

No. 86643-1

SUPREME COURT
OF THE STATE OF WASHINGTON

HUMPHREY INDUSTRIES, LTD.,

Petitioner

v.

CLAY STREET ASSOCIATES LLC, et al.,

Respondents

APPELLANT

Reply Brief of ~~Petitioner~~

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I. INTRODUCTION

In this dissenters' rights case, petitioner/plaintiff Humphrey Industries, Ltd. brings a second appeal to enforce this Court's mandate in the first appeal.

Respondent Clay Street Associates LLC is a single-asset real estate entity.¹ The LLC's company agreement required the members' unanimous consent to sell the asset.² Humphrey dissented from the merger of the LLC into a shell company that promptly sold the asset.

In *Humphrey Indus., Ltd. v. Clay St. Assocs., L.L.C.*, 170 Wn.2d 495, 507, 242 P.3d 846 (2010), this Court held the LLC failed to substantially comply with the dissenters' rights provisions, when it made an extremely tardy payment of fair value to the dissenter, Humphrey, in violation of RCW 25.15.460. *Id.* at 506, ¶ 17. The Opinion remanded to the trial court the determination of whether to make a discretionary award of attorney fees in favor of Humphrey pursuant to RCW 25.15.480(2)(a). *Id.* at 507, ¶ 21; *see also* RCW 25.15.480(2)(a)(authorizing an award of fees in favor of the dissenter when the LLC fails to substantially comply with the requirements

¹ The respondents are collectively referred to as Clay Street. Clay Street, the limited liability company, is also referred to as the LLC.

² As a result of the two appeals there are two sets of clerk's papers. They are referenced as 2007 CP and 2011 CP. Appendix A attaches the 2007 CPs that were cited in Humphrey's briefs and were not duplicated already in the 2011 CPs. Appendix E is a chart correlating the 2007 CPs and 2011 CPs.

of the dissenters' rights provisions.) This Court granted attorney fees on appeal to Humphrey. *Id.* at 509, ¶ 26.

This Court's Opinion reversed the trial court's grant of attorney fees to Clay Street and some of the members. The awards had been granted under RCW 25.15.480(2)(b). *Id.* at 507-08, ¶¶ 23-25. *See* RCW 25.15.480(2)(b) (authorizing a fee award "if the court finds that the party ... acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided under" the dissenter rights article of the LLC Act.) Reversing the fee awards against Humphrey, this Court held that:

¶ 24 Even if the evidence was admitted for a permissible purpose, given the circumstances of this case, the record does not establish that Humphrey's actions were arbitrary, vexatious, and not in good faith. If any acts were in bad faith, they were committed by the other members of Clay Street, who sought to bypass the dissenters' rights statute and section 8.1 of their own LLC Agreement, which specifies that the property, "shall not be sold, conveyed, and/or assigned without the mutual consent of each of the members...." CP at 54

¶ 25 We reverse the trial court's award of fees against Humphrey and in favor of the other parties, based as it was on "untenable grounds." *Noble*, 167 Wn.2d at 17, 216 P.3d 1007. We remand for consideration of whether, in light of Clay Street's failure to substantially comply with the statute, Humphrey is entitled to attorney fees.

Id. at 508, ¶¶ 24-25.

On remand, Clay Street attempted to refight the battle they had already lost in this Court, and—remarkably—the trial court on remand let them do so. The result is a trial court decision on remand that virtually over-

rules this Court's Opinion and reinstates the fee awards this Court expressly reversed.

As a matter of law, this Court's holding in ¶¶ 24-25 ("the record does not establish that Humphrey's actions were arbitrary, vexatious, and not in good faith") precluded the trial court from later ruling on remand that Humphrey's actions "were arbitrary, vexatious, or not in good faith." As a matter of law, it precluded the trial court from reinstating the § 2(b) awards against Humphrey. *Id.* But the trial court did just that. It erroneously reinstated those awards, violating this Court's mandate as well as the law of the case doctrine.³ In addition, the trial court on remand erred when it denied Humphrey's request for interest on the \$220,959 that Humphrey had paid to satisfy the reversed awards.

