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COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

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HUMPHREY INDUSTRIES, LTD.,

Appellants,

v.

CLAY STREET ASSOCIATES, LLC, *et al.*,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

This case represents the final chapter in a long and tortured series of business relationships involving plaintiff Humphrey Industries Ltd. and its principal, George Humphrey (collectively “Humphrey”), on the one hand, and several business partners, including Joseph and Ann Lee Rogel (the Rogels), their son, Scott Rogel, and ABO Investments, LLC – a company owned by Gerry Ostroff – on the other. The parties created a number of single-asset limited liability companies for the purpose of owning discrete parcels of commercial real estate. Ultimately, the business relationships between Humphrey and the other members fractured and became dysfunctional, culminating in Humphrey filing a series of lawsuits.

This particular case – the last of the disputes – concerns a company called Clay Street Associates, LLC (“Clay I”). Clay I was formed to develop an industrial warehouse property in Auburn, Washington. Like the other LLCs in which the parties were involved, Humphrey’s relations with the other Clay I members eventually became toxic. In an effort to extricate themselves from their dysfunctional relationship with Humphrey, the remaining members consulted counsel, who guided them through a merger transaction designed to facilitate sale of the Clay I property and thus terminate the parties’ business relationship.

Pursuant to the dissenters’ rights provisions of the LLC Act, Humphrey dissented from the merger and demanded payment of the fair

value of his interest in Clay I as of the date of the merger. In calculating his interest, Humphrey placed an outlandishly high value on the Clay I property – far in excess of what the property sold for in an arms-length transaction several months after the merger. In an effort to avoid litigation, the remaining members offered Humphrey more than they themselves obtained from the sale of the property. Humphrey vexatiously clung to his unreasonable valuation and, consistent with his pattern of conduct in previous cases, insisted on taking the matter to trial.

In a one-week bench trial conducted in June 2007, the Superior Court heard voluminous evidence relating to the fair value of Humphrey's interest in Clay I as of the merger date. Ultimately, in a carefully-reasoned decision tied tightly to the evidence presented at trial, the court found the fair value to be exactly what Clay I proposed. The court found Humphrey's valuation to be "well outside the mainstream of reasonably-based valuations" and unsupported by "substantial or credible evidence." CP 2314 (FOF 39, 40). (The court's valuation findings and conclusions are attached as Appendix I ("A-I")). The court further found Humphrey, in connection with the dissenters' rights litigation, to have behaved in an arbitrary and vexatious manner. The court accordingly awarded attorney fees to Clay I and to the Rogels. CP 2320-32 (The Court's fee and cost award findings and conclusions are attached as Appendix II ("A-II")).

In a scattershot submission riddled with procedural and substantive errors, Humphrey broadly alleges a litany of errors by the trial court. A careful review of the evidence and the record, however, establishes that

substantial evidence supports the trial court's determination of fair value and confirms that the trial court justifiably awarded fees and costs to Clay I and to the Rogels based on Humphrey's vexatious conduct and pursuant to CR 68. Clay I therefore respectfully asks that the trial court's decisions be affirmed.

II. RESTATEMENT OF ISSUES

1. Whether substantial evidence supports the trial court's findings of fact, assuming arguendo those findings are not verities on appeal.
2. Whether the trial court abused its discretion in denying Humphrey's request for fees and costs.
3. Whether the trial court abused its discretion in awarding fees and/or costs to respondents.
4. Whether the trial court abused its discretion in determining Humphrey's fair value as of December 7, 2004.

III. PROCEDURAL DISCUSSION

As noted above, Humphrey's appeal brief is riddled with errors. Clay I and the Rogels respectfully submit that the Court should disregard Humphrey's statement of facts, which contains not one citation to the record. *See* RAP 10.3(a)(5). The Court should also treat virtually all of the trial court's findings as verities, and limit its analysis to arguments made in Humphrey's actual brief (as opposed to in the appendices).

The trial court's findings are verities because Humphrey has failed to properly challenge most, if not all, of them. An appellant is required to

– in its brief – make “[a] separate assignment of error for each finding of fact a party contends was improperly made[.]” RAP 10.3(g). The appellant must reproduce the challenged finding verbatim, either in the brief or an appendix thereto. RAP 10.4(c). Humphrey’s brief challenges over 20 findings of fact entered in connection with the valuation trial in a single-sentence assignment of error, fails to challenge any finding entered in connection with the fee awards, and nowhere reproduces the trial court’s actual findings. App. Br. at 2; Appxs. E, F. As the Court well knows, unchallenged findings of fact are verities on appeal. *Metro. Park Dist. v. Griffith*, 106 Wn.2d 425, 433, 723 P.2d 1093 (1986); *Park Hill Corp. v. Don Sharp, Inc.*, 60 Wn. App. 283, 288-89, 803 P.2d 326 (1991) (applying *Metropolitan Park* to findings and conclusions entered on fee award).

Humphrey’s submission is also overlength. Absent leave to file an over-length brief, a brief should not exceed 50 pages. RAP 10.4(b). Humphrey tries to avoid that limit by using the Appendices for additional argument. But an appendix “may not include materials not contained in the record on review without permission from the appellate court[.]” RAP 10.3(a)(8). To Clay I’s knowledge, Humphrey never presented Appendices E or F to the trial court and prepared each specifically for this appeal. Humphrey’s multiple violations of court rules warrant complete disregard of all his appendices, and particularly Appendices E & F, which are simply 41 pages of additional briefing submitted without leave of court.

Regardless, the fundamental question Humphrey attempts to raise in this appeal is whether substantial evidence supports the trial court's findings. As shown below, whether or not the Court treats those findings as verities, they are supported by substantial evidence.

IV. STATEMENT OF FACTS

A. Clay I Background

At trial, Gerry Ostroff, Clay I's managing member during the events at issue, testified about Clay I's background and the events that led to this lawsuit. RP 341-443. The trial court "found Mr. Ostroff's testimony in this matter to be credible." CP 2307 (A-I FOF 3) (findings to which Humphrey makes no attempt to assign error are in bold). Based on the testimony of Mr. Ostroff and others, the trial court found that Clay I was formed to build a warehouse in Auburn, Washington. CP 2306 (A-I FOF 1). The entity had four members: Humphrey; Scott Rogel; Joseph and Ann Lee Rogel; and ABO Investments, a company owned by Gerry Ostroff. CP 2306-07 (A-I FOF 2, FOF 3); RP 343-46. The same individuals also were involved in other, similar ventures. CP 2307 (A-I FOF 4). Mr. Humphrey initially served as Clay I's managing member and Scott Rogel, a commercial real estate broker, handled leasing and other real estate issues. CP 2306 (A-I FOF 2); RP 346.

Relations between Humphrey and the Rogels became dysfunctional. RP 281, 348; CP 2307 (A-I FOF 6, FOF 8). Ostroff did not take sides, he "just wanted the bickering to stop." RP 348. In August 2003, Humphrey resigned as Clay I's managing member. CP 2307 (A-I

FOF 7). Ostroff was forced to take over as Clay I's managing member because "no other member would do it." CP 2307 (A-I **FOF 7**); RP 349. Over the next year, relations between Humphrey and the Rogels continued to deteriorate, leaving Ostroff convinced the business relationships in the various LLCs, including Clay I, could not proceed. CP 2307 (A-I **FOF 8**); RP 349-51.

Ostroff explored various options, but the parties could not agree on a scenario that would fully separate Humphrey from the remaining members. CP 2307-08 (A-I **FOF 8**); RP 352. Ostroff then consulted the LLCs' attorney, Alan Judy of Karr Tuttle Campbell, about dissolving the entities. RP 352. Judy advised Ostroff that while properties owned by certain other LLCs could be sold immediately, a sale of the Clay I property required the unanimous consent of all members. RP 352-53; *see* CP 2308 (A-I **FOF 9**).

Because Humphrey would not agree to a sale, Mr. Judy referred Ostroff to the Vanderberg Johnson & Gandara LLP firm in Seattle. CP 2308 (A-I **FOF 9**); RP 353-54. In lieu of a judicial dissolution, attorney George Cowan of Vanderberg Johnson recommended merging the Clay I LLC into a new entity with different voting classes that could consent to a sale. CP 2308 (A-I **FOF 10**); RP 354. Attorney Cowan told Ostroff a merger would allow an orderly sale of the property for a maximum return rather than the "fire sale" that would result from a judicial dissolution. RP 354-55. He further explained that the short-form merger would protect Humphrey, who could (1) become a member of the new LLC (albeit with

a different voting interest) and participate as an equal one-fourth member in the sale of the property, or (2) dissent from the merger and receive payment for the fair value of his interest at the time of the merger. CP 2308 (A-I FOF 10); RP 356; Ex. 28 (at 000118).

Based on counsel's advice, Ostroff elected to move forward with the merger transaction. CP 2308 (A-I FOF 10); RP 355. Counsel prepared all documentation for the merger and guided the LLC through the process. Ex. 28 at 000194; *see also* RP 357-58. Ostroff testified that he relied on Mr. Cowan "100 percent" to guide him through the steps. RP 358. The trial court found "Ostroff's reliance on the advice of counsel was in good faith." CP 2308 (A-I FOF 11).

B. Clay I's Counsel Implemented a Merger and Ostroff Had the Property Listed for Sale

On August 20, 2004, attorney Cowan sent Humphrey's counsel a notice of the proposed merger and a notice of dissenters' rights should Humphrey not approve the merger. Ex. 31; RP 361-62. Mr. Cowan filed the articles of merger with the Secretary of State on September 8, 2004. RP 363; Ex. 37. By statute, the merger would take effect 90 days later – i.e., on December 7, 2004. CP 2309 (A-I FOF 14); RP 363.

In the meantime, Ostroff took steps to alleviate Clay I's financial distress. The rental market was soft, the property had a 45 percent vacancy rate, and Clay I lacked funds to pay for tenant improvements and other costs connected with filling the vacant space. RP 366, 380, 382; CP 2309 (A-I FOF 17). Clay I even lacked cash for mortgage and tax

payments. CP 2309 (A-I FOF 18); RP 380. On September 13, 2004, Ostroff made a \$40,000 capital call and asked each member to infuse \$10,000 into the LLC. Ex. 213; CP 2309-10 (A-I FOF 18). Scott Rogel, his parents, and Ostroff all paid; Humphrey did not. CP 2309-10 (A-I FOF 18); RP 382. The property lost \$29,340 in 2004. RP 381; Ex. 75 (2004 Income Stmt).

