (collectively, Humphrey), and business partners Joseph and Ann Lee Rogel, Scott Rogel, and ABO Investments created several limited liability companies. One of those was Clay Street

Associates, LLC, which was formed to hold a single real estate asset. Each investor held a one-quarter interest in Clay Street. In the fall of 2004, Clay Street had no significant cash assets, the real estate market was weak, and the property had a high vacancy rate.

The relationship between Humphrey and the other investors became acrimonious. Various issues arose with all the LLCs. As to Clay Street, the members could not agree as to how to go forward. There was no means of liquidating the LLC other than by sale of the property, to which Humphrey would not consent. On the advice of attorney George Cowan, the other three members of Clay Street agreed to merge Clay Street into a new LLC in order to facilitate sale of the property.

The merger was to be effective December 7, 2004. Humphrey dissented from the merger, and on October 1, 2004, demanded payment of the fair value of its interest.

In May 2005, after several months of marketing, Clay Street sold its real property and associated leaseholds to Favro Investments, LLC for \$3.3 million. After the sale, using the income capitalization approach, Cowan calculated the value of Humphrey's share as of December 7, 2004 at \$181,192, including interest, and sent that amount to Humphrey on May 27, 2005. Humphrey rejected Cowan's calculation and demanded an additional \$424,607 based on its estimation of value at \$4.109 million.

After receiving Humphrey's demand, Clay Street hired Ken Barnes, a professional appraiser. Barnes concluded the property's fair value as of December 7, 2004 was \$3.15 million. In an effort to resolve the dispute, Clay Street offered in July 2005 to pay Humphrey an additional \$150,764, a figure based on Barnes' appraisal but

which made no deduction for transaction costs or existing liabilities other than the original loan.

Humphrey rejected the offer and filed this dissenter's rights lawsuit under the Washington Limited Liability Company Act, chapter 25.15 RCW (LLC Act). On July 29, 2005, Clay Street filed a petition seeking judicial determination of Clay Street's value. The court consolidated the two actions.

On October 27, 2006, Clay Street made Humphrey a CR 68 offer in the amount of \$144,183, plus interest at 7.75 percent from December 7, 2004, inclusive of Humphrey's costs and attorney fees. Humphrey rejected the offer.

The trial court heard testimony about the marketing and sale of the property. Expert witnesses Ken Barnes and Darin Shedd, a court-appointed appraiser, testified as to the fair value of Humphrey's share. George Humphrey gave his lay opinion on the property's value. The court found the property was worth \$3.15 million as of the merger date, December 7, 2004. After deducting Humphrey's portion of the transaction costs and Clay Street's outstanding liabilities, the court calculated Humphrey's share to be \$231,947. The court then offset the \$181,192 already paid, added interest, and ruled that Humphrey was due an additional payment of \$60,588.

All parties sought fees and costs. The court found that Humphrey had acted arbitrarily, vexatiously, and not in good faith, and assessed attorney and expert fees against Humphrey under RCW 25.15.480 (2)(b). The court also awarded Clay Street its post-CR 68 offer costs pursuant to that rule. Finding that Clay Street substantially complied with the statute and did not behave arbitrarily, vexatiously, or in bad faith in connection with the litigation, the court denied Humphrey's fees request.

Humphrey contends the court erred in its assessment of the fair value of Humphrey's interest in Clay Street, in denying its request for attorney fees and costs, and in granting Clay Street's and the Rogels' requests for same.

## ANALYSIS

### *Preliminary Matters*

An appellant must separately assign error to each challenged finding,<sup>1</sup> and the opening brief must include the relevant argument with citations to legal authority and references to relevant parts of the record.<sup>2</sup> Material portions of challenged findings should be quoted in the text or included in an appendix.<sup>3</sup> Unchallenged findings are verities on appeal.<sup>4</sup>

In its opening brief, Humphrey assigned error to "Findings [of Fact] 2, 5, 6, 11, 13, 16-19, 21, 23-24, 26-28, and 35-44,"<sup>5</sup> and attached the findings as an appendix. But most of the relevant argument and references to the record appear not in the 50 page opening brief, but in a 30 page appendix, with the challenged portions of each finding italicized and followed by argument and related references to the record. This not only violated the requirement that the argument appear in the body of the brief,<sup>6</sup> but also effectively violated the 50 page limit.<sup>7</sup>

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<sup>1</sup> RAP 10.3(g).

<sup>2</sup> RAP 10.3(a)(6).

<sup>3</sup> RAP 10.4(c).

<sup>4</sup> State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

<sup>5</sup> Revised Br. of Appellant at 2.

<sup>6</sup> RAP 10.3(a), (g).

<sup>7</sup> RAP 10.4(b).

When challenged on this approach by respondents, Humphrey requested permission to file an overlength brief. We deny this request, and limit our analysis to the issues raised and argued in the body of the opening brief.

*The Fair Value of Humphrey's Interest*

Humphrey attacks the trial court's determination of fair value on several grounds. First, Humphrey challenges the court's refusal to allow George Humphrey to offer expert testimony as to the fair value of the property.

In general, the qualifications of an expert are judged by the trial court, and its determination will not be overturned absent an abuse of discretion.<sup>8</sup> Although Mr. Humphrey has experience with real estate, he is not an appraiser, and his certified public accountant license is inactive. The court allowed him to give his lay opinion of the value of the property. The court did not abuse its broad discretion by refusing to treat him as an expert.

Second, Humphrey faults the court for failing to apply Financial Accounting Standards Board (FASB) methods for assessing fair value. In fact, the trial court made explicit, unchallenged findings that the definition of fair value offered by the two appraisers was consistent with FASB standards.

Next, Humphrey challenges the finding of fair value of the Clay Street property as of December 7, 2004 (\$3.15 million). "[W]here the trial court has weighed the evidence, our review is limited to determining whether substantial evidence supports the

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<sup>8</sup> Seybold v. Neu, 105 Wn. App. 666, 678, 19 P.3d 1068 (2001).

findings.”<sup>9</sup> “Substantial evidence exists when there is a sufficient quantum of proof to support the trial court’s findings of fact.”<sup>10</sup>

RCW 25.15.425(3) does not say how fair value is to be calculated. Humphrey does not challenge the court’s conclusion that, in the context of a single-asset LLC owning a parcel of real estate, the fair value is essentially the price for which the property could be sold on the open market between a willing buyer and willing seller, other than in a forced or liquidation sale.

The record shows that in the fall of 2004, Clay Street member Ostroff listed the property at \$3.35 million. The listing generated a \$2.9 million offer in October and a \$3.19 million offer in November. Clay Street countered at \$3.3 million, which both buyers rejected. In December 2004, Favro offered \$3.3 million subject to a rent guarantee, which Clay Street refused. After Clay Street filled its remaining vacancies, Favro agreed to purchase the property for \$3.3 million without a rent guarantee. The sale closed in May 2005.

The court made an unchallenged finding that the transaction was an orderly, fair market sale. Therefore, appraisal standards required that the actual sales price be given substantial weight in determining the property’s value. Appraiser Shedd did not consider the sale price, apparently because he was “aware that there were allegations of duress.”<sup>11</sup> Barnes, on the other hand, placed considerable weight on the sale price, concluded it represented the actual value of the property in May 2005, and that the

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<sup>9</sup> Ridgeview Properties v. Starbuck, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982).

<sup>10</sup> Org. to Preserve Agr. Lands v. Adams County, 128 Wn.2d 869, 882, 913 P.2d 793(1996).

<sup>11</sup> RP (June 11, 2007) at 79.

value in December 2004 was \$3.15 million. The court found Barnes' approach persuasive. The evidence supports the court's finding of fair value.

Finally, Humphrey contends the court improperly deducted transaction costs from its one-quarter share. We disagree.

In a different context involving division of marital assets upon dissolution of marriage, the courts have held that an asset's value should be reduced by sales costs if the party receiving it intends an imminent sale and there is evidence regarding the costs of sale.<sup>12</sup> The rationale, that the party to whom the asset is awarded is realizing only its net value when the asset is to be sold immediately, applies even more so here. The sale of the property was not of the remaining members' choosing. Rather, it was the only means to resolve the impasse and satisfy Clay Street's obligations toward Humphrey. The valuation figure does not reflect the transaction costs incurred to unlock the value, so deduction of that amount is necessary to achieve a proportional split. The court did not err.