Humphrey requests that this Court (a) reverse the trial court's ill-advised attempt to overrule this Court, and (b) hold Clay Street and its members jointly liable for the restitution of the amount paid plus interest at the 12% judgment rate since November 19, 2007 as well as for the prior supplemental judgment of \$98,191 for appellate fees, along with any additional awards.

³ 2011 CP 717:26-27, 719:1-5.

II. ARGUMENT

A. **When the trial court reinstated the reversed awards against Humphrey, the trial court violated the mandate. The mandate remanded only one issue: whether Humphrey was entitled to a fee award.**

“The mandate of this court is binding on the superior court, and must be strictly followed.”⁴ Erroneously concluding that this Court’s “opinion remanded for a reconsideration of possible awards,” the trial court on remand decided it would “determine an appropriate award ... as between the parties.”⁵ The trial court in its haste may have mistakenly relied upon a general statement of law in the Opinion (“the decision to award fees rests in the discretion of the trial court”).⁶ But that statement was not an instruction or direction. To the contrary, the Opinion includes precise and unambiguous instructions four times; each was for reconsideration of a fee award “to Humphrey.” 170 Wn.2d at 507, ¶ 20; *id.* at 507, ¶ 21; *see id.* at 508, ¶ 25 (whether ... Humphrey is entitled to ... fees”); *id.* at 509, ¶ 26 (“whether Humphrey is entitled to ... fees ...”).

⁴ *Harp v. Am. Surety Co of N.Y.*, 50 Wn.2d 365, 368, 311 P.2d 988 (1957). *See* 2011 CP 410:24-26 (“[t]his case is mandated for further proceedings in accordance with a true and correct copy of the opinion and order denying the motion for reconsideration.”).

⁵ 2011 CP 705:19-26 (underline added), 706:18-20.

⁶ 2011 CP 688 (quoting 170 Wn.2d at 507, ¶ 19), 712-19 (making three awards).

Clay Street now argues the mandate’s instruction to remand a single issue would be effective only if it contained “unmistakable language,” quoting a partial sentence from *Godefroy v. Reilly*.⁷ But the fact that the trial court concocted an egregious misinterpretation of this Court’s Opinion, at Clay Street’s urging, does not render the mandate’s four instructions any less unmistakable. Moreover, the “unmistakable language” standard does not apply in this case. Clay Street relies on the sentence underlined in the following block quotation:

[T]he usual and general rule is that, upon a reversal for a new trial, the whole case is open. Each of the parties is at liberty to retry the case on all of the issues, ... When the court intends that a specific issue shall alone be tried, it will give instructions to that effect, in unmistakable language.⁸

Clay Street completely changed the meaning of the underscored sentence, taking it out of the context of the first sentence: “the usual and general rule ... upon a reversal for a new trial ...”⁹ Here, there was no reversal for a new trial, opening the whole case up. Instead, this Court repeated no less than four times unmistakable directions remanding precisely one issue: “whether, in light of Clay Street’s failure to substantially comply with the statute, Humphrey is entitled to attorney’s fees” under RCW 25.15.480. 170 Wn.2d at 508, ¶ 25; *see also id.* at 509, ¶ 26; *id.* at 507, ¶¶ 20-21.

⁷ 140 Wash. 650, 657, 250 P. 59 (1926); Br. of Resp’ts at 24, 26.

⁸ 140 Wash. at 657 (underline added). *See* Br. of Resp’ts at 24.

⁹ 140 Wash. at 657.

Nowhere does the Opinion expressly state or imply in any way that there is a remand of fee awards in the plural. Yet, that is what the trial court ruled, flying in the face of the express instructions and standard canons of construction.¹⁰ Compounding this error, the trial court ignored the Opinion's substantive rulings, violated the law of the case doctrine, and committed additional reversible error.