Ostroff also obtained Mr. Cowan's permission to begin the process of listing the property for sale. CP 2309 (A-I FOF 15, FOF 16); RP 364. Ostroff's goal was "to maximize the return on his and the other members' investment[.]" CP 2309 (A-I FOF 15); CP 365, 371. Ostroff worked with Scott Rogel to set a list price. CP 2309 (A-I FOF 16); RP 364. Based on his own real estate experience and market research, Ostroff, with Scott Rogel's assistance, decided to list the Clay I property at \$3.35 million. CP 2309 (A-I FOF 16); Ex. 214; RP 368. Ostroff did not believe the property would support an asking price above that amount and knew an overpriced property will not attract potential buyers. CP 2309 (A-I FOF 16); RP 366.

Scott Rogel marketed the property aggressively. CP 2310 (A-I FOF 19); RP 609-40. Among other things, he listed it in the Commercial Brokers Association (CBA) – a commercial multiple listing service. CP 2310 (A-I FOF 19); RP 369. The listing service keeps track of all "hits" on the listing. *See* Ex. 247. In addition to listing the property in the CBA, Scott Rogel networked among his contacts in the commercial real estate industry in an effort to find a buyer. RP 609-40.

Two expert appraisers testified that a property listed and exposed to the market at a price below its actual worth will generate substantial interest and even a bidding war. RP 88-89, 568-69. In the case of Clay I, the \$3.35 million list price generated little interest. CP 2310 (A-I FOF 21); RP 371-72. In October and November 2004, Clay I received a \$2.9 million offer and a \$3.19 million offer. CP 2310-11 (A-I FOF 21, **FOF 22**); Exs. 225, 227. Ostroff directed Scott Rogel to counter both offers at \$3.3 million, with a message that Clay I would not accept less. In each case, the buyer “went away.” CP 2310-11 (A-I FOF 21, **FOF 22**); RP 372-74.

In December 2004, Favro, the eventual purchaser of the property, offered \$3.3 million subject to a rent guarantee that effectively reduced the sales price by several hundred thousand dollars. CP 2311 (A-I FOF 23); Ex. 293, ¶ 7; RP 374, 376-77. Ostroff refused the rent guarantee provision, but continued discussions with Favro. CP 2311 (A-I FOF 23); RP 377-78.

Clay I filled its remaining vacancies, at which point Favro agreed to purchase the property for \$3.3 million without a rent guarantee. The parties entered a Purchase and Sale Agreement in February 2005. CP 2311 (A-I **FOF 25**); Exs. 65A, 299; RP 378. The sale closed in May 2005. CP 2311 (A-I **FOF 25**). At Ostroff’s direction, Scott Rogel left the property listed in the CBA until the transaction closed, but no one else expressed interest in the property. CP 2311 (A-I **FOF 25**); CP 379-80.

Notably, the sale nearly fell through when Favro's lender appraised the property at \$2.75 million.¹ RP 418, 521-23, 641-42.

C. Humphrey Invoked Dissenters' Rights, Which Led to This Lawsuit

In response to the August 2004 notice of the proposed merger, on October 1, 2004 Humphrey notified attorney Cowan that he demanded payment of the fair value of his interest in Clay I if the planned merger took effect. Exs. 31, 45. The LLC Act required Clay I to pay Humphrey's fair value by 30 days after the December 7, 2004 effective date of the merger. RCW 25.15.460(1). However, on December 7, 2004, the LLC had no liquid assets with which to pay Humphrey. CP 2315 (A-I FOF 43). Indeed, it had a negative cash flow. RP 380; Ex. 75 (2004 Income Stmt).

Mr. Ostroff testified:

Q. At the time of the merger, did the LLC have any cash with which to make a payment?

A. No. To Mr. Humphrey?

Q. Correct.

A. No. We were living hand-to-mouth.

RP 439.

Mr. Cowan advised Mr. Ostroff that Clay I could comply with the LLC Act by delaying payment until the property sold and paying Humphrey the statutorily-required interest for the period of delay. CP

¹ The history of the offers made on and appraisals of Clay I was graphically depicted on Trial Ex. 300. A copy of that exhibit is attached as Appendix III to this brief.

2315 (A-I FOF 43); CP 1844-45; RP 425-26. Mr. Ostroff relied on that advice. RP 425-26; CP 1844-45.

After the sale closed in May 2005, attorney Cowan calculated Humphrey's interest. RP 384. Ostroff did not advise Mr. Cowan how to do the fair value calculation. RP 386. Mr. Cowan calculated the value of Humphrey's one-quarter interest as of December 7, 2004, at \$181,192.64, and sent a check for that amount to Humphrey. CP 2316 (A-I FOF 44); RP 390-391; Ex. 252. By letter dated June 1, 2005, Humphrey rejected the fair value calculation, and instead demanded that Clay I pay him an additional \$424,607.05 (for a total payment of \$605,799.69), based on an alleged property value of \$4.109 million. Ex. 76; CP 2316 (A-I FOF 44); RP 399-400.

Humphrey's demand sought nearly \$340,000 more for his share of the LLC than the other members who had approved the merger, who made capital contributions in 2004, and whose interest was valued as of the date of closing, had received. (Those members each received \$266,529.66 from the sale). CP 2315 (A-I FOF 42); RP 398; Ex. 252 (Settlement Stmt.). After receiving Humphrey's outrageous demand, Clay I hired a professional appraiser to value Humphrey's interest at the time of the merger. RP 401; Ex. 78. Ken Barnes, a Member of the Appraisal Institute then employed by Cushman & Wakefield, conducted the appraisal. RP 533, 535-36. In his July 14, 2005 report, Mr. Barnes concluded the property's fair value as of the December 2004 effective date of the merger was \$3.15 million. Ex. 257; CP 2313 (A-I FOF 34).

Based on the appraisal, in July 2005 Clay Street offered to pay Humphrey an additional sum that would bring Humphrey's total payment to approximately \$325,000. RP 293, 412-14; CP 2324 (A-II at 5). The proposed additional payment did not deduct for existing liabilities (other than Humphrey's share of amounts due on the original loan) or transaction costs and would have given Humphrey almost \$80,000 more for his one-quarter interest as of the date of the merger than the other members had received from the subsequent sale. RP 413-14; CP 2327 (A-II at 8, **FOF 3**). Nonetheless, Humphrey rejected the new tender. RP 293; CP 2327 (A-II at 8, **FOF 4**). Humphrey then began effecting service of an omnibus lawsuit involving several LLCs and making individual claims against the Rogels, which Humphrey had filed on June 20, 2005. CP 3177-86; *see* CP 2055 (admitting service attempts did not begin until August 3, 2005). Unaware Humphrey had filed, but not served, a lawsuit, Clay I filed on July 29, 2005, an RCW 25.15.475 petition seeking a judicial determination of Clay I's value on the date of the merger. Supp. CP (Dkt. No. 1 of Consolidated Case 05-2-24967-6); *see* CP 2856; RP 414. The court later consolidated the two actions. Supp. CP (Dkt. No. 125); *see* CP 3498 (Dkt. entry 125). Although the Rogels, a retired couple who were passive investors in Clay I, sought to extricate themselves from the proceeding, Humphrey refused to allow them to do so. CP 2329 (A-II at 10, **FOF 5**).

D. Based on the Evidence and the Expert Appraisal Testimony, the Court Found the May 2005 Sale to be at Market Value

The Clay I appraisal action went to trial in June 2007. The court heard background testimony and testimony about the marketing and sale of the property from Ostroff and Scott Rogel, testimony about the sale from a representative of Favro, the property buyer (RP 495-532), and testimony from two appraiser experts: Mr. Shedd, the court-appointed appraiser, and Mr. Barnes, the appraiser retained by Clay I after Humphrey's June 2005 demand. RP 41-112, 533-93. The other major witness was Mr. Humphrey, who testified at length about other comparable properties and gave his lay opinion of Clay I's value. RP 202-307. Mr. Munson, the appraiser for Favro's bank, briefly testified about his appraisal. RP 444-67.

A key issue at trial was whether the \$3.3 million sale to Favro represented a fair-market or fair-value sale or, as Humphrey alleged, was a below-market, fire-sale. If the sale was for fair value, appraisal standards required the actual sales price be given substantial, if not dispositive, weight in determining the property's value. RP 77, 547-48. The elements of a fair value sale are: (1) the buyer and seller are typically motivated; (2) are well informed; (3) the property was exposed for a reasonable time in the open market; (4) payment is in cash; and (5) the price is not affected by special or creative interests or financing. CP 2312 (A-I FOF 27); Ex. 113 at Rpt. p.3; Ex. 257 at Rpt. p.2; RP 76-77, 547-48.

Humphrey's position at trial was that the sale was a "fire-sale" i.e., one seeking a quick, below-market sale. The trial court rejected that characterization, finding instead:

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

CP 2310 (A-I FOF 19); *see* RP 609-40. The trial court likewise rejected Humphrey's attempts to cast doubt on Scott Rogel's motivation by, among other things, linking the sale to Scott Rogel's earlier divorce. *E.g.*, RP 420; Exs. 10, 10A. The court instead determined – in a finding of fact to which Humphrey does not attempt to assign error – that:

While questions have been raised about Scott Rogel's motivations, the Court notes that it was in Scott Rogel's financial self-interest to obtain the best possible price for the property. In any event, the Court finds Scott Rogel's motivations largely irrelevant, as it was Mr. Ostroff

who was ultimately making decisions about the price for which the property should be listed and ultimately the price that the LLC was willing to accept for the Clay Street property.

CP 2310 (A-I FOF 20).

Based on these findings and the detailed evidence concerning Clay I's efforts to market the property and the market response to it, the trial court found the Favro sale met the standards for a fair-market or fair-value sale. CP 2312 (A-I FOF 28). Specifically, it found:

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.

...

Having considered all 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.

CP 2311-12 (A-I FOF 26, 28); *see also* CP 2312 (A-I FOF 27).

These determinations were significant because the court-appointed appraiser, Mr. Shedd, chose not to consider the \$3.3 million sale price of the property in valuing the Clay I property. CP 2313 (A-I FOF 32); RP 78-79. Mr. Shedd disregarded the sale because "he couldn't get to the bottom of" Humphrey's "fire sale" allegations. *Id.* Nevertheless, Shedd

candidly admitted he was unaware of any relationship between the Favro group and the Clay I owners that would make it anything other than an arms-length transaction. RP 80. He also admitted the property was listed for an adequate exposure period, and that the market reaction to the \$3.35 million listing did not suggest the price was below market. RP 87-88.