*Attorney and Expert Fees Under RCW 25.15.480(2)(a)*

Humphrey asserts that Clay Street did not substantially comply with the provisions of the statute, and the court should have awarded fees in his favor pursuant to RCW 25.15.480, which provides:

(2) The court may . . . assess the fees and expenses of counsel and experts for the respective parties, in amounts the court finds equitable:

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<sup>12</sup> In re Berg, 47 Wn. App. 754, 759, 737 P.2d 680 (1987); In re Martin, 32 Wn. App. 92, 97, 645 P.2d 1148 (1982); In re Hay, 80 Wn App. 202, 206, 907 P.2d 334 (1995).

(a) Against the limited liability company and in favor of any or all dissenters if the court finds the limited liability company did not substantially comply with the requirements of this article; or

(b) Against either the limited liability company or a dissenter, in favor of any other party, if the court finds that the party against whom the fees and expenses are assessed acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this article.

The court did not err. First, the fees statute is permissive, not mandatory.<sup>13</sup> The court may decline to award fees even where there is no substantial compliance with the statute. Humphrey's argument thus fails.

Second, the statute authorizes a substantial compliance inquiry. Washington courts have defined substantial compliance as "actual compliance in respect to the substance essential to every reasonable objective of [a] statute."<sup>14</sup> Under the substantial compliance doctrine, an appellate court will not reverse for "a merely technical error that does not result in prejudice."<sup>15</sup> Whether a party substantially complied with a statute is a mixed question of law and fact.<sup>16</sup> We review the findings for substantial evidence.<sup>17</sup> The application of law to those facts is subject to de novo review.<sup>18</sup>

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<sup>13</sup> See Nat'l Elec. Contractors Ass'n v. Riveland, 138 Wn.2d 9, 28, 978 P.2d 481 (1999) (the term "may" in a statute has a permissive or discretionary meaning).

<sup>14</sup> City of Seattle v. Public Employment Relations Comm'n, 116 Wn.2d 923, 928, 809 P.2d 1377 (1991) (quoting In re Santore, 28 Wn. App. 319, 327, 623 P.2d 702 (1981)) (alteration in original).

<sup>15</sup> See Black v. Dep't of Labor & Indus., 131 Wn.2d 547, 552-53, 933 P.2d 1025 (1997).

<sup>16</sup> Tapper v. State Employment Sec. Dep't., 122 Wn.2d 397, 403, 858 P.2d 494 (1993) ("a mixed question of law and fact . . . requires the application of legal precepts . . . to factual circumstances")

<sup>17</sup> Ridgeview Properties, 96 Wn.2d at 719.

<sup>18</sup> Tapper, 122 Wn.2d at 403.

Humphrey challenges the court's implicit finding that Clay Street's belated initial payment was its only violation of the LLC Act. Humphrey identifies three other violations, alleging that Clay Street did not provide it with complete financial statements, filed suit after the statutory deadline, and failed to make a credible fair value payment. Humphrey argues that these violations, either by themselves or taken together, defeat the court's conclusion that Clay Street substantially complied with the LLC Act.

Payment Deadline. Clay Street violated the LLC Act by paying its estimate of the fair value of Humphrey's share more than five months after the date of the merger, in violation of the 30 day limit imposed by RCW 25.15.460. The very close deadlines imposed in RCW 25.15.435 emphasize the legislature's concern with protecting the property rights of dissenters.<sup>19</sup>

The deadlines are premised upon the assumption that the LLC has (or can acquire) funds to pay the dissenter. Where a corporation has only one illiquid asset, such that sale of that asset is the only source of payment, compliance with the deadlines may be objectively impossible. Under such circumstances, the reasons for the delay and the conduct of the parties are relevant to a substantial compliance determination.

Here, Clay Street acted swiftly to liquidate its only asset and paid Humphrey immediately upon realizing the proceeds of sale, including interest. Humphrey was thus

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<sup>19</sup> "This obligation to make immediate payment is based on the view that since the person's rights as a shareholder are terminated with the completion of the transaction, the shareholder should have immediate use of the money to which the corporation agrees it has no further claim. A difference of opinion over the total amount to be paid should not delay payment of the amount that is undisputed." 2 SENATE JOURNAL, 51st Leg., Reg. and Spec. Sess., at 3091 (Wash. 1989).

not financially prejudiced. Nor was Humphrey prejudiced by inability to participate in the management of the LLC subsequent to its dissent. The only actions taken thereafter were intended to, and in fact did, enable the LLC to fulfill its statutory obligations toward Humphrey. Humphrey's rights were protected to the extent circumstances allowed. This is what the statute intends.

Also relevant are the genesis of the entire scenario in an irreparable rift among the parties, and the fact that the merger was made necessary by Humphrey's refusal to consent to liquidation.

The legislature's objective, to avoid oppression of the dissenting LLC member by the remaining members, was not compromised. Clay Street's belated payment did not preclude a finding of substantial compliance.

Financial Statements. Humphrey also argues that Clay Street violated the statute by providing only its income statement along with its payment, not the previous year's financial statements as mandated by RCW 25.15.460. Humphrey raises this argument for the first time on appeal. We thus do not address it.<sup>20</sup>

Timely Filing. Humphrey argues that Clay Street violated the LLC Act in a third way by failing to file its suit within 60 days after receiving Humphrey's October 2004 demand for payment. Humphrey relies on language in RCW 25.15.475(1): "If a demand for payment under RCW 25.15.450 remains unsettled, the limited liability company shall commence a proceeding within sixty days after receiving the payment demand and petition the court to determine the fair value of the dissenting member's

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<sup>20</sup> See RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988).

interest in the limited liability company, and accrued interest.”

But the statutes must be read together. RCW 25.15.460 requires the LLC to pay its estimate of fair value within 30 days of the dissenter’s initial demand. If the dissenter is not content, RCW 25.15.470 provides a further 30 days in which to demand payment according to its own estimate of fair value. The LLC and the dissenter thus have a total of 60 days for this exchange of communications. Under Humphrey’s reading of the 60 day deadline in RCW 25.15.475(1), if each party waited its entire 30 days to act, the LLC would be required to file a petition for judicial determination of value on the day the dissenter makes demand under RCW 25.15.470.

The language “remains unsettled” in RCW 25.15.475(1) suggests that the trigger for the deadline for the petition is the dissenter’s demand of its own estimate of fair value. This is a more sensible reading of the statutes. Clay Street filed its suit within 60 days of Humphrey’s demand for payment of its own estimate<sup>21</sup> and did not violate the LLC Act in this respect.

Credible Fair Value Payment. Humphrey next contends Clay Street violated the LLC Act by failing to make a “credible fair value payment.”<sup>22</sup> We need not decide whether such failure could defeat a finding of substantial compliance, because Clay Street’s payment was credible. Its initial payment (\$181,192) is almost 75 percent of the fair value determined by the court (\$231,947, a one-quarter interest in net value,

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<sup>21</sup> Humphrey informed Clay Street of its own estimate of fair value on June 1, 2005. Clay Street filed its petition for a judicial determination of value on July 29, 2005.

<sup>22</sup> Revised Br. of Appellant at 21.

plus \$9,833 interest for 2.5 years). Humphrey's argument fails.<sup>23</sup>

The court's finding that Clay Street substantially complied with the dissenter's rights statute is supported by the record. Consequently, an award of costs and attorney fees was not available to Humphrey under RCW 25.15.480(2)(a).

In the alternative, Humphrey contends it should have awarded fees pursuant to RCW 25.15.480(2)(b) because Clay Street, not Humphrey, acted arbitrarily, vexatiously, or not in good faith.

Humphrey first argues that Clay Street's initial payment was vexatious because it was intended to start a negotiation process. Humphrey offers no evidence in support of this allegation.

Humphrey next argues the value used by Cowan to calculate the initial payment was arbitrary, pointing out that the \$2.5 million base figure Cowan used matched the valuation for the Clay Street property used by Scott Rogel in his divorce. This observation does not support an argument that the payment amount was arbitrary. Humphrey also contends Cowan used a book value that ignored two rejected offers for \$2.9 and \$3.19 million. But Cowan used the income capitalization approach. This is a valid appraisal approach, and was considered by both trial experts. Further, Cowan's result was reasonably close to the court's final calculation of Humphrey's interest. Humphrey did not show that Clay Street acted arbitrarily in making its initial payment.

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<sup>23</sup> Compare Spinnaker Software Corp. v. Nicholson, 495 N.W.2d 441, 446 (Minn. App. 1993) (upholding determination that corporation failed to substantially comply with dissenter's rights provisions and award of fees to dissenter, where company paid \$0.90 per share and court concluded minimum fair value would be approximately \$1-5/8 per share).