B. The trial court also violated the law of the case doctrine.

“The courts apply the doctrine ... ‘to avoid indefinite relitigation of the same issue, to obtain consistent results in the same litigation, to afford one opportunity for argument and decision of the matter at issue, and to assure the obedience of lower courts to the decision of appellate courts.’”¹¹

Those goals were thwarted in this case. “‘The appellate court’s decision became the law of the case and superseded the trial court’s findings on every issue that the appellate court decided.’”¹² “The same rule applies in this case, where the supreme court explicitly ruled: ‘given the circumstances of this case, the record does not establish that Humphrey’s actions were arbitrary, vexatious, and not in good faith. If any acts were in bad faith, they

¹⁰ 2011 CP 705:20-22 (order stating “opinion remanded this matter for reconsideration of possible fee awards ...”), 160:9-13 (“Whether the Court should reinstate ... awards ...?”); *see, e.g.*, Br. of Resp’ts at 2 (Issue 3).

¹¹ *State v. Harrison*, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003) (quoting 5 Am. Jur. 2d *Appellate Review* § 605 (2d ed. 1995)).

¹² 2011 CP 414:19-415:4 (quoting *Strauss v. State*, 119 Wn.2d 401, 412, 832 P.2d 78 (1992)).

were committed by other members of Clay Street ...’ 170 Wn.2d at 508, ¶ 24. That is the law of the case and “superseded the trial court’s findings.”¹³

On remand, Humphrey invoked the law of the case doctrine. Upon the issuance of the mandate, the appellate decision became “effective and binding on the parties to review and [the decision] govern[ed] all subsequent proceedings in the action in any court ...”¹⁴ Although the law of the case doctrine contains a limited number of narrow exceptions, those exceptions do not apply here. Those exceptions are newly discovered evidence,¹⁵ an intervening change in the law, or a clearly erroneous appellate decision working an injustice to one party, with no corresponding injustice resulting to the other party if the erroneous ruling were set aside.¹⁶ While Clay Street has asked this Court to prospectively revisit any additional prevailing party award of appellate fees, they have not asked pursuant to RAP 2.5(c)(2) for this Court to alter its earlier decision.¹⁷

¹³ *Strauss*, 119 Wn.2d at 412. 2011 CP 415:5-9, 406:17-20, 401:6-13.

¹⁴ 2011 CP 415:5-9 (quoting *Strauss*, 119 Wn.2d at 412, which in turn is quoting RAP 12.2), CP 406:17-20, 401:6-13. Humphrey never asked the trial court to consider RAP 12.2. Br. of Resp’ts at 17.

¹⁵ 3 Karl B. Tegland *Wash. Practice: Rules Practice* RAP 12.2 at 152 (7th ed. 2011); *id.* (Task Force Comment to RAP 12.2, 1994 Amendment stating “RAP 12.2 was amended in 1994 to codify the Supreme Court’s holding in *Alpine Industries, Inc. v. Gohl*, 101 Wn.2d 252 ... (1984) (following appeal, ... a motion for a new trial based on newly-discovered evidence). The amended added what is now the last sentence to the rule.”)

¹⁶ *State v. Schwab*, 163 Wn.2d 664, 672-73, 676, 185 P.3d 1151 (2008) (RAP 2.5(c)(2) codifies two common law exceptions to the doctrine); 2011 CP 410:21-23.

¹⁷ Br. of Resp’ts at 12 n.5 (citing RAP 2.5(c)(2)).

1. The Opinion’s ¶¶ 24-25 are holdings – not dicta.

Clay Street argues that the Opinion’s ¶ 24 is dicta and therefore not binding on the trial court.¹⁸ But that contention is mistaken for four reasons.

First, there is a presumption against discarding a portion of an appellate opinion as merely dicta.¹⁹

Second, the paragraph contains the holding of the case, not dicta. Dicta is “an observation or remark ... suggested by the case at bar, but not necessarily involved in the case or essential to its determination ...”²⁰ Here, ¶ 24’s language (“the record does not establish Humphrey’s actions were arbitrary, vexatious, and not in good faith”) was an essential predicate for ¶ 25’s conclusion: (“We reverse the trial court’s award of fees against Humphrey and in favor of the other parties, based as it was on ‘untenable grounds.’”) This Court’s determination in ¶ 24 is essential to its conclusion in ¶ 25.²¹ It is holding, not dicta.