Mr. Barnes, on the other hand, placed considerable weight on the actual sales price and concluded that it represented the actual value of the property in May 2005. CP 2313 (A-I FOF 34); RP 546-47, 566, 587-88. After hearing all the evidence about the sale and the parties' motivations, the court found Mr. Shedd's disregard of the May 2005 sale problematic. CP 2314-15 (A-I FOF 41). As had Mr. Barnes, the court found that the \$3.3 million sale in May 2005 represented the actual value of the property as of that date. CP 2314-15 (A-I FOF 37-41).

E. Based on the Evidence, the Trial Court Valued the Property at \$3.15 Million as of December 7, 2004 and Awarded Humphrey One-Quarter of That Amount, Less Humphrey's Share of Liabilities and Transaction Costs

The LLC Act required the court to determine the property's fair value as of the effective date of the merger, i.e., December 2004. CP 2316 (A-I COL 45) (citing RCW 25.15.425(3)). The expert appraisers who testified at trial agreed the property was worth less in December 2004 than in May 2005 because (1) the market was rapidly appreciating during that period and (2) the property was in a distressed state and suffering from high vacancy in early December 2004 – a problem largely cured by May 2005. RP 542, 567, 98-99. Notably, Mr. Shedd, the court-appointed

appraiser, opined that, assuming the \$3.3 million sale in May 2005 was a fair-market sale, the value in December 2004 would have been less than \$3.1 million. RP 98-99. Mr. Barnes testified that the value in December 2004 was his previous calculation of \$3.15 million. RP 543. After weighing all of the evidence, the court found Mr. Barnes's approach most persuasive:

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

CP 2314-15 (A-I FOF 41).

The trial court then determined that it would be unfair to award Humphrey a full one-quarter share of the \$3.15 million value, because that number did not reflect costs necessarily incurred to unlock the value of the LLC's sole asset by leasing and then selling the property, and because the sale resulted from the inability of the members of the LLC (including Mr. Humphrey) to cooperate. CP 2317 (A-I COL 48); *see also* RP 281, 348; CP 2307 (A-I FOF 6). It is undisputed that the LLC's dysfunctionality forced the sale. CP 2307 (A-I **FOF 8**). That being the case, the costs

incurred were necessary because “the LLC members could not realize their equity in the property without paying existing liabilities and incurring such transaction costs.” CP 2315 (A-I FOF 42); *see* RP 395-98; Ex. 252 (Settlement Stmt.). Given the unique circumstances, the court concluded that “the valuation of [Humphrey’s] interest must account for a proportional share [of] the transaction costs incurred, as well as the LLC’s outstanding liabilities.” CP 2317 (A-I COL 48).

Based on this conclusion and its related findings, the court calculated Humphrey’s share as of December 7, 2004 to be \$231,947.17. After deducting the \$181,192.64 already paid to Humphrey, and adding interest, the court concluded that Humphrey was due an additional payment of \$60,588.22. CP 2317-18 (A-I COL 49 & Ex. A). The additional payment was within the range suggested by Clay I’s counsel. RP 776.

F. The Trial Court Awarded Clay I and the Rogels Their Attorney Fees, Expenses and Costs

The trial court indicated in the findings and conclusions entered in connection with the valuation proceeding that its final judgment would be subject to an award of fees and/or costs. CP 2317 (A-I COL 50). All parties sought their fees and/or costs. Humphrey sought fees and costs under all provisions of RCW 25.15.480. CP 1682-1911, 1939-92. Clay I and the Rogels sought fees under RCW 25.15.480(2)(b), and Clay I sought costs under CR 68. CP 3155-68; 3369-97. Clay I limited its request to fees and costs incurred after Humphrey spurned a CR 68 offer of judgment

that Clay I made on October 27, 2006. CP 3156-57. In its CR 68 offer of judgment, Clay I had offered to allow judgment to be taken against it in the amount of \$144,183.86, plus interest at 7.75 percent from December 7, 2004.² CP 3308-09. In other words, Clay I had in October 2006, effectively reiterated its willingness to pay Humphrey the same total amount it had offered in July 2005, with additional interest, for a total additional payment of \$165,276.59 and a net return of \$346,469.23. CP 3159-61 & n.3.

Clay I's Rule 68 offer was for roughly three times the amount awarded Humphrey by the trial court and would have given Humphrey an investment return substantially greater than the \$266,529.66 received by the other members of Clay I.³ CP 2327 (A-II at 8, **FOF 3**); CP 2315 (A-I FOF 42); RP 398. Clay I made that generous offer because it wanted to avoid expensive and protracted litigation with Humphrey – a very real concern given Humphrey's established track record of litigation over the LLCs. CP 3168; RP 274-81. While Humphrey had yet to prevail in any action, those who opposed him incurred enormous litigation costs and "hassle." CP 3168, *see* CP 3205-18 (decision dismissing Humphrey's

² Under RCW 25.15.425(4), the interest rate due a dissenter is tied to the underlying bank loan.

³ The trial court found the amount Humphrey would have received pursuant to the Rule 68 offer to be nearly \$80,000 more than the other members. CP 2327 (A-II at 8, **FOF 3**). In fact the amount was even more, since in order to pay Humphrey the additional amount, each member would have had to accept reductions in their own share of the sale proceeds. CP 3161. Respondents accept the trial court's \$80,000 finding for purposes of this appeal.

claims against other LLC members with prejudice and awarding fees and costs to respondents); 3235-38 (decision finding, among other things, that Humphrey violated fiduciary duties owed to other LLC members); 3240-43 (decision ordering the wind up of another LLC because of the parties' inability to function). The Rogels, who were mere passive investors, bore the same burdens. CP 2322-26 (A-II at 3-7).

The trial court considered the voluminous materials submitted and awarded fees and costs to Clay I and the Rogels. The trial court supported its awards with detailed findings of fact and conclusions of law *to which Humphrey does not assign error in his brief. See Sec. III, supra* (discussing Humphrey's RAP violations). Most significantly regarding Clay I, the trial court found that its Rule 68 offer:

[W]ould have given Humphrey nearly \$80,000 more than any other LLC member received from the sale of the property, far more than the amount actually in controversy, and nearly three times the actual award of this court.

CP 2327 (A-II at 8, **FOF 3**). The court further found that:

Humphrey had no reasonable or legitimate basis for his refusal to accept the Rule 68 offer and, instead, Humphrey's insistence on litigation and trial after October 27, 2006 was arbitrary and vexatious.

CP 2327 (A-II at 8, **FOF 4**). With respect to the Rogels, the court found: that Humphrey had "refused to dismiss them" as parties despite having the opportunity to do so and even though Humphrey's claims against the Rogels in proceedings involving other LLCs had all been dismissed. CP 2325-26 (A-II at 6-7); CP 2829-30 (A-II at 10-11, **FOF 5-8**).

Based on these and other findings, the court concluded that Humphrey “acted arbitrarily, vexatiously and not in good faith with respect to” Clay I, and that attorney and expert fees were properly assessed against him under RCW 25.15.480(2)(b). CP 2328-29 (A-II at 9-10, COL 1-2). The court further awarded Clay I its post-CR 68 offer costs pursuant to that Rule. CP 2329 (A-II at 10, COL 3). The court similarly found that Humphrey had “acted arbitrarily, vexatiously, or not in good faith” in pursuing dissenters’ rights claims against the Rogels, and awarded them their fees and expenses under RCW 25.15.480(2)(b). CP 2331 (A-II at 12, COL 1-2).

V. STANDARD OF REVIEW

When a court enters findings of fact and conclusions of law following a bench trial, appellate review is limited to determining whether substantial evidence supports the findings and, if so, whether they support the trial court's conclusions of law and judgment. Substantial evidence exists when the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. If the trial court's findings are based on conflicting testimony, the court’s review is limited to determining whether “the evidence most favorable to the prevailing party supports the challenged findings.” *State v. Black*, 100 Wn.2d 793, 802, 676 P.2d 963 (1984); *Peoples Nat’l Bank of Wash. v. Taylor*, 42 Wn. App. 518, 525, 711 P.2d 1021 (1985).

The challenging party bears the burden of showing that the record does not support the challenged findings. To meet that burden, the

challenging party must present argument (in its brief) as to why the specific findings are unsupported and cite to the record to support that argument. *In re Disciplinary Proceeding Against Marshall*, 160 Wn.2d 317, 331, 157 P.3d 859 (2007); *Sunnyside Valley Irrig. Dist. v. Dickie*, 111 Wn. App. 209, 214, 43 P.3d 1277 (2002), *aff'd*, 149 Wn.2d 873, 73 P.3d 369 (2003). Unchallenged findings of facts are verities on appeal. *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 123, 615 P.2d 1279 (1980).

A trial court's decision to admit or exclude evidence, or whether a witness is qualified as an expert, is reviewed for abuse of discretion. *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003); *Ma'ele v. Arrington*, 111 Wn. App. 557, 563, 45 P.3d 557 (2002).

A fee award made under a statute affording the trial court discretion as to whether, and to whom, to award fees is also reviewed for an abuse of discretion. *Kennedy v. Martin*, 115 Wn. App. 866, 871-72, 63 P.3d 866 (2003) (under condemnation statute giving trial court discretion to award fees to either party, party appealing decision to award fees to opponent "must demonstrate that the court abused its discretion"). A court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds. *Id.*

VI. LEGAL ARGUMENT

Virtually all of Humphrey's arguments fail for procedural reasons (i.e., the trial court's findings are verities) and because substantial evidence supports the trial court's findings. They also fail because as is

shown below, Humphrey's arguments are largely based on misstatements of the law and of the evidence.

A. The Trial Court Did Not Err in Determining That Clay I Substantially Complied With the LLC Act, Nor Abuse its Discretion in Declining to Award Fees to Humphrey

1. Humphrey's arguments ignore the trial court's discretion in making RCW 25.15.480(2) fee awards

Humphrey first challenges the trial court's finding that "notwithstanding the delayed payment" of Humphrey's share of Clay I's fair value "the LLC substantially complied with the LLC Act." CP 2315 (A-I FOF 43); *see* App. Br. at 12-13. Humphrey asserts that given "[t]he sheer number and magnitude" of Clay I's violations of the LLC Act, Clay I could not have substantially complied with the statute and thus Humphrey was entitled to fees under RCW 25.15.480(2)(a). App. Br. at 23. That statute provides in relevant part:

(2) 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; or

(b) Against [any party] if the court finds that the party against whom the fees and expenses are assessed acted arbitrarily, vexatiously, or not in good faith respect to the rights provided by this article.