Lastly, Humphrey challenges the court's finding that Clay Street relied in good faith on the advice of its attorney. He argues the only evidence of advice of counsel was a July 14, 2004 memorandum from attorney Cowan to Ostroff regarding the proposed merger. Humphrey is mistaken. The court also considered Ostroff's testimony and the deposition of Cowan. Humphrey's argument that the advice of counsel defense is not available to a defendant who does not call its counsel as a witness at trial also fails; the case authority Humphrey relies upon does not support its contention,<sup>24</sup> and we have found no case so holding.

The finding that Clay Street did not act arbitrarily, vexatiously, or not in good faith is supported by substantial evidence. That finding precluded an award of attorney's fees and costs to Humphrey under RCW 25.15.480(2)(b). The court did not err in rejecting Humphrey's request for attorney fees.

*Award of Fees to Clay Street and the Rogels Under RCW 45.15.480(2)(b)*

Humphrey challenges the finding<sup>25</sup> that it acted arbitrarily, vexatiously, or not in good faith, and contends the court abused its discretion in awarding fees to Clay Street and to Joseph and Ann Lee Rogel.<sup>26</sup>

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<sup>24</sup> See Bill Edwards Oldsmobile, Inc. v. Carey, 219 Va. 90, 244 S.E.2d 767, 772 (1978) (holding that the advice of counsel defense to a malicious prosecution action was not available under the facts of the case, where the advice of counsel was based upon incorrect and incomplete information.)

<sup>25</sup> In its order regarding attorney fees and expenses, the court designated its finding that Humphrey acted "arbitrarily, vexatiously, or not in good faith" as a conclusion of law. See Clerk's Papers at 2328, 2331. This is a factual finding and we review it accordingly. Willener v. Sweeting, 107 Wn.2d 388, 394, 730 P.2d 45 (1986).

<sup>26</sup> Humphrey does not challenge the court's award of \$24,961 in costs to Clay Street pursuant to CR 68.

As a preliminary matter, Humphrey raises several evidentiary issues. Humphrey argues the court erred in considering the July 2005 settlement offer because it was "unfunded" and, in any case, inadmissible. Humphrey failed to object to this evidence, however, and cites no authority suggesting it was irrelevant to the question of vexatious behavior.

Humphrey attacks as irrelevant the evidence of several arbitration awards involving the other LLCs in which the members were involved. But the arbitration awards were relevant to understanding the litigation environment here. Those LLCs involved Humphrey and many of the same partners, and suffered a similar fate when relationships deteriorated.

Finally, Humphrey argues the court improperly considered evidence of Clay Street's CR 68 offer. Humphrey is correct that evidence of a CR 68 offer is not admissible except in a proceeding to determine costs, the award of which is mandatory when the final judgment obtained is less favorable than the offer. The court erroneously considered the CR 68 offer in determining whether Humphrey's behavior with respect to its dissenter's rights was vexatious.

We nevertheless uphold the finding that Humphrey acted vexatiously, because the rest of the evidence amply supports it. Humphrey has the right to pursue its interests under the statute, but must act reasonable in doing so.

The LLC was dysfunctional, but Humphrey objected to selling the property. Then Humphrey objected to Clay Street's initial payment and demanded an additional \$424,607 based on an alleged value of over \$4.1 million, a figure the court ultimately

rejected as unsupported by substantial or credible evidence. Then Humphrey rejected the offer of an additional \$150,764, by which Humphrey would have received \$65,426 more than the other members. The court eventually awarded \$45,524 less than Humphrey had been offered.

Further, the evidence points to Humphrey as the source of the acrimony and resulting dysfunctional relationships. In prior arbitrations involving many of the same investors but different LLCs, arbitrators found Humphrey's conduct wanting. One arbitrator found that Humphrey breached its fiduciary duty and that its conduct left winding up "the only rational solution."<sup>27</sup>

Finally, Humphrey's litigiousness was itself unreasonable. Humphrey engaged in multiple lawsuits against these and other partners. Each of these disputes involved similar circumstances and a similar trail of rejected offers. In each, Humphrey lost. This included actions against Joseph and Ann Lee Rogel, who were retired, passive investors in Clay Street and another LLC in Tacoma known as 615. As to 615, Humphrey's lawsuit against them was twice dismissed. Humphrey refused to dismiss them from this litigation, despite admitting it had no claim that they were involved in any misconduct.

The evidence amply supports the court's finding that Humphrey acted vexatiously in pursuing its dissenter's rights. The court had discretion to award attorney fees and expenses to Clay Street and the Rogels under RCW 25.15.480(2)(b).

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<sup>27</sup> Clerk's Papers at 2323.

We affirm the trial court in all respects, and award Clay Street and Joseph and Ann Lee Rogel their reasonable attorney fees on appeal under RAP 18.1 and RCW 25.15.480(2)(b).

Affirmed.

E. Livingston, J.

WE CONCUR:

Schiveler, CT

Ayd, J.

***APPENDIX B***

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2  
3  
4  
5  
6  
7  
8 SUPERIOR COURT OF WASHINGTON FOR KING COUNTY  
9 HUMPHREYS INDUSTRIES LTD.,

10 Plaintiff,

11 v.

12 CLAY STREET ASSOCIATES LLC,

13 Defendant.

No. 05-2-20201-7 SEA

(Consolidated With  
05-2-24967-6 SEA)

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

14 CLAY STREET ASSOCIATES LLC, a  
15 limited liability company,

16 Petitioner,

17 v.

18 HUMPHREY INDUSTRIES, LTD, a  
19 Washington corporation,

20 Respondent.

21 This matter was tried to the Court, without a jury, from June 11-15, 2007. The  
22 undersigned judge presided at trial. The claims presented at trial for adjudication were  
23 as follows:

24 1. A judicial determination of the value of Clay Street Associates, LLC  
25 ("Clay Street") pursuant to RCW 25.15.475 as of December 7, 2004, the effective date  
26 of a merger from which Clay Street member Humphrey Industries, Ltd. ("Humphrey")  
27 dissented;

28 2. The right of Humphrey as a dissenting member, if any, to further payment  
29 from Clay Street; and

ORDER

B.1

Judge Harry J. McCarthy  
King County Superior Court  
516 Third Avenue  
Seattle, WA 98104  
206-296-9205

3. The right of any party to costs and/or attorney fees in this matter. Humphrey's Industries, LTD. appeared at trial through its owner and officer, George Humphrey, and through its attorney of record, David C. Spellman of Lane Powell PC. Clay Street appeared at trial through its managing member, ABO Investments, LLC, and through its attorneys of record, Gregory J. Hollon and Gregory G. Schwartz of McNaul Ebel Nawrot & Helgren, PLLC. Clay Street members ABO Investments and Scott Rogel were also represented by Mr. Hollon and Mr. Schwartz. Clay Street members Joseph and Ann Lee Rogel appeared at trial and were represented by Alan Bornstein of Jameson Babbitt Stites & Lombard, PLLC.

At trial, the Court heard expert testimony from the court-appointed appraiser, Darin Shedd, and from Ken Barnes, an expert appraiser retained by Clay Street. The Court also heard testimony from George Humphrey, Scott Rogel, Gerry Ostroff, Phil Newell, Carl Munson, Jim Claeys, and Bart Farrar. The Court further considered designations and counter-designations of deposition testimony of George Humphrey, George Cowan, Gerry Ostroff, and Scott Rogel, as well as numerous exhibits admitted in evidence. The Court afforded particular attention to those admitted exhibits bearing directly on the question of the value of Clay Street as of December 7, 2004.

In arriving at its Findings of Fact and Conclusions of Law, the Court has additionally considered the arguments of counsel at trial, and post trial, as well as the entire court record, including the various proceedings before the Honorable Michael Hayden prior to trial of this matter. On June 20, 2007, the Court orally issued its ruling in this matter.

### I. FINDINGS OF FACT

1. Clay Street was formed for the purpose of developing a commercial warehouse property at 116 Clay Street, N.W., in Auburn, Washington.

2. The members of Clay Street at the time of formation were George Humphrey, Scott and Lori Rogel, ABO Investments, and Joseph and Ann Lee Rogel. Each member held a 25 percent interest in Clay Street. Mr. Humphrey initially acted

ORDER

1 as managing member. Scott Rogel acted as the property manager and real estate  
2 agent for Clay Street.