Third, at the very least, the language of ¶ 24 represents an alternative holding, not dicta. As this Court made clear, even if Humphrey’s rejection of

¹⁸ Br. of Resp’ts at 26; 2011 CP 427:1-3 (“the Supreme Court’s comment about which party acted more vexatiously. ... is clearly dictum.”).

¹⁹ *Union Trust Co. of Indianapolis v. Curtis*, 186 Ind. 516, 525, 116 N.E. 916 (1917) (“It is not for the [trial court] to answer that this court’s opinion is any part dictum and of no bearing on its mandate.”); 5 C.J.S. *Appeal & Error* § 1130 at 524 (2007).

²⁰ *State ex. Rel. Lemon v. Langlie*, 45 Wn.2d 82, 89, 273 P.2d 464 (1954) (quoting *Black’s Law Dictionary* at 541 (4th ed.)).

²¹ *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 904 P.2d 1362 (1997) (a “court’s decision is ... based on untenable grounds if the factual findings are unsupported by the record.”)

a settlement offer had been admissible, and even if that rejection might somehow be thought to go to the “vexatious” standard, the record simply “does not establish that Humphrey’s actions were arbitrary, vexatious, and not in good faith.” 170 Wn.2d at 508, ¶ 24.

Fourth, the language is categorical: “the record does not establish ...” The categorical language prevents any reasonable inference that this Court considered only part of the record, leaving the trial court to decide the rest. When Humphrey’s pleadings on remand expressly raised the binding effect of ¶ 24, the trial court evaded the issue.²² Instead, the trial court directly challenged the categorical language of this Court’s holding by ruling—yet again, and in the face of the Opinion’s express and categorical language—that “Humphrey acted ‘arbitrarily, vexatiously, or not in good faith’” on the new ground that Humphrey’s estimate “was indicative of arbitrariness and lack of good faith and the court so found following trial.”²³ Yet, following the trial, there had been no ruling that Humphrey had acted “arbitrarily, vexatiously or not in good faith” in making its fair value estimate, as Humphrey repeatedly emphasized in the first appeal.²⁴ For the

²² Compare 2011 CP 408:21-410:13,414:6-13, 435:12-21 (Humphrey invoking ¶¶ 24-25 as binding on the trial court) with 2011 CP 705-06, 710-19 (orders not mentioning ¶ 24).

²³ 2011 CP 716:20-717:28.

²⁴ 2011 CP 1076 (heading), 1077 (“Even though the trial court erroneously concluded ..., there is no ruling that he acted arbitrarily, vexatiously, or not in good faith in making the fair value calculation.”). The relevant text was even highlighted in yellow.

trial court's interpretation to be correct, one has to assume that this Court obliquely intended to instruct the trial court to make "after-the-fact findings" supporting the very awards this Court had expressly and repeatedly reversed.²⁵ The trial court committed reversible error when it implicitly construed ¶ 24 to be superfluous.

2. In the first appeal, Clay Street conceded a remand was "clearly unnecessary."

The trial court also erred when it ignored a critical concession. Clay Street would like to turn back the clock and take a second bite of the apple. Clay Street now argues that they did not have "an opportunity to respond" to this Court's "discretion-limiting decision" and they "had no reason to (and did not) address whether ... Humphrey's ... baseless valuation figure ..., and its refusal to dismiss the Rogels, would support § 2(b) awards."²⁶ But Clay Street had already contested the "discretion limiting decision" in their unsuccessful motion for reconsideration and clarification before this Court, citing the same decisions and making the same arguments about Humphrey's "buyout figure" and "litigation conduct towards the Rogels," being allegedly

²⁵ *Accord, Blair v. Ta-Seattle East No. 176*, 171 Wn.2d 342, 352, 254 P.3d 797 (2011) (ruling the same trial court abused discretion when imposing the sanction of witness exclusion without considering and entering findings under *Burnet* and compounded in a later order); *id.* at 352 n.6 (ruling it would be inappropriate for trial court "to make after-the-fact findings supporting" its prior orders).