RCW 25.15.480(2) (emphasis added).

The fundamental premise of Humphrey's argument is that if Clay I did not substantially comply with the LLC Act, the trial court had to award fees to Humphrey. But RCW 25.15.480, which is based upon a similar provision in the Business Corporation Act, RCW 23B.13.310, does not mandate an award of fees to any party, but instead leaves that determination to the trial court's discretion in order "to increase the incentives of both sides to proceed in good faith under this chapter[.]" WASH. BUSINESS CORP. ACT COMMENT §§ 13.31 (reproduced in Stewart M. Landefeld, *et al.*, WASH. CORPORATE LAW: CORPORATIONS AND LLCs App. A-178 (2002) (hereinafter "COMMENT"). Notably, the Legislature left fee awards in dissenters' rights actions to the trial court's discretion even though the Model Business Corporation Act (upon which Washington's dissenter rights provisions are based) made an award of fees mandatory for certain statutory violations. *Compare* RCW 23B.13.310, 25.15.480, *with* CP 1975. By rejecting that approach, the Legislature demonstrated its clear intent to leave fee determinations in dissenters' rights actions to the trial court's discretion.

Thus, contrary to Humphrey's implicit argument, the trial court here had ample discretion to weigh the materiality of any statutory violation by Clay I against Humphrey's own conduct in deciding whether, and to whom, it should award fees. Given the trial court's express and unchallenged findings as to: (1) Ostroff's credibility and his good faith

reliance on counsel, CP 2307-08 (A-I FOF 3, FOF 11);⁴ (2) Clay I's dysfunctionality, CP 2307 (A-I FOF 8); and (3) the investment-maximizing motives of the post-merger LLC members (CP 2309-10 (A-I FOF 15, 20)); and its findings that Mr. Humphrey's valuation was "well outside the mainstream" and his insistence on trying claims against Clay I was arbitrary and vexatious, CP 2314 (A-I FOF 39); CP 2327 (A-II at 8, FOF 4), the court was well within its discretion to reject Humphrey's fee request. Humphrey's reliance on "substantial compliance" arguments as a basis for limiting that discretion is misplaced.

2. Humphrey provides no legal authority supporting his "substantial compliance" arguments

Not only do Humphrey's "substantial compliance" arguments ignore the trial court's discretion, they lack legal merit. In assessing whether a party substantially complied with its appraisal duties, the court determines whether the statute was followed sufficiently to carry out its purpose, and should not find lack of substantial compliance based upon a technical error that results in no prejudice. *James v. County of Kitsap*, 154 Wn.2d 574, 588, 115 P.3d 286 (2005); *Merseal v. State Dept. of Licensing*, 99 Wn. App. 414, 422, 994 P.2d 262 (2000). The fundamental purpose of statutory appraisal rights for dissenters is "to protect the property rights of dissenting shareholders from actions by majority shareholders which alter the character of their investment." *China Prods.*

⁴ Although Humphrey purports to assign error to FOF 11, which pertains to Ostroff's good faith reliance on counsel, he does not challenge the substance or that finding. *See infra* at 35.

N. Am., Inc. v. Manewal, 69 Wn. App. 767, 773, 850 P.2d 565 (1993) (quoting FLETCHER CYC. CORPS. § 5906.1 (Perm.Ed.)). Here that property right was protected by Clay I's interest payment to Humphrey. CP 2315-16 (A-I FOF 43).

The trial court found that Humphrey suffered no prejudice from the short delay in payment of his share of Clay I proceeds. CP 2315-16 (A-I FOF 43). Humphrey challenges that finding by complaining of actions taken in other litigation between the parties, *see* App. Br. at 16; and by alleging (without citing any relevant evidence) that he remained a guarantor for the Clay I bank loan. But if Humphrey had truly suffered prejudice from the delay, surely he would have asked Clay I to comply with the time-of-payment provision of RCW 25.15.460(1) at some time between December 7, 2004 and May 2005. Significantly, Humphrey cites no evidence indicating he ever asked Clay I to do so. Nor does Humphrey cite a single case in which failing to meet a non-jurisdictional time limitation constituted lack of substantial compliance. *See* App. Br. at n.22 (citing cases holding that violation of jurisdictional time limit is not substantial compliance).

Moreover, Humphrey has not cited any dissenters' rights case (nor has Clay I located one) in which a court found a lack of substantial compliance in circumstances like those at issue here, namely: (1) any statutory violation resulted from the LLC's good faith reliance on the advice of its counsel; (2) the LLC's lack of funds (exacerbated by the dissenting member's refusal to honor a capital call) prevented it from

complying with the statute's payment provision until it sold the subject property; and (3) the LLC promptly made payment, with statutory interest, as soon as the property sale closed. Significantly, LLC managers and members are "entitled to rely in good faith upon the ... opinions [of professionals] ... as to matters the member or manager reasonably believes are within such person's professional or expert competence[.]" RCW 25.15.175.

3. Humphrey has failed to establish any noncompliance with the LLC Act other than the time-of-payment violation considered by the trial court

Despite the dearth of supporting authority (and despite the trial court's broad discretion to weigh substantial compliance against other factors in making a fee award), Humphrey argues the trial court could not have found substantial compliance given evidence that the LLC (1) failed to make timely payment of fair value even though funds from other ventures were available to do so; (2) failed to send financial statements with its fair value payment; (3) failed to timely file suit; and (4) failed to make a credible fair value payment. App. Br. at 12-26. The evidence belies these arguments.

a. Humphrey has not shown that the LLC had a duty to access other funds to pay Humphrey, or that it could or should have done so

Humphrey's first assertion – that members of the LLC could have accessed other funds in order to make timely payment and therefore the trial court erred in finding substantial compliance – rests on Humphrey's

theory that Mr. Ostroff could have used personal funds to make the payment, that Clay I could have used funds from another entity to pay him, or it could have sought to refinance the property.⁵ Notably, Humphrey cites no law requiring one entity to raid the funds of another to satisfy a dissenter, or requiring one member to personally satisfy the financial obligations of an LLC. Indeed, the plain language of the statute is to the contrary. *See* RCW 25.15.125, .155(1).

In any event, the trial court had ample reason to reject Humphrey's assertions that the LLC could have obtained the necessary funds, given testimony that the other entity from which Humphrey claims Clay I should have acquired funds was owned by a different set of investors, and that it, too, was in litigation with Humphrey. RP 432-36; *see* CP 2322-24 (A-II at 3-5). Humphrey's challenge to the trial court's finding also ignores that the LLC was at all times following its attorney's advice. As Mr. Ostroff testified during his cross-examination by Humphrey:

Q. Did you approach Bank of America to get any sort of refinance to pay Mr. Humphrey?

A. I will say this, as I said it before. We followed the advice of George Cowan, who we hired and paid substantial legal fees to take us through this process.

⁵ In connection with the refinance argument, Humphrey asserts that Clay I concealed the merger from the bank. App. Br. at 16. That was never the case. To the contrary, in July 2004 (even before Clay I took steps to initiate the merger), Mr. Ostroff advised the bank in writing of the merger plan. Ex. 29; RP 359-60. Mr. Cowan continued to keep the bank informed throughout the process. CP 1830.

Whatever we did, we did under the advice of his counsel. We weren't hiding anything. We weren't sneaking anything. We were doing it according to what the attorneys were telling us.

RP 432. The trial court found Mr. Ostroff to be a credible witness, and his “reliance on the advice of counsel was in good faith.” CP 2307-08 (A-I FOF 3, FOF 11).

b. Humphrey has not shown the trial court erred in failing to enter findings as to other alleged LLC Act violations

(1) Clay I provided adequate financial information

With respect to Humphrey's “inadequate financial statements” claim, it is uncontested that Clay I sent a 2004 year-end income statement with its payment. Ex. 73; *see* App. Brf. at 18. It is uncontested that Humphrey's complaint in this action specifically alleged receipt of “the six items required by the dissenters' rights statute” on May 27, 2005. CP 3183 at ¶ 20. It is uncontested that on May 23, 2005, Humphrey's counsel expressly asked Clay I's attorney not to “postpone” Humphrey's payment from the sale proceeds “while the documents are being gathered.” Ex. 74. It is uncontested that Humphrey's response to the May 27 payment did not allege receipt of insufficient financial information or ask for more financial data. Ex. 76. Finally, even after receiving discovery propounded in this action, Humphrey did not abandon his June 2005 valuation. CP 2314 (A-1 FOF 39).

Not only does the evidence rebut Humphrey's claim of insufficient financial information, it is notable that Humphrey has not cited any trial testimony on the issue, nor cited any evidence submitted at trial upon which the trial court could have entered a finding that Clay I violated the statute in the manner he now alleges. *See* App. Br. at 18 n.23 (citing materials submitted in connection with Humphrey's fee petition and an exhibit not admitted at trial). For Humphrey to assert that the trial court erred in failing to enter a finding on a subject about which he proffered no trial evidence (and which contravenes his own complaint), borders on the frivolous.

(2) Clay I timely filed its valuation lawsuit

No more viable is Humphrey's claim that Clay I violated the statute by failing to timely file suit. Humphrey rejected attorney Cowan's fair value calculation on June 1, 2005. Ex. 76. Clay I filed its RCW 25.15.475 petition seeking a judicial determination of value on July 29, 2005, 59 days later. Supp. CP (Dkt. No. 1 of Consolidated Case 05-2-24967-6); *see* CP 2856. Under RCW 25.15.475(1), "if a demand for payment under RCW 25.15.450 **remains unsettled**," the LLC must commence a proceeding within 60 days of the dissenting member's payment demand. Humphrey's demand for payment was not "**unsettled**" until Humphrey informed Clay I that its initial payment was inadequate. RCW 25.15.475(1) (emphasis added). The comments to the "unsettled" demand and court action provisions of Washington's Business

Corporation Act (RCW 23B.13.300(1)) upon which RCW 25.15.475 is based, make that clear:

Section 13.28 ...

A dissenter to whom the corporation has made payment ... must make the dissenter's supplemental demand within 30 days after receipt of the payment ... in order to permit the corporation to make an early decision on initiating appraisal proceedings....

Section 13.30

Proposed section 13.30 retains the concept of judicial appraisal as the ultimate means of determining fair value. The proceeding is to be commenced by the corporation within 60 days after receiving a demand for payment under Proposed section 13.28....

COMMENT §§ 13.28, 13.30 (reproduced in Landefeld, *supra* at App. A-177). Clearly, Clay I complied with the time-of-suit requirements of RCW 25.15.475(1).