3 3. Gerry Ostroff is the principal in ABO Investments. The Court found Mr.  
4 Ostroff's testimony in this matter to be credible. Mr. Ostroff provided a credible  
5 summary of how events led to the merger and ultimately to the sale of the Clay Street  
6 property.

7 4. Mr. Ostroff has been involved in investing in real estate since the mid-  
8 1970s. Eventually, Mr. Ostroff became involved in Clay Street, as well as in 901  
9 Tacoma Avenue, LLC and Westwood Village Apartments, LLC, with George  
10 Humphrey, Scott Rogel, and Joseph and Ann Lee Rogel.

11 5. With respect to Clay Street, Mr. Ostroff originally invested between  
12 \$425,000 and \$450,000. Joseph and Ann Lee Rogel initially invested some money  
13 into Clay Street as well. George Humphrey and Scott Rogel did not invest any cash at  
14 the inception of Clay Street. At the time the Clay Street project received permanent  
15 financing, the four members equalized their investments. At that point, each member  
16 had approximately \$100,000 invested in the project.

17 6. Mr. Ostroff wished to remain a passive investor in Clay Street. However,  
18 by 2003, the relationship between George Humphrey and the Rogels had markedly  
19 deteriorated, causing great friction. It is undisputed that by 2003 Clay Street had  
20 become dysfunctional and was not operating successfully for a period of time.

21 7. In August 2003, George Humphrey resigned as managing member.  
22 Because no other member would do it, Mr. Ostroff, through ABO Investments, became  
23 the managing member of Clay Street.

24 8. In his role as managing member, Mr. Ostroff determined that the most  
25 reasonable solution to the dysfunctionality of the LLC was to sell the Clay Street  
26 property and dissolve the LLC. Prior to moving forward with a sale of the property, Mr.  
27 Ostroff explored the possibility of trading interests in various properties in which the  
28

1 parties were involved in order to separate the parties' business interests. The trading  
2 idea did not work out.

3 9. The Clay Street Operating Agreement required unanimous approval of  
4 the members to sell the property. Because Mr. Humphrey would not agree to a sale,  
5 Mr. Ostroff sought the advice of counsel concerning how to end the parties' business  
6 relationships in Clay Street. Ultimately, Mr. Ostroff was referred to George Cowan, an  
7 attorney with the Vandenberg Johnson & Gandara firm in Seattle, Washington.

8 10. After reviewing the situation, Mr. Cowan advised Mr. Ostroff that a  
9 merger of Clay Street into a new LLC was the best means to solve Clay Street's  
10 problems. In particular, a merger would allow the new LLC to have different voting  
11 rights which would allow a sale of Clay Street's property to occur without the consent of  
12 George Humphrey. Mr. Cowan further advised Mr. Ostroff that Humphrey would have  
13 a right to notice of the merger and payment of his fair share in the LLC as of the date  
14 of the merger, should he dissent from the planned merger. In August 2004, a new  
15 LLC, The WXYZ LLC, was formed.

16 11. The Court finds that Mr. Ostroff's reliance on the advice of counsel was in  
17 good faith.

18 12. Mr. Cowan did make some errors in the merger process in that Bank of  
19 America's consent was not obtained, a new identification # was not obtained and Mr.  
20 Humphrey was neither timely informed nor timely paid as required by statute.

21 13. Clay Street's loan documents with Bank of America required the bank's  
22 consent to any transaction such as the merger at issue. The bank did not expressly  
23 consent in writing to the plan of merger; however, the bank continued to accept Clay  
24 Street's payments and did not at any time declare Clay Street or its successor LLC to  
25 be in default. Instead, the bank allowed Clay Street and its successor to continue  
26 making loan payments up through the sale of the Clay Street property.

1 14. The Plan of Merger was initiated in late August and early September  
2 2004. Pursuant to the Plan of Merger, the merger would become effective on  
3 December 7, 2004.

4 15. In September 2004, after the merger was initiated, Mr. Ostroff moved  
5 forward with listing the Clay Street property for sale. To maximize the return on his  
6 and the other members' investment, Mr. Ostroff wished to sell the Clay Street property  
7 and dissolve the parties' dysfunctional business relationship.

8 16. After conferring with various brokers and considering other information,  
9 Mr. Ostroff, in conjunction with Scott Rogel, decided to list the property for sale at  
10 \$3.35 million. A listing agreement was signed on September 15, 2004. The property  
11 was listed with Morris Piha Real Estate Services, a real estate brokerage company with  
12 which Scott Rogel was affiliated. At the time the property was listed, the market was  
13 regarded by all witnesses with knowledge of the real estate market at issue as being  
14 reasonably flat and soft. Mr. Ostroff did not believe that the LLC property would justify  
15 a listing much above \$3.3 million.

16 17. At the time the Clay Street property was listed for sale, it was suffering  
17 from a vacancy rate of approximately 45 percent. Specifically, two of the seven units  
18 within the building were vacant and another had only a short term lease. In October  
19 2004, a lease was signed for one vacant space with a move-in date in February 2005.  
20 In January 2005, Clay Street obtained commitments or long-term leases for the other  
21 two vacancies with a scheduled move-in date in May 2005.

22 18. At the time the property was listed for sale, Clay Street was losing  
23 money. By year-end 2004, the property had an annual loss of approximately \$29,000.  
24 In September 2004, prior to the effective date of the merger, Mr. Ostroff made a capital  
25 call to the other LLC members. Mr. Ostroff requested a \$10,000 contribution from  
26 each member to cover mortgage payments, taxes, and other expenses anticipated for  
27 the last quarter of 2004. Mr. Ostroff, Scott Rogel, and Joseph and Ann Lee Rogel  
28 each made the requested capital contribution of \$10,000. Mr. Humphrey disagreed  
29

ORDER

1 with the capital call and did not contribute \$10,000. Subsequently, he dissented from  
2 the proposed merger. The financial problems of the property gave further support to  
3 Mr. Ostroff's decision to sell the property.

4 19. In this matter, Mr. Humphrey has alleged that Scott Rogel was attempting  
5 to sell the property in a "fire sale" — i.e., attempting to sell the property as quickly as  
6 possible for an artificially low price. The Court finds that the most credible evidence  
7 does not support this allegation. Specifically, the evidence established that Scott  
8 Rogel marketed the property aggressively. The property was listed through the CBA  
9 (the commercial multiple listing service) and received many "hits." Mr. Rogel  
10 additionally contacted numerous individuals in an effort to market the property,  
11 including brokers, agents, neighbors, and individuals known to Mr. Rogel to have an  
12 interest in industrial properties in the area. Further, Mr. Rogel worked to fill the  
13 vacancies, and kept potential buyers apprised of the decreasing vacancy rate as the  
14 property was leased. Mr. Rogel prepared aggressive pro-forma valuations that valued  
15 the property as if it were fully leased, and provided his pro-forma evaluations to agents  
16 and potential buyers. On balance, the Court finds that the most persuasive evidence is  
17 that Scott Rogel made a good-faith attempt to market the property for the best price  
18 that could be obtained in the market.

19 20. While questions have been raised about Scott Rogel's motivations, the  
20 Court notes that it was in Scott Rogel's financial self-interest to obtain the best possible  
21 price for the property. In any event, the Court finds Scott Rogel's motivations largely  
22 irrelevant, as it was Mr. Ostroff who was ultimately making decisions about the price for  
23 which the property should be listed and ultimately the price that the LLC was willing to  
24 accept for the Clay Street property.

25 21. At the time it was listed, the property did not generate much interest. The  
26 first offer came in late October from a Mr. Oliver for \$2.9 million. Mr. Ostroff rejected  
27 the offer as too low.

28  
29 ORDER

22. A second offer came from a buyer called Remco in November of 2004 for \$3.19 million. Again, Mr. Ostroff considered the offer too low, and instructed Scott Rogel to counter at \$3.3 million. Remco did not respond to the counter-offer.

23. In early December 2004, an offer was made by the Favro Group at \$3 million. Mr. Ostroff again instructed Scott Rogel to counter at \$3.3 million. The Favro Group agreed that it would pay \$3.3 million, but only if the LLC agreed to an unfavorable rent-guarantee clause. Mr. Ostroff was not willing to accept the rent-guarantee clause.

24. While the Clay Street property did receive some bids below the list price, by no means did it generate a bidding war, as would be expected if the property were listed well below its value.