²⁶ Br. of Resp'ts at 25.

unchallenged findings.²⁷ This Court denied their request for remand on precisely those specific issues.²⁸

Their request was correctly denied. The *Bernal* affirm-or-remand issue was moot,²⁹ when Clay Street had earlier conceded “a remand was clearly unnecessary,” contending there was “ample support for the trial court’s findings.”³⁰ Also, there were compelling reasons for concluding the alternative grounds were insufficient.

3. The alternative grounds had been refuted in the first appeal and were refuted once more on remand.

Contending Humphrey has not challenged the merits of the two reinstated awards,³¹ Clay Street attempts to resurrect the two grounds it previously offered for affirming the awards in the prior appeal.³²

Responding to the false charge about a baseless initial value, Humphrey

²⁷ 2011 CP 55, 63-69, 161-63 (raising same arguments and citing same decisions); Br. of Resp’ts at 41-44 (arguments of the Rogels).

²⁸ 2011 CP 3 (order denying reconsideration and clarification).

²⁹ Compare Br. of Resp’ts at 10 (referring to *Bernal v. Am. Honda Motor Co.*, 87 Wn.2d 406, 414, 553 P.2d 107 (1976)); 2011 CP 163:21-164:16 (Clay Street asserting on remand: “That a majority of Supreme Court justices ruled otherwise cannot obviate the evidentiary remand rule of *Bernal* ...”) with 2011 CP 413:12-414:13 (distinguishing *Bernal* on remand).

³⁰ 2011 CP 406:10-13 (raising this argument below), 413:23-414:1 (same), 422 (“Given that evidence, a remand was clearly unnecessary.”); 421 (“a Remand Was Unnecessary.”); *id.* (“a fee award remand is warranted only if the record is insufficient for the appellate court to determine the basis of the trial court’s ruling.”).

³¹ Br. of Resp’ts at 23-24.

³² 2011 CP 65 (“move on remand for fees ... based on ... Humphrey’s insistence on a baseless buyout amount ...”). 2011 CP 160 (“Whether the Court should reinstate ... awards based on the Court’s previous findings that Humphrey forced a ... dispute to trial by stubbornly adhering to a baseless ... valuation and refused to dismiss the individual defendants ...?”). 2011 CP 63-65, 161-62 (citing same comment and decisions). 2011 CP 415-16 (distinguishing the same cases).

explained in the prior appeal that Clay Street had failed to provide requested documents, so the initial “calculation reasonably relied on the information that was then presently available,” which included other appraisals of nearby buildings, values historically used by the parties, and other information.³³ “During trial, Clay Street offered no evidence challenging his good faith and the accuracy and legitimacy of the documentation summarized above.”³⁴ “Furthermore ... Humphrey stipulated to the values in the report by the first appraiser appointed by the court.”³⁵

Responding to the false charge that the Rogels should have been dismissed, Humphrey explained there are “direct claims against the Rogels ‘for funds received in trust subject to creditors claims’ ... stayed pending arbitration so the claims were not part of the ‘judicial appraisal’ ... the stayed claims were well supported by the LLC statute and common law concerning preferential distributions by a dissolved company.”³⁶

Despite this record, the Court of Appeals decision adopted those alternative grounds.³⁷ But this Court’s Opinion reversed, holding that the

³³ 2011 CP 1076-77. 2011 CP 1076 n. 60 (comparing Humphrey’s \$85/sq.ft. (\$4.1 million) demand with an average of \$85.96 average in a chart, and other buildings including a mirror image by the same contractor at \$91.69), 1063. See Appendix B (Trial Ex. 113).

³⁴ CP 1077, 1080.

³⁵ 2011 CP 1077, 1071:22-25, 1040, 1042. The LLC never paid the made a payment based on the \$3.15 million value its own appraiser determined. 2011 CP 629:11-14.

³⁶ 2011 CP 1027-29; *see* 2011 CP 1018-19.