(3) Clay I's initial fair value payment was credible

Humphrey's final evidentiary challenge to the court's denial of his attorney fee request under RCW 25.15.480(2)(a) turns on Clay I having initially made what he claims was not a "credible" fair value payment. But the pre-interest amount the trial court awarded Humphrey was just \$50,754.53 more than the payment made to him in May 2005. CP 2319 (A-I Ex. A). That, alone, evidences the reasonableness of Clay I's payment. Indeed, the only not "credible" property valuation was Humphrey's, about which the trial court found:

At trial, George Humphrey ... 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 [the experts].

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.

CP 2314 (A-I FOF 38-39); *see also* CP 2314 (A-I FOF 40) (finding that "no one offered anything close to \$4.1 million [and] Humphrey's \$4.1 million figure does not have substantial or credible evidence to support it"). In any event, the evidence establishes that the LLC's payment was based on attorney Cowan's fair value determination, that Mr. Cowan independently calculated that value, and that the LLC relied in good faith on Mr. Cowan. Ex. 267; RP 384-85; CP 2308 (A-I FOF 11).

In short, Humphrey has failed to show the trial court erred in determining that Clay I substantially complied with LLC Act, that its findings are not supported by substantial evidence, or that it abused its discretion in rejecting his request for fees under RCW 25.15.480(2)(a).

B. The Trial Court Did Not Err in Determining That Clay I Did Not Act Arbitrarily, Vexatiously, or in Bad Faith, or Abuse its Discretion in Declining to Award Fees to Humphrey

Post trial, Humphrey sought fees under RCW 25.15.480(2)(b), the statute's "arbitrary or vexatious" prong, as well as RCW 25.15.480(2)(a), the "substantial compliance" prong. CP 1880-1911. Then, as now, he advanced virtually the same arguments in support of both requests, and then, as now, his arguments ignore the evidence and applicable law.

Humphrey's sole legal argument in support of his right to fees under the arbitrary or vexatious clause is the conclusory assertion that "Clay Street is vicariously liable for the actions of its counsel[.]" App. Br. at 24. Apparently, Humphrey wishes the Court to pay no heed to the fact that any technical noncompliance with the LLC Act by Clay I resulted from its good faith – and statutorily authorized – reliance on advice of counsel. RCW 25.15.175. Further, Humphrey cites no authority in support of his vicarious liability argument, which is reason alone to reject it. *State v. Lord*, 117 Wn.2d 829, 853, 822 P.2d 177 (1991) (argument unsupported by legal authority will not be addressed on appeal).

In any event, Humphrey does not accurately state the law. While the lawyer-client relationship is sometimes viewed as one of principal and agent, *see Demopolis v. People's Nat'l Bank*, 59 Wn. App. 105, 117-18, 796 P.2d 426 (1990); a client's liability for its attorney's acts is very limited, *id.*, and vicarious liability is never imposed unless the principal had the right and ability to control the agent. *E.g., Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 183, 159 P.3d 10 (2007), *rev. granted*, 163 Wn.2d

1012 (2008). A client hires an attorney to provide specialized information and usually has no choice but to rely on the attorney's advice and expertise. That is not a situation giving rise to vicarious liability. The LLC Act recognizes this, as does the common law. RCW 25.15.175; *see* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 29 & cmt. c (2000) (at a minimum, counsel's advice is evidence to consider in appraising client's state of mind).

Humphrey's evidentiary assertions are no more availing. After several days of trial testimony, the trial court was acutely aware of the contentious and litigious background between Humphrey and other members of LLCs with which he was involved. *See* CP 2322-27 (A-II at 3-8). After weighing all the evidence presented at trial, and hundreds of pages of post-trial fee award submissions (CP 1682-1911, 1934-2012, 2070-89, 3155-3397, 3423-3796), the trial court rejected Humphrey's claim that Clay I had acted arbitrarily, vexatiously, or in bad faith. CP 2327 (A-II at 7).

Sorting through Humphrey's various arguments nonetheless, it appears Humphrey alleges the trial court had to find Clay I acted arbitrarily because its initial payment to him was based on an "arbitrarily" low fair value calculation." App. Br. at 24. But, as explained above, Clay I's payment was not arbitrarily low in comparison to the fair value found by the court, Mr. Barnes, or even Mr. Shedd – had Mr. Shedd given consideration to the actual sales price of the property. The only value calculation substantially higher than Clay I's was Humphrey's – a

valuation the trial court rejected as unsupported by credible evidence. *See supra* at 31-32 & CP 2314 (A-I FOF 40).

Humphrey next seems to challenge the trial court's finding that the LLC relied in good faith on its attorney, Mr. Cowan. CP 2308 (A-I FOF 11). To that end, Humphrey invites the court to weigh the evidence and draw inferences adverse to the LLC from evidence Humphrey submitted at trial and in support of his fee petition. That is not this Court's role. Notably, Humphrey does not challenge the substance or evidentiary sufficiency of the trial court's good-faith reliance finding – not even in his improperly submitted assignment of error Appendices. Instead, Humphrey tries to argue that because Mr. Cowan did not testify, the trial court could not find that Clay I relied on his advice. That assertion fails for two reasons. One, evidence of reliance is best obtained from those who relied. Mr. Ostroff testified repeatedly that he relied on Mr. Cowan and the trial court found that testimony credible. RP 358, 384-85; CP 2307-08 (A-I FOF 3, FOF 11). Second, the trial court did consider Mr. Cowan's testimony. The parties submitted Mr. Cowan's deposition testimony to the court, and the court repeatedly indicated it had reviewed designations and counter-designations of his testimony. CP 1657, 1664, 2306 (A-I at 2, ¶ 3).

The remainder of Humphrey's "vexatious" argument pertains to discovery of, and the contents of, Mr. Cowan's billing records. Humphrey avers these records show Scott Rogel somehow influenced Mr. Cowan's valuation. Since Humphrey fails to accurately cite any admitted exhibit or

trial testimony supporting those assertions, the Court should not consider them. In any event, Scott Rogel testified that he forwarded information about Clay I leases and the sale to Mr. Cowan because Mr. Cowan sought that information to use for his valuation and to understand input from the LLC's manager, Mr. Ostroff. RP 691-92. Scott Rogel emphatically denied having anything to do with the fair value calculation:

Q. Were you calculating the amount that Mr. Humphrey was going to be paid?

A. No, I had nothing to do with that.

RP 692. Humphrey offers no evidence to the contrary. In a nutshell, his arguments of vexatious conduct by Clay I are wholly unsupported by the evidence and the trial court properly rejected them.

C. The Trial Court Did Not Abuse Its Discretion in Its Fee and Cost Awards to Respondents

Humphrey has failed to assign error to any finding entered by the trial court in connection with its fee and cost award. Those findings were based not only on the materials submitted after trial, but on the findings of fact and conclusions of law the trial court entered after considering testimony in the valuation trial. CP 2322 (A-II at 3(¶ 20)). Indeed, the trial court expressly incorporated those findings and conclusions into its fee award. CP 2327 (A-II at 8, **FOF 1**), CP 2329 (A-II at 10, **FOF 1**).

1. The court had ample reason to award Clay I its fees and costs

As explained above, Clay I sought (and received) an award only for the fees and costs it incurred after Humphrey rejected its October 27,

2006 Rule 68 offer of judgment. If accepted, the offer would have given Humphrey \$144,183.86 more than the \$181,192.64 he had already received, plus interest from December 7, 2004, for an additional payment of \$165,276.59. CP 3160-61 & n.3, 3308-09. Humphrey's total return, had he accepted the offer, would have been at least \$80,000 more than the other LLC members would have received, and was nearly three times the court's \$60,588.22 award. CP 2317 (A-I COL 49); CP 2327 (A-II at 8, **FOF 3**); *see* p.19, n.3, *supra*. But rather than accepting Clay I's offer, which was based on the independent appraisal provided to Humphrey in July 2005, Ex. 257, CP 3285-90;⁶ Humphrey insisted on trying this matter.

On appeal, Humphrey does not appear to contest Clay I's right to recover its post-offer costs under CR 68, which award is mandated by the Rule. Clay I's costs totaled \$24,961.55. CP 2329 (A-II at 10, COL 3). Instead, Humphrey argues that the trial court should not have considered the Rule 68 offer in deciding whether Humphrey acted arbitrarily and vexatiously for purposes of RCW 25.15.480(2)(b). Humphrey cites no case barring a trial court from considering such evidence in assessing whether a litigant's conduct was vexatious or arbitrary,⁷ and his arguments ignore why a trial court has discretion to award fees for such conduct, i.e.,

⁶ Exhibit 257 was sent with the letter reproduced at CP 3285-90. Because the trial court excluded the letter at trial, RP 403-12, the full communication is separated in the record.

⁷ Instead, Humphrey cites cases addressing when attorney fees can be considered costs within the purview of a Rule 68 offer, and other inapposite issues. *See* App. Br. at nn. 46-48, 51.

“to increase the incentives of both sides *to proceed in good faith* under this chapter[.]” COMMENT § 13.31 (reproduced in Landefeld, *supra* at App. A-178) (emphasis added).

Humphrey’s rejection of a CR 68 offer which would have given him a far greater investment return than any other Clay I investor received (and which was triple the sum awarded by the trial court) is relevant and admissible on the question of Humphrey’s good faith. *See* ER 408. So, too, was Humphrey’s adherence to his demand for a total payment of \$605,799.69, pursuant to his baseless \$4.109 million property valuation. Ex. 76; CP 2314, 2316 (A-I FOF 39-40, 44). As the comments to the dissenters’ rights provisions to Washington’s Business Corporation Act explain:

[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 court cost and counsel fees provision]. These provisions are designed to encourage settlement without a judicial proceeding.

COMMENT § 13.28 (reproduced in Landefeld, *supra* at App. A-177).