25. In December 2004 and January 2005, Scott Rogel kept the potential buyers informed of the status of the property and, in particular, of developments concerning the leasing of the property's vacancies. Ultimately, in January 2005, after receiving a commitment to lease the property's last remaining vacancies, the Favro Group agreed to a price of \$3.3 million without a rent guarantee. In early February 2005 Clay Street and the Favro Group entered a Purchase and Sale Agreement ("PSA") for \$3.3 million, admitted at trial as Exhibit 65A. The Favro sale did not close until May 2005. From the time of the February 2005 PSA to the closing in May 2005, Mr. Ostroff continued to leave the property in the commercial multiple listing service in an effort to generate back-up offers or other interest in the property. Clay Street did not, however, receive further offers.

26. When considering all of the evidence concerning the Favro sale, including the testimony of Mr. Ostroff, Mr. Claeys, Mr. Newell, and Mr. Scott Rogel, the Court finds that the sale was the result of aggressive marketing of the property and reflected an effort to obtain the best price available from the various potential buyers interested in the property. The Court further finds that the most credible evidence does not in any way support plaintiff's allegation of a distressed, forced, or fire sale.

ORDER

27. At trial, the Court received evidence from expert appraisers concerning the definition of a fair market sale. The expert appraisers agreed that to establish a fair-market sale, a transaction must satisfy five conditions, including that the buyer and seller are typically motivated, that they are well informed, that there has been a reasonable time for exposure in the open market, that payment is made in cash, and that the price represents normal consideration unaffected by any special or creative interests or financing. The Court received other evidence concerning the definition of fair value, including Exhibit 137, offered by George Humphrey. Exhibit 137 is consistent with the definition of fair value offered by the appraisers. Specifically, Exhibit 137, which the Court has at times called the "FASB exhibit," establishes that the "fair value" of real estate is the amount in cash or cash equivalent that the real estate parcel would yield in a current sale between a willing buyer and a willing seller, other than in a forced or liquidation sale.

28. Having considered all of the evidence, the Court finds that the ultimate sale of the property to the Favro Group was an orderly sale that satisfied the five conditions for a fair-market or fair-value sale.

29. At trial, the Court considered the testimony of experts Darin Shedd, appointed by the court, and Ken Barnes, retained by Clay Street. Both appraisers used the traditional appraisal approaches, including the cost approach, the sales comparison approach, and the income approach.

30. Mr. Barnes' appraisal was conducted in June-July 2005, shortly after the sale of the property closed. Mr. Shedd's appraisal was completed in 2007 in connection with the anticipated trial of this matter. Mr. Shedd's report (exhibit 113) also included an earlier report done by appraiser Bruce Allen.

31. After considering the three appraisal approaches, Mr. Shedd opined that the "as is" value of the property on December 7, 2004 was \$3.5 million. Mr. Shedd opined that the "stabilized value" on that date — i.e., the value of the property if fully leased — was \$3.885 million.

ORDER

1           32.     Notably, Mr. Shedd did not consider the Favro sale because he could not  
2 determine if it met the five conditions for a fair-market sale. More precisely, he stated  
3 "he couldn't get to the bottom of it." Notably, Mr. Shedd had been informed of  
4 allegations of a distressed sale, including allegations that Scott Rogel's divorce may  
5 have affected the sales price. Given the possible doubts created by such allegations,  
6 Mr. Shedd disregarded the \$3.3 million sale of the property in May 2005.

7           33.     Mr. Shedd and Mr. Barnes both testified to the difficulty of a "look back"  
8 appraisal such as that done by Mr. Shedd several years after the effective date of the  
9 appraisal.

10          34.     Mr. Barnes, Clay Street's expert, approached the appraisal with the same  
11 goal as Mr. Shedd — to determine the market value of the property as of December 7,  
12 2004. Like Mr. Shedd, Mr. Barnes used the cost approach, the sales comparison  
13 approach, and the income approach. Mr. Barnes testified that he gave greater weight  
14 to the sales comparison approach and the income approach and less to the cost  
15 approach. Mr. Barnes concluded that the "as-is" value of the property was \$3.15  
16 million on December 7, 2004; he further concluded that the "stabilized" value as of that  
17 date was \$3.3 million.

18          35.     Unlike Mr. Shedd, Mr. Barnes considered the May 2005 sale of the Clay  
19 Street property to the Favro Group. In Mr. Barnes' estimation, the sale met the five  
20 requirements of a market-value sale. Mr. Barnes testified that such a sale is the best  
21 evidence with respect to the sales comparison approach. As he testified, "you can't  
22 beat it as a comp." In reconciling the various approaches, Mr. Barnes gave significant  
23 weight to the actual sale of the property, and testified specifically that he weighted the  
24 sale at approximately 70 percent as far as his entire appraisal was concerned.

25          36.     At trial, Mr. Humphrey took issue with certain of the comparables relied  
26 on by Mr. Barnes in his appraisal. The Court finds, however, that the comparables  
27 used by Mr. Barnes were not out of line with market conditions and, in the Court's view,  
28 were reasonably considered in support of his valuation.

29 ORDER

37. Both appraisers offered opinions about how to work back from a value established by a fair-market sale (here, the May 2005 sale for \$3.3 million) to establish a value at a point earlier in time (the December 7, 2004 merger date). Using the methodology described in his report, Exhibit 257, and to which he testified at trial, Mr. Barnes estimated the fair market value of the property as of December 7, 2004 to be \$3.15 million. Mr. Shedd opined that if the \$3.3 million sale in May 2005 was a market sale, the fair value of the property in December 2004, given the fifteen percent rate of market appreciation in the relevant time period, would be a bit less than \$3.1 million.

38. At trial, George Humphrey, the principal of plaintiff Humphrey's Industries, LLC, offered testimony concerning the LLC and the value of its property. Mr. Humphrey is not an appraiser, and his opinions concerning value were considered by the Court only as lay opinions based on his experience with real estate. In the Court's judgment, Mr. Humphrey's opinions, while based on considerable investment and property management experience, are not entitled to the same weight as those of Mr. Shedd or Mr. Barnes, experts on whose testimony the Court placed considerable weight with respect to the value of the Clay Street property on December 7, 2004.

39. At trial, Mr. Humphrey placed a value of \$4.1 million on the Clay Street property as of December 7, 2004. In the Court's view, the evidence used by Mr. Humphrey in his valuation appears to be well outside the mainstream of reasonably-based valuations, whether based on the cost approach, income approach, or sales comparison approach.

40. The Court further notes that, during the relevant time frame, and despite the fact that the property was openly and aggressively marketed, no one offered anything close to \$4.1 million for the Clay Street property. In short, Humphrey's \$4.1 million figure does not have substantial or credible evidence to support it.

41. Based on all evidence available, including the expert testimony and the evidence concerning the fair-market sale of the property in May 2005, the Court finds that Mr. Barnes provided the best estimate of fair value as of December 7, 2004.

ORDER

1 Between the two appraisers, the Court found Mr. Barnes's approach more persuasive,  
2 in particular insofar as he considered the fair-market sale of the property in May 2005.  
3 Based on all of the evidence, the Court concludes that the fair value of the property as  
4 of the merger date of December 7, 2004 was \$3.15 million. The Court further notes  
5 that, given the market conditions and the actual conditions of the property in December  
6 2004, including the property's vacancy problems, the property necessarily had to be  
7 worth less in December 2004 than at the time of the fair-market sale of the property in  
8 May 2005 for \$3.3 million.

9 42. Exhibit 70 is the title company settlement statement from the May 2007  
10 sale of the property. The settlement statement reflects the payments and deductions  
11 made to account for the liabilities of the LLC at the time of the sale and the costs of the  
12 transaction. The Court finds that the LLC members could not realize their equity in the  
13 property without paying existing liabilities and incurring such transaction costs. In  
14 connection with the \$3.3 million May 2005 sale, each of the remaining LLC members  
15 received net proceeds of \$266,529.67. Mr. Humphrey's share in that amount was  
16 placed in the Vanderberg Johnson Gandara trust account.

17 43. At the time of the merger on December 7, 2004, the LLC did not have  
18 any liquid assets with which to make a payment to George Humphrey pursuant to the  
19 dissenter's rights provisions of the LLC Act. Mr. Cowan advised the LLC that it could  
20 satisfy the LLC Act by paying Mr. Humphrey the amount due, plus interest, at the time  
21 the property was sold. As previously determined by Judge Hayden, the delay in  
22 payment to Humphrey until the property was sold constituted a violation of the statute.  
23 However, given that Clay Street lacked any funds to make the payment to Humphrey,  
24 that it could not obtain the requisite funds without a sale of the property, and that it was  
25 willing to pay the statutorily required interest during the period of delay, the Court finds  
26 that, notwithstanding the delayed payment, the LLC substantially complied with the  
27 LLC Act. The material question before the Court is simply the extent to which George  
28  
29

ORDER

1 Humphrey was financially prejudiced and the amount that he is due an additional  
2 payment based on the Court's determination of fair value.