³⁷ 2011 CP 205-06 (Unpublished Opinion at 14-15) (upholding “the finding that Humphrey acted vexatiously, because the rest of the evidence amply supports it. ... The Humphrey ... (continued . . .)

record failed to support a tenable § 2(b) claim against Humphrey. 170 Wn.2d at 508, ¶¶ 24-25.³⁸

On remand, Clay Street attempted to breathe life into the two alternative grounds and to convince the trial court to reinstate the very fee awards reversed by this Court. Humphrey demonstrated those grounds had been raised in the prior appeal, and Humphrey distinguished out-of-state decisions cited by Clay Street,³⁹ including one where the dissenter declined to review company records and never changed his position.⁴⁰ Yet, the trial court raced past these red flags, making a completely new finding that Humphrey's \$4.1 million value was arbitrary and lacked good faith.⁴¹ In essence, the trial court simply ignored this Court's Opinion. That alone is dispositive here, but the trial court also ignored the court-appointed

(. . . continued)

demanding an additional \$424,607 based on an alleged value of over \$4.1 million, a figure the court ultimately rejected as unsupported by substantial or credible evidence. . . . Finally . . . Humphrey refused to dismiss [the Rogels] . . . despite admitting it had no claim . . .").

³⁸ 2011 CP 55, 65 (valuation claim), 68-69 (the Rogels' claims).

³⁹ 2011 CP 415 n.10; 1390-91, 1461:22-25, 1466-67, 1470. *See* 2011 CP 415:17-417:11 (distinguishing the exchange-of-offers statutes from the immediate-payment-to-dissenter statute at issue).

⁴⁰ 2011 CP 415 n.10 ("In another decision, the dissenter never changed his position and declined to review the company's books and records, . . . *Santa's Workshop v. A.B. Hirschfeld Press Inc.*, 851 P.2d 264, 266-67 (Colo. App. 1993)."). Humphrey had demonstrated that the initial value was based on the limited information available – while the company withheld information. 2011 CP 415 n.10, 1076-77, 292 (citing appraiser Shedd's \$3.95 million cost approach and other evidence). 2011 CP 1080 n.46 (same). 2011 CP 415-16 (*Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 205, 225-29 (Del. 2005) ("where the CEO unilaterally set price and ignored advice to hire an independent financial advisor, lied under oath, allowed destruction of evidence, and refused to produce records except after court order.")).

⁴¹ 2011 CP 716:20-28.

appraiser's \$3.95 million value on a cost basis and evidence in the record,⁴² along with LLC's lowball \$2.5 million value that assumed the property had not appreciated one cent in seven years.⁴³ (Adding insult to injury, hindsight makes it clear that Humphrey's estimate of the intrinsic value of the property, which could be sold only upon unanimous consent, was spot on since the property later sold for \$4.8 million,⁴⁴ almost \$1.5 million more than the fair value set by the court.)

Apparently recognizing that the Opinion's plain terms preclude the reinstatement of the reversed fee awards,⁴⁵ Clay Street now attempts to resurrect its argument in the prior appeal that Humphrey never assigned error to the findings entered in support of the 2007 fee award.⁴⁶ That argument lacks merit for any number of reasons. First, the Opinion does not state in any way that this Court's review was restricted in this way. Second, the rulings under review were actually rulings of mixed law and fact requiring the court to construe the statute – not purely issues of fact. Third, the petition for review specifically requested the review of the “affirmance on the alternative ground that there was adequate record that Humphrey acted

⁴² Trial Ex. 113, Apr. 13, 2007 report at 26, Appendix B to this brief.

⁴³ 2011 CP 1076-77.

⁴⁴ 2011 CP 1615 (\$4.8 million statutory warranty deed filed under 20081002329). *See* 2011 CP 658:17-20.

⁴⁵ 2011 CP 692:20-693:28 (Clay Street), 694:5-695:2 (Rogels).

⁴⁶ 2011 CP 155-56 n.1 (arguing failure to seek review of factual findings and to assign error to findings support fee determination).

vexatiously.”⁴⁷ Most importantly and dispositively, fourth, this is water under the bridge, since the law of the case bars relitigation of the issue. This Court already accepted review and reversed in its prior Opinion. It is remarkable that the trial court on remand allowed Clay Street’s attempt to refight the battles it had already lost on appeal. It makes no sense for this Court to do so as well.