Humphrey also complains that the trial court recognized (although it did not expressly rely upon) his conduct in other litigation involving the members of Clay I. To the extent the trial court considered that conduct, it had discretion to do so. There is little case law interpreting RCW 25.15.480, RCW 23B.13.300, or similar provisions adopted by other states. However, the Delaware Supreme Court has concluded that “evidence of a party’s prelitigation conduct can be relevant to show the

motive or intent driving that party's conduct during the appraisal litigation." *Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206, 228 (Del. 2005). The Delaware court further noted that a party's adherence to a baseless valuation figure during appraisal litigation is reason to award fees to its opponent. *Id.*

Humphrey tries to avoid this analysis by arguing that his initial calculation was reasonable based on the evidence available to him at that time. Humphrey's initial calculation is irrelevant, however, in determining whether his rejection of Clay I's Rule 68 offer was vexatious or not in good faith. By the time of the offer, Humphrey knew the property had sold for \$3.3 million after being listed for several months, Ex. 252, and presumably had learned through discovery that \$3.3 million was by far the best offer submitted. Humphrey knew a professional appraiser, Mr. Barnes, had valued the property at \$3.3 million at the time of sale, and \$3.15 million as of December 7, 2004. CP 3285-90; Ex. 257; *see p.37, n.6, supra*. Humphrey knew that if he accepted the Rule 68 offer, he would make more from the property than would the other LLC members, even though his interest was valued five months earlier than theirs and even though he had refused to comply with the capital call needed to keep the LLC afloat in late 2004. Ex. 252 (Settlement Stmt.). Yet, consistent with his approach to other LLC disputes, Humphrey insisted on taking this case to trial. On such facts, it was well within the trial court's discretion to require Humphrey to pay Clay I the fees it incurred after it made its Rule 68 offer.

Humphrey tries to avoid this result by accusing Clay I's trial counsel of misconduct, which he claims should have caused the trial court to rule that Clay I forfeited its right to fees. Specifically, Humphrey asserts that Clay Street should have "forfeited" any right to fees because its counsel "repeatedly" disclosed a settlement offer and/or an offer of judgment to the court during trial. App. Br. at 31-32. Notably, Humphrey's allegations include no citation to the record. The reason for that omission is the allegations are untrue. The actual facts, and relevant trial court rulings, are as follows.

As explained above, in July 2005, after Clay I obtained Mr. Barnes's appraisal, Clay I offered to pay Humphrey \$325,376 for his one-quarter interest based on the appraised value of \$3.15 million, less his share of the existing mortgage, but not including any transaction costs incurred in connection with the actual sale. CP 3285-90. At trial, defense counsel argued that the letter, and related testimony, were admissible to show Clay I's efforts to comply with the dissenters' rights provisions of the LLC Act. RP 403-04, 407. The court agreed in part, as it allowed Mr. Ostroff to testify about the payment offer but excluded the letter. RP 408, 412-14. By so doing, the court did not err, nor did Clay I's counsel engage in misconduct. Indeed, Clay I's counsel had previously cross-examined Humphrey on the increased offer without objection by Humphrey's counsel:

Q. Sir, you agree that in July 2005, following the sale, Clay I offered to pay you for your dissenter's

interests, based on the appraisal of the property by Mr. Barnes at 3.15 million dollars; is that correct?

A. That's correct.

RP 293. Clearly, there was no misconduct in later introducing additional testimony about the increased payment offer; if there was, Humphrey waived any objection to it by failing to timely object. ER 103(a)(1).

In October 2006, after the undersigned took over as counsel for Clay I, Clay I reiterated its earlier proposal by making the CR 68 offer described above. Clay I's offer of judgment was never presented or mentioned at trial; the first time it was filed with the court was in connection with the attorney fee motions. CP 3160-65, 3308-09; *see* CP 3433-50. Put simply, there is no more factual basis for Humphrey's claim that Clay I somehow committed misconduct by putting "settlement" offers before the trier of fact than there is for any of his other allegations.

2. The court had ample reason to award fees and expenses to the Rogels

As with Clay I, Humphrey failed to challenge the findings that support the trial court's fee award to Joseph and Ann Lee Rogel. The Rogels are a retired couple who were "passive investors" in Clay I. CP 2329 (A-II at 10, **FOF 3**).

The trial court's findings and conclusions of Humphrey's vexatious litigation against Clay I were applied by the trial court with equal weight to the Rogels. CP 2329, 2331 (A-II at 10, 12, **FOF 1-2, COL 1**). As with Clay I, Humphrey similarly failed to establish that the trial

court's findings and conclusions to award fees to the Rogels were an abuse of discretion.

By way of background, Humphrey held particular animus towards this elderly couple. This background animus is described at pages 4-7 of the trial court's fee award. CP 2323-26, 2328 (A-II at 4-7, 9 (COL 1)). As the trial court noted, the Rogels were embroiled in prior arbitrations against Humphrey concerning a co-investment named 899 West Main, LLC. Retired King County Superior Court Judge David Soukup acted as the arbitrator. Arbitrator Soukup found that Humphrey breached fiduciary duties and created a situation in which that LLC had to be wound up. CP 2323 (A-II at 4).

Humphrey then named the Rogels as defendants in this case, purportedly because of their alleged unlawful involvement in a co-investment named 615 Commerce Street (CP 21) and their alleged unlawful involvement with the sale of the Clay I property. CP 21-24. Humphrey sought a judgment against Joe Rogel in his complaint. CP 26.

The Rogels had been embroiled in another prior case with Humphrey concerning 615 Commerce Street. There, King County Superior Court Judge Lum dismissed Humphrey's action with prejudice in the Spring 2005. Humphrey then revived the "615" cause of action against the Rogels *in the present case* where it was then *dismissed a second time with prejudice* by the trial court in October 2005. CP 2525, 2530 (A-II at 6, 11, **FOF 6-8**).

The trial court in this matter ordered that the statutory dissenters' rights action that is the subject of this appeal be heard by the court and bifurcated the remaining issues for resolution by binding arbitration. CP 342-45. However, Humphrey refused to dismiss the Rogels from the dissenters' rights action despite their demands in September and October 2006. Supp. CP (Dkt. No. 287). Although presented with the opportunity to dismiss them, Humphrey's refusal required the Rogels to defend a case that really did not involve them and thus they were required to prepare for and participate in trial. CP 3369-89; Supp. CP (Dkt. No. 287); CP 2325-26 (A-II at at 6-7), CP 2329 (A-II at 10, **FOF 3-5**).

Nothing within RCW 25.15.475, the statute governing the initiation of and naming of parties to a dissenters' rights action, grants a dissenter a right of action against a passive-investor member of an LLC. The dissenters' right of action is statutory and supplants the common law. *Matthew G. Norton v. Smyth*, 112 Wn. App. 865, 873, 51 P.3d 159 (2002). Therefore, Humphrey had no right to maintain a dissenters' rights action against any member of Clay I.

Humphrey now contends that the naming of the Rogels was proper in the dissenters' rights action because Clay I was dissolved and distributions had been made to its members, including the Rogels (and Humphrey, too). Thus, Humphrey argues, there is some intuitive right to preemptively name the Rogels as defendants prior to Humphrey suffering any loss. Humphrey has and had it vexatiously backwards. Facts, not wishful thinking, are what give rise to a claim against a culpable

defendant. Our system of law does not allow Humphrey to choose persons as defendants (the Rogels) to satisfy a claim lacking facts (that Clay I cannot pay a judgment), particularly where the underlying claim (dissenters' rights) is solely against another person, here Clay I.

In sum, the trial court did not abuse its discretion with its findings and conclusions that Humphrey vexed thrice: naming the Rogels as defendants in the dissenters' rights action, refusing to dismiss them, and then engaging in the vexatious litigation described in the Clay I section, above.

D. Substantial Evidence Supports the Trial Court's Fair Value Determination

Humphrey's final arguments pertain to the trial court's fair value determination. The court made that determination based on some 200 exhibits, and testimony presented at a one-week trial. As explained in Sec. III, *supra*, after trial the court made detailed findings of fact to which Humphrey fails to effectively assign error and which are amply supported by the evidence. Not surprisingly, given the substantial evidentiary support for the trial court's findings, that part of Humphrey's brief devoted to the valuation (App. Br. at 39-49) argues not that the evidence does not support the court's findings, but that the court erred by relying on evidence and analyses other than Humphrey's. Such arguments establish no basis for reversal, particularly given the rule that when findings are based on conflicting testimony, this Court's substantial evidence analysis is limited to determining whether evidence favorable to the prevailing

party supports the challenged findings. *Black*, 100 Wn.2d at 802; *People's Nat'l Bank*, 42 Wn. App. at 525.

That rule notwithstanding, Humphrey challenges the accuracy of Mr. Barnes' appraisal and argues the trial court should not have relied upon it. That challenge fails for two reasons. First, the trial court noted Humphrey's complaints in its findings and found them immaterial. CP 2313 (A-I FOF 36). Second, the trial court had wide discretion with respect to "the details by which 'fair value' is to be determined within the broad outlines of the [statutory] definition." COMMENT § 13.01 (reproduced in Landefeld, *supra* at App. A-168). In a share value case, the court can "accept proof of value by any techniques and methods which are generally accepted in the financial community." *Id.* The same general approach necessarily governs a judicial real property valuation.

Humphrey also argues that the trial court's finding that the property's fair value on the merger's December 7, 2004 effective date was \$3.15 million, CP 2313, 2315-16 (A-I FOF 34, FOF 41), is not supported by substantial evidence. He is wrong. Not only did Mr. Barnes, a professional appraiser, make that valuation, the court-appointed appraiser, Mr. Shedd, testified that he would have set the December 2004 value at less than \$3.1 million, had he been able to conclude (as the trial court ultimately did after hearing all the evidence) that the \$3.3 million sale in May 2005 was a fair market sale. RP 98-99; CP 2312 (A-I FOF 2728). Moreover, both professionals testified that a real property appraisal must take a recent actual sale into account. RP 77, 547-48. Of the values

presented to the trial court, only Mr. Barnes' valuation complied with that rule. RP 566; CP 2313 (A-I FOF 35).

Alternatively, Humphrey argues that the trial court erred in rejecting his "fire-sale" allegations. As explained above, substantial evidence supported the court's finding on that issue. *Supra* Secs. IV.B, D. Indeed, the only "evidence" to the contrary consisted of Humphrey's speculation and the arguments of his counsel. Neither is sufficient to meet Humphrey's burden on appeal – particularly given Humphrey's failure to properly assign error to the trial court's findings on this issue.

Humphrey additionally takes issue with various evidentiary rulings. Humphrey argues the trial court (1) should have admitted Mr. Humphrey's testimony under ER 701 rather than ER 702, (2) erroneously excluded valuation standards adopted after the events at issue here, (3) erroneously allowed Mr. Barnes to give previously undisclosed "rebuttal testimony," and (4) failed to recognize various alleged errors and omissions in the Barnes' appraisal. App. Br. at 39-49.