3 44. Following the May 2005 sale, Mr. Cowan calculated Mr. Humphrey's  
4 share as of December 7, 2004 to be worth \$181,192.64, and caused Clay Street to  
5 distribute that amount to Humphrey. Mr. Humphrey objected to the calculation, and,  
6 based on his alleged value of over \$4.1 million, demanded an additional payment of  
7 \$424,607.05 (for a total payment of \$605,799.69) — an amount which, as noted  
8 above, the Court has determined is without support. As required by the LLC Act, the  
9 disagreement over valuation resulted in the instant valuation proceeding before this  
10 Court.

## 11 II. CONCLUSIONS OF LAW

12 45. Pursuant to RCW 25.15.475, Humphrey is entitled to the "fair value" of  
13 his interest in Clay Street as of the date of the merger. "Fair value" under RCW  
14 25.15.475 is defined as "the value of the member's limited liability company interest  
15 immediately before the effectuation of the merger to which the dissenter objects,  
16 excluding any appreciation or depreciation in anticipation of the merger unless  
17 exclusion would be inequitable." RCW 25.15.425(3).

18 46. *Mathew G. Norton Co. v. Smyth*, 112 Wn. App. 865, 874, 51 P.3d 159  
19 (2002) and related authorities ultimately leave the question of fair value to the Court,  
20 and afford the Court discretion to consider any valuation evidence or methodology  
21 appropriate under the specific circumstances of the case, including accumulated case  
22 law regarding market value, value based on prior sales, capitalized earnings value and  
23 asset value. Further, under *Norton*, "[w]hen available, evidence as to the price an  
24 unaffiliated third party would be willing to pay for the [company] as a whole should be  
25 particularly probative in the appraisal context." *Id.* at 880 n.5.

26 47. Here, the evidence established that, in the context of a single-asset LLC  
27 owning a parcel of real estate, "fair value" is essentially the price for which the real  
28

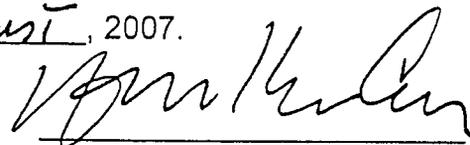
1 estate parcel could be sold on the open market between a willing buyer and willing  
2 seller, other than in a forced or liquidation sale.

3 48. Under *Norton* and related authorities, the Court also has discretion, in  
4 appropriate circumstances, to consider the company's liabilities and transaction costs  
5 in determining the fair value of a dissenter's interest. Here, given the dysfunctionality  
6 of the LLC and the need for the members to terminate their business relationships, and  
7 further given the fact that no members could enjoy any return from the property without  
8 satisfying the LLC's outstanding liabilities and incurring transaction costs in connection  
9 with a sale, the Court holds that the valuation of the dissenter's interest must account  
10 for a proportional share among all Clay Street's principals including the transaction  
11 costs incurred, as well as the LLC's outstanding liabilities.

12 49. Attached hereto as Exhibit A is a spreadsheet offered by Clay Street in  
13 closing arguments calculating the value of Humphrey's interest at a fair value of \$3.15  
14 million, less proportional transaction costs and outstanding liabilities. The Court holds  
15 that the calculations set forth therein appropriately calculate the additional payment  
16 due to George Humphrey for his share of the fair value of the LLC at the time of the  
17 merger. Based on those calculations, and including interest from the date of the  
18 merger at the rate of the LLC's then-current bank note of 7.75%, as required by the  
19 LLC Act, the Court concludes that Mr. Humphrey is due an additional payment of  
20 \$60,588.22.

21 50. The parties have submitted motions for attorney fees and costs. Once  
22 the Court rules on those motions, final judgment should be entered that takes into  
23 account a valuation award in favor of Humphrey against Clay Street in the amount of  
24 \$60,588.22, and any appropriate adjustments based on any award of fees or costs to  
25 any of the parties.

26 DATED this 29 day of August, 2007.

27   
28 \_\_\_\_\_  
29 Honorable Harry J. McCarthy

ORDER

B.13

Judge Harry J. McCarthy  
King County Superior Court  
516 Third Avenue  
Seattle, WA 98104  
206-296-9205

**BARNES \$3.15 MM VALUE  
at 25% per member**

**At \$3,300,000 (5/16/05)**

(Ex. 65A)

net return for each ¼ interest (Ex. 252-007)	<u>\$266,529.67</u>
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**At \$3,150,000 (12/7/04)**

(Ex. 257 -- Barnes' appraisal)

each ¼ interest receives <u>\$37,500</u> less	<u>\$229,029.67</u>
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Plus approximate credit for lower transaction costs:

(6% commission + 1.78% <sup>excise</sup> ~~income~~ tax = 7.78%)

7.78% x \$150,000 = \$11,670

25% of \$11,670	\$2,917.50
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Net return for each ¼ interest:	<u>\$231,947.17</u>
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**Additional Payment Due to Plaintiff Humphrey Industries, Ltd**

¼ interest in net value	\$231,947.17
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Less amount already paid	(\$181,192.64)
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Subtotal:	<u>\$50,754.53</u>
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Plus interest @ 7.75% (2.5 yrs)	<u>\$9,833.69</u>
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<b>Total payment due:</b>	<b>\$60,588.22</b>
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***APPENDIX C***



- 1 (2) Declaration of Ann S. Humphrey in Support of Humphrey's Motion for Fees and
- 2 Costs;
- 3
- 4 (3) Defendant Clay Street Associates Opposition to Humphrey's Motion for Fees
- 5 and Costs;
- 6
- 7 (4) Declaration of Gregory G. Schwartz in Support of Opposition to Plaintiff's
- 8 Motion for Fees and Costs, with attached Exhibits A-D;
- 9
- 10 (5) Humphrey's Reply in Support of Motion for Fees and Costs;
- 11
- 12 (6) Declaration of Stan Beck in Support of Humphrey's Motion for Fees;
- 13
- 14 (7) Declaration of David C. Spellman with Attorney Invoices through May 30, 2007;
- 15
- 16 (8) Defendant Clay Street's Motion for Award of Costs and Attorney's Fees;
- 17
- 18 (9) Declaration of Gregory J. Hollon regarding Motion for Attorney's Fees;
- 19
- 20 (10) Declaration of Gerald Ostroff in Support of Defendants' Motion for Award of
- 21 Costs and Attorney Fees;
- 22
- 23 (11) Declaration of Gregory G. Schwartz in Support of Defendant Clay Street's
- 24 Motion for Award of Costs and Attorney Fees;
- 25
- 26 (12) Supplemental Declaration of Gregory J. Holland Regarding Motion for Attorney
- 27 Fees;
- 28
- 29 (13) Humphrey's Opposition to Clay Street's Motion for Attorney's Fees and
- Expenses, with attached Exhibits A-D;
- (14) Joseph and Ann Lee Rogel's Motion for Attorney's Fees and Expenses;

ORDER

C•2

Judge Harry J. McCarthy  
King County Superior Court  
516 Third Avenue  
Seattle, WA 98104  
206-296-9205

- (15) Declaration of Alan Bornstein in Support of an Award of Attorney's Fees and Litigation Expenses in Favor of Joseph and Ann Lee Rogel, with Exhibits A and B;
- (16) Declaration of Alan Bornstein Containing Inadvertently Omitted Exhibits, with Exhibits A-C;
- (17) Revised Declaration of Alan Bornstein in Support of an Award of Attorney's Fees and Litigation Expenses in Favor of Joseph and Ann Lee Rogel, with Exhibit A;
- (18) Humphrey's Opposition to Joseph and Ann Lee Rogel's Motion for Attorney's Fees and Expenses;
- (19) Reply of Joseph and Ann Lee Rogel in Support of their Motion to Recover Attorney's Fees and Expenses and
- (20) Court's Findings of Fact and Conclusions of Law entered on August 30, 2007.

I  
BACKGROUND

In order to assess attorney's fees and expenses equitably as authorized by RCW 25.15.480, it is necessary to understand the relevant history relating to the deterioration of the relationship of the members not only of the Clay Street LLC but other related LLCs. The highly contentious relationship among the parties ultimately doomed any hope of conducting the business of Clay Street Associates rationally and in the best financial interest of the LLC's members. Before Clay Street's operations became paralyzed, there were other LLCs involving the same parties that suffered the same preventable fate as Clay Street Associates.