In summary, this Court’s Opinion reversed the awards against Humphrey. The Opinion did so in the face of Clay Street’s two claims that Humphrey’s valuation and Humphrey’s naming the members as parties to the suit were grounds for affirming the awards. Not one word in the Opinion reserves those two claims for consideration on remand. There is no requirement for the Opinion to provide an explanation why it rejected the two claims. Also, there was no precedential value in giving an explanation. The reversal of the awards had been univocal and categorical. The reinstatement of the reversed awards was reversible error.

⁴⁷ Compare 2011 CP 214 with Br. of Resp’ts at 24 (citing CP 214-15). See 2011 CP 215 (petition stating issue), 230-32 (summarizing records supporting Humphrey’s initial estimate), 292 (“It was reasonable to join the individual members as parties, when the company admitted most of the funds had been distributed, the company was inactive, and the claim [was] stayed pending arbitration.”).

C. The trial court abused its discretion by denying interest on moneys paid to satisfy the reversed judgments.⁴⁸

Humphrey requests Clay Street and its members be ordered to repay the reversed fee awards together with interest accruing from the date when they were satisfied.⁴⁹ One who retains money should be charged interest for its use value.⁵⁰ “[I]nterest on the claim shall date back and shall accrue from the date the original judgment was entered.”⁵¹ “The original judgment was entered over [four] years and made a fair value award to Humphrey for \$60,588.22.”⁵²

Humphrey did not request interest on the fee award granted on remand; there, a discretionary decision was required to arrive at the liquidated sum.⁵³ But Humphrey does request interest on the liquidated sums paid and credited to satisfy the reversed awards.⁵⁴ Interest is an essential remedy. “Where the claimed amount is liquidated, the rightful claimant of the funds should be compensated for the lost ‘use’ value of the

⁴⁸ See, e.g., *Scoccolo Constr., Inc. ex rel Curb One, Inc. v. City of Renton*, 158 Wn.2d 506, 519, 145 P.3d 371 (2006) (abuse of discretion standard).

⁴⁹ 2011 CP 560:6-15.

⁵⁰ *Hansen v. Rothaus*, 107 Wn.2d 468, 473, 30 P.2d 662 (1986); 2011 CP 35:21-23.

⁵¹ 2011 CP 134:3-6 & n.4.

⁵² 2011 CP 134:21-22, 138-41. Humphrey did not ask for an award of interest on the fair value award alone. Br. of Resp’ts at 17, 32.

⁵³ 2011 CP 971:2-11 (distinguishing *Weyerhaeuser Co. v. Com. Union Ins. Co.*, 142 Wn.2d 654, 687-88, 15 P.3d 115 (2001) (reversing prejudgment interest on insured’s *Olympic Steamship* attorneys’ fees)).

⁵⁴ 2011 CP 560:6-15, 139:23-140:21, 36:5-8.

money.”⁵⁵ Humphrey was deprived of the use of the funds that satisfied the judgments.

Interest is warranted “to undo the effects of the erroneously entered judgment and to restore the parties to the status quo ante” and make the wronged party whole.⁵⁶ The trial court mistakenly relied upon cases denying interest where the unsatisfied judgment is reversed. The present case, however, concerns the reversal of a satisfied judgment, where the judgment debtor has lost the use of money paid.⁵⁷

The trial court erroneously concluded that “prejudgment interest is not appropriate.”⁵⁸ Not only does Clay Street oppose the award of any interest, Clay Street contends no equitable relief should be granted on appeal.⁵⁹

D. The members are liable for restitution and other relief.

Humphrey requested a partial judgment for the reversed fee awards against Clay Street and the Rogels and for the supplemental judgment for

⁵⁵ *Forbes v. Am. Bldg. Maint. Co.*, 170 Wn.2d 157, 167, 240 P.3d 790 (2010) (ruling attorney seeking to recover contingent fee compensation was deprived of the use of funds deposited in court registry).