Humphrey's evidentiary arguments are reviewed under an abuse of discretion standard. *State v. C.J.*, 148 Wn.2d at 686; *Ma'ele*, 111 Wn. App. at 563. Humphrey makes no showing it was an abuse of discretion to treat him as a lay witness rather than an expert or, more importantly, that doing so caused any harm to him. Likewise, Humphrey shows neither an abuse of discretion nor resultant harm from excluding evidence of accounting standards that did not exist at the relevant time, and on which no expert relied in making their valuations. Finally, Humphrey's

complaint that Mr. Barnes offered previously undisclosed “rebuttal” testimony is based on a false characterization, as the testimony about which Humphrey complains was in response to the court’s own questions. RP 585-89.

Humphrey also alleges that both the expert appraisers and the trial court failed to utilize the definition of “fair value” set forth in FASB Statement 157. *See* App. Br. at 40. Notably, the various appraisers agreed that the definition of “fair value” in FASB No. 157 is consistent with the standard “fair market value” definition used by appraisers. RP 461-62, *see also* Ex. 113 at Rpt. p.3. Indeed, after hearing all the evidence, the court specifically found that the FASB standard offered by Humphrey was consistent with the definition of fair value offered by all the appraisers. CP 2312 (A-I at FOF 27).

Lastly, Humphrey argues the trial court erred in deducting transaction costs and expenses from his payment. Humphrey supports this argument by attempting to equate an “appraised value” with the “fair value” to which he was entitled under the LLC Act. Humphrey cites no support for this approach, and none exists. RCW 25.15.425(3) defines “fair value” as “the value of the member’s limited liability company interest immediately before the effectuation of the merger ... excluding any appreciation or depreciation in anticipation of the merger unless exclusion would be inequitable.” The “value” of a member’s interest in real property necessarily must take into account the bottom line and

deduct for necessary payments such as outstanding loans, amounts due third parties, and other costs incurred in connection with the transaction.

In any event, as the trial court here concluded, a court has discretion under the LLC Act and *Mathew G. Norton Co.*, 112 Wn. App. at 874, to make fair value determinations and to consider the company's liabilities and transaction costs. CP 2316-17 (A-I COL 47-48). As stated above, the Legislature deliberately gave trial courts wide discretion as to "the details by which 'fair value' is to be determined within the broad outlines of the [statutory] definition." COMMENT § 13.01 (reproduced in Landefeld, *supra* at App. A-168). Given the circumstances here – a property sale necessitated by the LLC's dysfunctionality and its resultant need to incur transaction costs – the court's decision to make such deductions here was not an abuse of discretion.

In short, Humphrey's challenge to the trial court's fair value determination lacks evidentiary or legal support. The trial court's determination is tied to the evidence presented at trial and its decision is well within the broad discretion afforded under the LLC Act.

VII. RESPONDENTS' REQUEST FOR ATTORNEY FEES

Pursuant to RAP 18.1 and RCW 25.15.480(2)(b), respondents respectfully ask the Court to award them the attorney fees they have incurred on appeal. When fees are allowable at trial, the prevailing party may recover fees on appeal as well. *Landberg v. Carlson*, 108 Wn. App. 749, 758, 33 P.3d 406 (2001); *Ur-Rahman v. Changchun Dev., Ltd.*, 84 Wn. App. 569, 576, 928 P.2d 1149 (1997). The trial court found that

Humphrey's insistence on taking this case to trial despite having received a generous CR 68 offer that would have brought closure to the parties' relationship, and his inclusion of the Rogels as defendants, was arbitrary and vexatious. His pursuit of this appeal is founded on the same ill-motives as was his decision to go to trial.

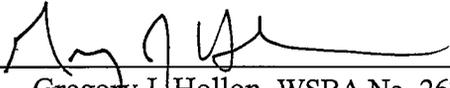
Respondents further ask the Court to impose terms against Humphrey for his conduct in this appeal. Humphrey's designations of clerk's papers included few, if any, pleadings filed by respondents, which required respondents to make their own designations, at substantial cost. Further, Humphrey's brief is rife with procedural errors, inaccurate record citations, and misrepresentations of the evidence and law. Those flaws made preparing this response inordinately difficult and time-consuming, and warrant imposition of terms.

VIII. CONCLUSION

For all the reasons stated above, respondents respectfully ask that the Court affirm the judgment entered by the trial court, award them the fees and costs they have incurred on appeal, and impose terms.

DATED this 3rd day of July, 2008.

McNAUL EBEL NAWROT & HELGREN PLLC

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2008 JUN 9 PM 4:21

APPENDIX I

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8 SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

HUMPHREYS INDUSTRIES LTD.,

Plaintiff,

v.

9
10
11 CLAY STREET ASSOCIATES LLC,

Defendant.

No. 05-2-20201-7 SEA

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

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

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13
14 CLAY STREET ASSOCIATES LLC, a
limited liability company,

Petitioner,

v.

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16
17 HUMPHREY INDUSTRIES, LTD, a
18 Washington corporation,

Respondent.

19
20 This matter was tried to the Court, without a jury, from June 11-15, 2007. The
21 undersigned judge presided at trial. The claims presented at trial for adjudication were
as follows:

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

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

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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

29 ORDER

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.

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28
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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

1 22. A second offer came from a buyer called Remco in November of 2004 for
2 \$3.19 million. Again, Mr. Ostroff considered the offer too low, and instructed Scott
3 Rogel to counter at \$3.3 million. Remco did not respond to the counter-offer.

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

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

12 25 In December 2004 and January 2005, Scott Rogel kept the potential
13 buyers informed of the status of the property and, in particular, of developments
14 concerning the leasing of the property's vacancies. Ultimately, in January 2005, after
15 receiving a commitment to lease the property's last remaining vacancies, the Favro
16 Group agreed to a price of \$3.3 million without a rent guarantee. In early February
17 2005 Clay Street and the Favro Group entered a Purchase and Sale Agreement
18 ("PSA") for \$3.3 million, admitted at trial as Exhibit 65A. The Favro sale did not close
19 until May 2005. From the time of the February 2005 PSA to the closing in May 2005,
20 Mr. Ostroff continued to leave the property in the commercial multiple listing service in
21 an effort to generate back-up offers or other interest in the property. Clay Street did
22 not, however, receive further offers.

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

29 ORDER

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

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

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

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

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

29 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

1 37. Both appraisers offered opinions about how to work back from a value
2 established by a fair-market sale (here, the May 2005 sale for \$3.3 million) to establish
3 a value at a point earlier in time (the December 7, 2004 merger date). Using the
4 methodology described in his report, Exhibit 257, and to which he testified at trial, Mr.
5 Barnes estimated the fair market value of the property as of December 7, 2004 to be
6 \$3.15 million. Mr. Shedd opined that if the \$3.3 million sale in May 2005 was a market
7 sale, the fair value of the property in December 2004, given the fifteen percent rate of
8 market appreciation in the relevant time period, would be a bit less than \$3.1 million.

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

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

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

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

29 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

29 ORDER

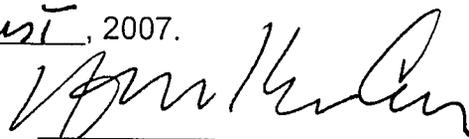
1 estate parcel could be sold on the open market between a willing buyer and willing
2 seller, other than in a forced or liquidation sale.

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

EXHIBIT A

BARNES \$3.15 MM VALUE
at 25% per member

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

(Ex. 65A)

net return for each ¼ interest \$266,529.67
(Ex. 252-007)

At \$3,150,000 (12/7/04)

(Ex. 257 -- Barnes' appraisal)

each ¼ interest receives \$37,500 less \$229,029.67

Plus approximate credit for lower transaction costs:

(6% commission + 1.78% ^{excise} ~~income~~ tax = 7.78%)

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

25% of \$11,670 \$2,917.50

Net return for each ¼ interest: \$231,947.17

Additional Payment Due to Plaintiff Humphrey Industries, Ltd

¼ interest in net value \$231,947.17

Less amount already paid (\$181,192.64)

Subtotal: \$50,754.53

Plus interest @ 7.75% (2.5 yrs) \$9,833.69

Total payment due: \$60,588.22

APPENDIX II

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8
9 SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY
10

11 HUMPHREY INDUSTRIES LTD.,)
12)
13) PLAINIFF,)
14 vs.)
15)
16) CLAY STREET ASSOCIATES LLC,)
17) Washington Limited Liability Company)
18) and JOSEPH and ANN LEE ROGEL,)
19) husband and wife, et.al.,)
20) DEFENDANTS.)

No. 05-2-20201-7 SEA
(CONSOLIDATED WITH
05-2-24967-6 SEA)
ORDER REGARDING
ATTORNEY'S FEES AND
EXPENSES

21 CLAY STREET ASSOCIATES LLC, a)
22) limited liability company,)
23) PETITIONER,)
24 vs.)
25) HUMPHREY INDUSTRIES, LTD, a)
26) Washington corporation,)
27) RESPONDENT.)

28
29
30 THIS MATTER is before the court on the motions of the parties concerning the award of
31 attorney's fees and costs. The court has considered the following:

- 32 (1) Plaintiff Humphrey's Motion for Fees and Costs;

33 ORDER

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

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

- 1 (15) Declaration of Alan Bornstein in Support of an Award of Attorney's Fees and
2 Litigation Expenses in Favor of Joseph and Ann Lee Rogel, with Exhibits A and
3 B;
4
5 (16) Declaration of Alan Bornstein Containing Inadvertently Omitted Exhibits, with
6 Exhibits A-C;
7
8 (17) Revised Declaration of Alan Bornstein in Support of an Award of Attorney's
9 Fees and Litigation Expenses in Favor of Joseph and Ann Lee Rogel, with
10 Exhibit A;
11
12 (18) Humphrey's Opposition to Joseph and Ann Lee Rogel's Motion for Attorney's
13 Fees and Expenses;
14
15 (19) Reply of Joseph and Ann Lee Rogel in Support of their Motion to Recover
16 Attorney's Fees and Expenses and
17
18 (20) Court's Findings of Fact and Conclusions of Law entered on August 30, 2007.

18 I
19 BACKGROUND

20 In order to assess attorney's fees and expenses equitably as authorized by RCW
21 25.15.480, it is necessary to understand the relevant history relating to the deterioration of the
22 relationship of the members not only of the Clay Street LLC but other related LLCs. The highly
23 contentious relationship among the parties ultimately doomed any hope of conducting the
24 business of Clay Street Associates rationally and in the best financial interest of the LLC's
25 members. Before Clay Street's operations became paralyzed, there were other LLCs involving
26 the same parties that suffered the same preventable fate as Clay Street Associates.
27
28

29 ORDER

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 II
6 DISCUSSION

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

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

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
29 ORDER

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.