1 The conduct of Mr. Humphrey involving two other closely related LLCs, 901 Tacoma  
2 Avenue and Westwood Village, foreshadowed the outcome of the Clay Street Associates LLC  
3 trial. On August 3, 2006, arbitrator Thomas J. Brewer dismissed all Humphrey's claims with  
4 prejudice against respondents 901 Tacoma Avenue LLC, Westwood Village Apartments LLC,  
5 ABO Investments, Scott Rogel, Joseph Rogel and Ann Lee Rogel, Lori Goldfarb and Avram  
6 Investments. The evidence presented to Mr. Brewer had similarities to the evidence in the Clay  
7 Street Associates LLC trial. Mr. Brewer found respondents to be the prevailing party and  
8 awarded them attorney's fees of \$220,566.06.  
9

10  
11 A year before the arbitration before Mr. Brewer, another arbitration took place before  
12 retired Judge David Soukup. That arbitration concerned another similar dispute over whether  
13 899 West Main LLC should have been wound up pursuant to RCW 25.15.295(1). That  
14 arbitration, like the 901 Tacoma Avenue LLC and Westwood Village Apartments LLC and like  
15 Clay St. Associates, involved the same parties and was marked by the same extreme animosity  
16 among those parties. Mr. Soukup noted that Humphrey Industries had a number of breaches of  
17 fiduciary duties and had created a situation where not only was there cause to wind up the LLC,  
18 it was "the only rational solution". (Exhibit D to Declaration of Gregory G. Schwartz in  
19 Support of Defendants' Motion for Award of Costs and Attorney Fees). In that case, Mr.  
20 Soukup directed that each party pay their own costs and fees.  
21  
22

23  
24 As he did at trial, Gerald Ostroff summarized the history of the decline of 901 Tacoma  
25 and Westwood Villages LLC. Mr. Ostroff also had been named as a defendant in the earlier  
26 cases. Mr. Ostroff declared that given the history of Mr. Humphrey's conduct of the 901  
27 Tacoma and Westwood Villages LLC litigation, he "decided to offer Humphrey for more that I  
28

29 ORDER

1 believed he would be able to recover in this suit just to avoid the hassle, high attorney fees and  
2 opportunity costs of the litigation, Humphrey rejected all of our offers". Declaration of Gerald  
3 Ostroff in Support of Defendants' Motion for Award of Cost and Attorney Fees.  
4

5  
6 II  
DISCUSSION

7 A.  
CLAY ST ASSOCIATES LLC  
AND HUMPHREY INDUSTRIES LTD.  
8

9 With the foregoing relevant background as prologue, the events causing the Clay St.  
10 LLC failure, as established by the trial evidence and the pleadings, take on added meaning. The  
11 LLC was sold May 25, 2005 for \$3.3million. The court found that the trial evidence showed the  
12 most reasonable appraisal value for the LLC as of the date of the merger, December 7, 2004,  
13 was \$3,150,000. The court also found that Mr. Humphrey's estimate of \$4.1 million was not  
14 based on credible, substantial evidence and was well outside the mainstream of reasonable  
15 valuations (Findings of Fact 39-41).  
16

17 At the closing of the LLC sale, defendants had paid Humphrey \$181,192.64. Humphrey  
18 objected to the payment amount. Defendants then hired an appraiser who appraised the property  
19 at \$3,150,000 and the Defendants then offered an additional \$150,764.00 and did not deduct his  
20 transaction costs which they themselves had already paid. The defendants were willing to  
21 accept a net total of \$216,275.01 in order to settle the case. In effect, the defendants had offered  
22 Humphrey a substantial windfall to resolve the case. Humphrey rejected that offer as well and a  
23 trial followed which resulted in Humphrey being awarded \$60,588.22.  
24

25 In September, 2006, defendants made a CR 68 offer of judgment of \$165,275.59.  
26 Humphrey had previously received \$181,192.64, bringing the total amount he could have  
27  
28

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1 received 7 months before trial to \$346,469.23. Humphrey refused the Rule 68 offer, an offer  
2 which exceeded the court's award by \$104,688.37.

3  
4 B.  
5 JOSEPH AND ANN LEE ROGEL.  
6 ABO INVESTMENTS AND  
7 HUMPHREY INDUSTRIES LTD.

8 Defendants Joseph and Ann Lee Rogel are a retired couple and members of Clay Street  
9 Associates LLC as passive investors. Mr. & Mrs. Rogel are also the parents of Scott Rogel,  
10 with whom Mr. Humphrey had developed an extremely acrimonious relationship. Scott Rogel  
11 was closely involved in efforts to market the Clay Street LLC and was a witness at trial. He was  
12 also a respondent in the arbitration before Mr. Brewer.

13 Humphrey Industries, Ltd. included Mr. and Mrs. Rogel in a complaint in June 2005,  
14 alleging that the Rogels were involved in an unlawful sale of a property located at 615  
15 Commerce Street, Tacoma, Washington, another LLC known as "615". That suit against the  
16 Rogels was dismissed with prejudice in the Spring of 2005 by Judge Lum and was later  
17 dismissed a second time by Judge Hayden. Although the Rogels were never active members of  
18 Clay Street, Humphrey refused to dismiss them and they were therefore required to prepare for  
19 trial and to participate in trial. In his opposition to the Rogel's Motion for Attorney's Fees and  
20 Expenses, at page 4, Humphrey referred to his response to the Rogels Motion for Definite  
21 Statement, stating that "[a]lthough [Joe Rogel] was not a managing member of the company, he  
22 may have acted in concert with the two managing members, his son and Gerry Ostroff."  
23 Humphrey also stated that "[d]epending upon the extent of his involvement in Clay Street's  
24 misconduct, Joe Rogel may have some direct liability for the breaches. Id.

1 No evidence was admitted at trial showing the Rogels acted in concert with any officer  
2 of Clay Street, including their son. Neither was any evidence admitted at trial showing that the  
3 Rogels had any involvement in any alleged misconduct by the Clay Street LLC. Humphrey  
4 further stated that the Rogels were merely incidental defendants who held funds in trust from the  
5 sale of Clay Street and against whom Humphrey had no claim. Id. at 9. However, when the  
6 opportunity was presented to dismiss them from the suit, he refused and required Mr. and Mrs.  
7 Rogel to defend a case that really did not involve them nor did it require their presence at trial.  
8  
9

10 C.  
11 RCW 25.15.480

12 RCW 25.15.480 provides in pertinent part:

13 (1) The court in a proceeding commenced under RCW 25.15.475 shall determine  
14 all costs of the proceeding, including the reasonable compensation and expenses  
15 of appraisers appointed by the court. The court shall assess the costs against the  
16 limited liability company except that the court may assess the costs against all or  
17 some of the dissenters, in amounts the court finds equitable, to the extent the  
18 court finds the dissenters acted arbitrarily, vexatiously, or not in good faith in  
19 demanding payment.

20 (2) The court may also assess the fees and expenses of counsel and experts for  
21 the respective parties, in amounts the court finds equitable:

- 22 (a) Against the limited liability company and in favor of any or all  
23 dissenters if the court finds the limited liability company did not  
24 substantially comply with the requirements of this article, or  
25 (b) Against either the limited liability company or a dissenter, in favor  
26 of any other party, if the court finds that the party against whom  
27 the fees and expenses are assessed acted arbitrarily, vexatiously,  
28 or not in good faith with respect to the rights provided by this  
29 article.