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29 ORDER

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

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
7 III
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

ORDER

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

ORDER

- 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

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

29 ORDER

- 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 ORDER

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

17 (3) The hours and rates charged by Joseph & Ann Lee Rogel's attorney are
18 reasonable rates as used in the lodestar calculation, as adjusted.
19

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

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

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

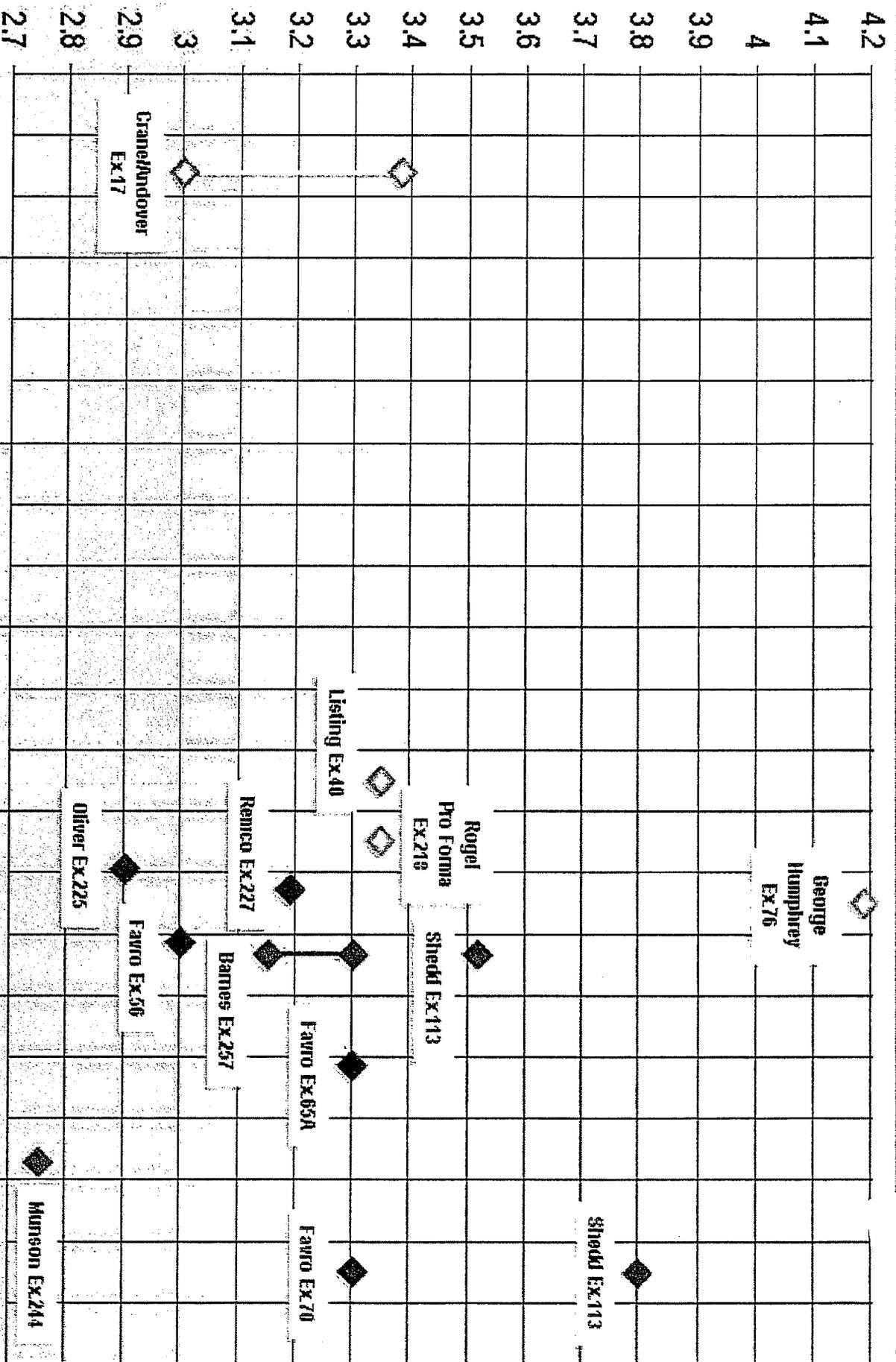
ORDER

APPENDIX III

Clay Street Value Range

DEFENDANT EXHIBIT
300

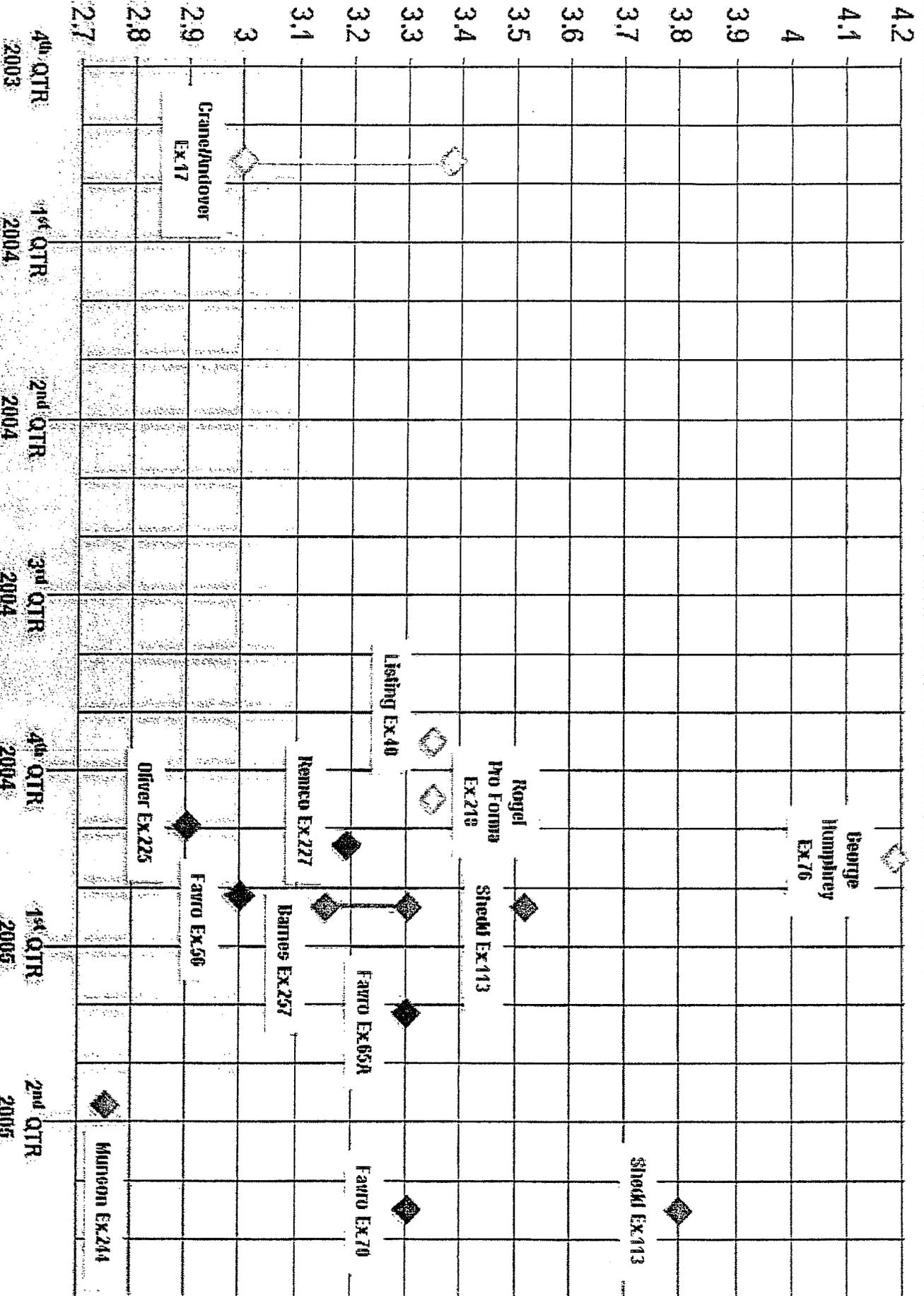
Millions of Dollars



- ◆ Offers
- ◆ Appraisals
- ◇ Estimates
- ◆ Sale

Clay Street Value Range

Millions of Dollars



- ◆ Offers
- ◇ Appraisals
- ◇ Estimates
- ◆ Sale

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2008 JUL -31 PM 4:21

No. 60923-8-I

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

HUMPHREY INDUSTRIES, LTD.,

Appellants,

v.

CLAY STREET ASSOCIATES, LLC, et al.,

Respondents.

PROOF OF SERVICE

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Seattle, Washington 98101-3143
Telephone (206) 467-1816

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LOMBARD, PLLC

Alan Bornstein
WSBA No. 14275
Attorneys for Respondents Joseph
& Ann Lee Rogel

I, Beth E. Zentz, declare under penalty of perjury as follows:

1. I am now and at all times herein mentioned, a citizen of the United States and resident of the State of Washington, over the age of eighteen years, not a party to the above-captioned action, and competent to testify as a witness.

2. I am employed with the law firm of McNaul Ebel Nawrot & Helgren, PLLC, 600 University Street, Suite 2700, Seattle, Washington.

3. On July 3, 2008, I caused to be filed and served true copies of the following documents: **Brief of Respondents** on the following parties in the manner as indicated below:

ORIGINAL:

The Court of Appeals of the
State of Washington
Division I
One Union Square, 600 University Street
Seattle, WA 98101

Via Messenger
Via U.S. Mail
Via Overnight Delivery
Via Facsimile
Via E-mail

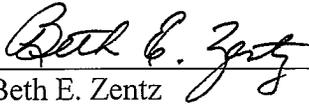
Mr. David C. Spellman
Lane Powell PC
1420 Fifth Avenue, Suite 4100
Seattle, Washington 98101

Via Messenger
Via U.S. Mail
Via Overnight Delivery
Via Facsimile
Via E-mail

Mr. Alan Bornstein
Jameson Babbitt Stites & Lombard, PLLC
999 Third Avenue, Suite 1900
Seattle, WA 98104

Via Messenger
Via U.S. Mail
Via Overnight Delivery
Via Facsimile
 Via E-mail

The foregoing statements are made under penalty of perjury under the laws of the State of Washington and are true and correct. Signed at Seattle, Washington, this 3rd day of July, 2008.


Beth E. Zentz