30 The court has previously found in Finding of Fact No. 43 that Clay Street, despite having  
31 erred in the timing of its payment to Humphrey and in certain other respects, was in substantial  
32 compliance with RCW 25. The late payment by Clay Street to Humphrey was caused by a lack

33 ORDER

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1 of funds by the LLC at the time and did not ultimately result in financial prejudice to  
2 Humphrey. It does not appear to the court that any member of Clay Street Associates acted  
3 arbitrarily, vexatiously or in bad faith in its conduct toward Humphrey Industries, Ltd.  
4 Therefore, fees and expenses are not assessed against Clay Street.  
5

6 III  
7 ATTORNEY'S FEES AND COSTS  
8 CLAY ST. ASSOCIATES

9 A.  
10 FINDINGS OF FACT

- 11 (1) The court incorporates by reference the Findings of Fact and Conclusions of Law  
12 entered on August 30, 2007.
- 13 (2) The court finds that the real amount in controversy in this case was between  
14 \$50,000 to \$85,000.
- 15 (3) The court further finds that Clay Street's Rule 68 offer would have given  
16 Humphrey nearly \$80,000 more than any other LLC member received from the  
17 sale of the property, far more than the amount actually in controversy, and nearly  
18 three times the actual award of this court.
- 19 (4) The court also finds that Humphrey had no reasonable or legitimate basis for his  
20 refusal to accept the Rule 68 offer and, instead, Humphrey's insistence on  
21 litigation and trial after October 27, 2006 was arbitrary and vexatious.
- 22 (5) The court further finds that after October 27, 2006, Clay Street reasonably  
23 incurred expert fees of \$3,375 and reasonably incurred attorney fees of \$184,343.  
24  
25 In making these findings, the court has applied the lodestar analysis, pursuant to  
26  
27  
28  
29

1 Mahler v Szucs, 135 Wn. 2d 398 (1998) and Bowers v Transamerica Title Co.  
2 100 Wn. 2d 581 (1983), and has reviewed the invoices submitted as Exhibit M to  
3 the Declaration of Gregory G. Schwartz, the Declaration of Gregory J. Hollon in  
4 Support of Motion for Award of Costs and Attorney Fees, and the Supplemental  
5 Declaration of Gregory J. Hollon Regarding Motion for Attorney Fees.  
6

- 7 (6) The court finds the hourly rates charged by counsel to be reasonable.  
8  
9 (7) The court also finds the number of hours expended on behalf of Clay Street in  
10 this litigation to be reasonable. The court has taken into account potential  
11 adjustments under the lodestar analysis, including consideration of the difficulty  
12 of the problem, the skill and experience of counsel involved, the amount at issue  
13 in the dispute, and the quality of work performed.  
14  
15 (8) No adjustment to the lodestar amount is necessary.

16  
17 B.  
CONCLUSIONS OF LAW

- 18  
19 (1) Considering the totality of the trial evidence and the related LLC arbitrations  
20 before Mr. Brewer and Mr. Soukup, the court concludes that Humphrey  
21 Industries Ltd., and George Humphrey acted arbitrarily, vexatiously and not in  
22 good faith with respect to the pursuit of this matter against Clay Street Associates  
23 LLC, its members and Joseph and Ann Lee Rogel. Accordingly, attorney's fees  
24 and expenses should be assessed pursuant to RCW 25.15.480 (2)(b).  
25  
26  
27  
28  
29

- 1 (2) Based on these findings of fact, the court hereby concludes and ORDERS that  
2 Clay Street is awarded reasonably incurred expert fees of \$3,375 and reasonably  
3 incurred attorney fees of \$184,343 pursuant to RCW 25.15.480(2)(b).  
4  
5 (3) In addition, Clay Street Associates is entitled to its costs of \$24,961.55  
6 subsequent to October 27, 2006, pursuant to CR68.  
7

8 IV  
9 ATTORNEY FEES  
10 AND COSTS  
11 JOSEPH AND ANN LEE ROGEL

12 A.  
13 FINDINGS OF FACT

- 14 (1) The court incorporates by reference the Findings of Fact and Conclusions of Law  
15 entered on August 30, 2007.  
16  
17 (2) The court also incorporates by reference herein the Findings of Fact and  
18 Conclusions of Law concerning Clay St. Associates in Part III, A and B supra.  
19  
20 (3) Defendants Joseph & Ann Lee Rogel were retired, passive investors of Clay  
21 Street Associates, LLC.  
22  
23 (4) Plaintiff Humphrey Industries, Ltd., owned and operated by George Humphrey,  
24 was the dissenter in this dissenter's rights valuation case.  
25  
26 (5) In Humphrey Industries, Ltds. Dissenter's rights valuation case, Humphrey  
27 Industries named Joseph & Ann Lee Rogel as defendants. In September and  
28 October 2006, Joseph & Ann Lee Rogel demanded that they be dismissed from  
29 the dissenter's rights case, but Humphrey Industries refused to dismiss them as  
parties.

- ( )
- )
- 1 (6) The court finds that Humphrey Industries named Joseph & Ann Lee as  
2 defendants involving the allegedly improper sale of real property located at 615  
3 Commerce Street ("615") in Tacoma, Washington in which Joseph & Ann Lee  
4 and Humphrey Industries were members.  
5
- 6 (7) Judge Lum dismissed all disputes related to "615", during Spring 2005, with  
7 prejudice.  
8
- 9 (8) Judge Hayden dismissed, by summary judgment order, Humphrey Industries'  
10 "615" claims against Joseph & Ann Lee Rogel, with prejudice in October 2005.  
11
- 12 (9) Alan Bornstein of the Seattle law firm of Jameson Babbit Stites & Lombard  
13 represented Joseph & Ann Lee Rogel throughout this dissenter's right lawsuit.  
14 This court finds that the time spent by attorney Alan Bornstein to defend Joseph  
15 & Ann Lee Rogel in this dissenter's rights case has been segregated from other  
16 time defending Joseph & Ann Lee Rogel from other Humphrey Industries, Ltd.'s  
17 claims.  
18
- 19 (10) The court further finds that Joseph & Ann Lee Rogel has segregated out time  
20 spent on particular defense activities, including the discovery (written discovery  
21 propounded and answered; deposition preparation and examination), appraiser  
22 selection, valuation of the company (legal research; review documents in support  
23 of fair-market -value sale and sales efforts plus witness lists and court filings),  
24 mediation (before mediator-attorney Gregory Bertram), and trial.  
25
- 26 (11) Joseph & Ann Lee Rogel claim that the total fees incurred for the defense of  
27 Humphrey Industries Ltd.'s dissenter's right case equals \$38,241.25.  
28  
29

1 (12) In making these findings, this court finds that the rates charged by Mr. Bornstein  
2 are reasonable and are their normal hourly billing rates and are the rates actually  
3 charged to Joseph & Ann Lee Rogel.  
4

5 (13) The court finds that the reasonable amount of litigation expenses incurred from  
6 August 1, 2003 to the present equals \$292.70.  
7

8 B.  
9 CONCLUSIONS OF LAW

10 This court adopts the following Conclusions of Law:

11 (1) The court concludes that Humphrey Industries acted "arbitrarily, vexatiously, or  
12 not in good faith" in pursuing its dissenter's rights claim against Joseph & Ann Lee  
13 Rogel. RCW 25.15.480(2)(b).

14 (2) Joseph & Ann Lee Rogel are entitled to an award of attorney's fees and litigation  
15 expenses against dissenter Humphrey Industries, Ltd. pursuant to RCW 25.15.480(2)(b).

16 (3) The hours and rates charged by Joseph & Ann Lee Rogel's attorney are  
17 reasonable rates as used in the lodestar calculation, as adjusted.  
18

19 (4) The lodestar fee of \$38,241.25 is the sum of the annual hours multiplied by the  
20 annual hourly rates in each year against Humphrey Industries pursuant to RCW  
21 25.15.480(2)(b).  
22

23 (5) The court deducts \$5,000.00 from \$38,241.25 in attorney's fees associated with  
24 counsel's trial participation at trial, leaving a balance of \$33,241.25 This adjustment is  
25 appropriate because counsel for Joseph and Ann Lee Rogel, while exhibiting  
26 professional advocacy skills at trial in representing his clients, relied primarily on the  
27  
28  
29

1 presentation of evidence at trial by counsel for Clay Street Associates. Counsel for the  
2 Rogels assumed a more secondary role at trial.

3 (6) The \$292.70 of reasonable litigation expenses are recoverable under RCW  
4 25.15.480 (2)(b) and are awarded to Joseph & Ann Lee Rogel against Humphrey  
5 Industries, Ltd.  
6

7  
8 V  
9 SUMMARY OF AWARD OF  
10 ATTORNEY'S FEES AND COSTS

11	A. Clay Street Associates LLC	
12	1. Attorney's Fees and	\$184,343.00
13	Expert Fees	3,375.00
14	2. <u>Costs CR 68</u>	<u>24,961.55</u>
15	Subtotal	\$212,679.55
16	B. Joseph and Ann Lee Rogal	
17	1. Attorney's Fees	\$33,241.25
18	2. <u>Expenses</u>	<u>292.70</u>
19	Subtotal	\$33,533.95
20	C. Total Attorney's Fees and Costs	<u>\$246,213.50</u>

21  
22  
23 DATED this 17 day of October, 2007  
24

25  
26  
27   
28 \_\_\_\_\_  
29 Harry J. McCarthy, Judge

ORDER

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