⁵⁶ *Battle Ground Plaza, LLC v. Ray (In re Ray)*, 2011 U.S. Dist. LEXIS 117979 (W.D. Wash. Oct. 12, 2011). “Prejudgment interest is a make-whole remedy which itself is grounded in equitable principles, ...” *Crest, Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 775, 115 P.3d 349 (2005) ((quoting *Colonial Imports v Carlton NW, Inc.*, 83 Wn. App. 229, 242, 921 P.2d 575 (1996) (citation omitted)).

⁵⁷ 2011 CP 719:6-720:13 (order failing to address moneys paid to satisfy judgment).

⁵⁸ 2011 CP 719-20.

⁵⁹ Br. of Resp’ts at 32-41.

appellate fees against the LLC members.⁶⁰ Later, Humphrey asked for a final judgment against the LLC and its members for all sums.⁶¹ Member liability arises from the dissolved LLC's liquidating distributions to the members and from the problematic merger.⁶² While the trial court did not rule on the request for member liability, the trial court implicitly rejected that liability, ruling the Rogels should never have been named as parties and reinstating the fee award in their favor.⁶³

Clay Street argues that LLC members are generally not personally liable for LLC debts, "Humphrey must establish a basis for imposing member ... liability in an independent lawsuit," and, by the way, the claims are time-barred by a limitations period that expired in 2008, three years after the distributions were made.⁶⁴ Those arguments are precisely the reason why the complaint filed in 2005 named the members as

⁶⁰ 2011 CP 41 (proposed partial judgment), 135 (stating the company was inactive when this suit was filed, and arguing member liability).

⁶¹ 2011 CP 438:8-10, 972:11-18. 2011 CP 1112:11-16 ("inactive company whose assets had been directly transferred to its members and all funds liquidated in November 2006. With those transfers went the attendant liability that flows to the individual members ...").

⁶² 2011 CP 44 ¶ 5 (inactive company status on state website); *see infra* n.67 (distributions). 2011 CP 93 (Finding 12 about errors in the merger process). 2011 CP 972:13-18 ("statutory and common law claims and remedies against the individual members since the company was dissolved, and the other members [were] paid first and before creditors like Humphrey. *See, e.g.,* Appellant's Revised Br. at 19 n.45. The individual members joined in Respondents' Supplemental Brief in the supreme court. They did not invoke nominal party status under RAP 14.2."). The trial court's order refers to this pleading, 2011 CP 709:24, along with Clay Street' and its members' joint response, 2011 CP 709:25-26. The pleading was attached to Appellant's Brief and was made part of supplemental designations. 2011 CP 970-1080.

⁶³ 2011 CP 718:5-10.

⁶⁴ Br. of Resp'ts at 39-41.

defendants and warned of relief from them.⁶⁵ Those arguments are the reason why Humphrey asks this Court itself to grant complete and final relief or provide very specific instructions to the trial court.

The court has inherent power to undo and restore, “when the record shows the money has been paid, and there has been certainty as to what has been lost.”⁶⁶ The record shows the money paid, the prior liquidating distributions, and the loss to Humphrey.⁶⁷ There is a presumption that restitutionary interest accrues from the date of payment of a judgment later reversed.⁶⁸ Despite Clay Street’s argument, there is no voluntary payment doctrine barring restitution.⁶⁹ “[T]he failure to obtain or even seek interim relief from the judgment is not a bar to subsequent restitution. ... Nor is the restitution claim of a judgment creditor barred by the doctrine of ‘voluntary payment’ if the debtor elects to pay a

⁶⁵ 2011 CP 593:5-7, 595:14-18, 972:11-18, 1019 n.63, 1027-28 (citing RCW 25.15.235; 15.300); 1112:11-15.

⁶⁶ *Nw. Fuel Co. v. Brock*, 139 U.S. 216, 219-20, 11 S. Ct. 523, 35 L. Ed. 151 (1890).

⁶⁷ 2011 CP 100-01 (Finding 42-43 liquidating distributions with remainder placed in trust account and referring to the settlement statement), 1274 (settlement statement showing distributions on May 16, 2005), CP 1268 (May 27, 2005 payment to Humphrey), 639 (order requiring notice before disbursement of remaining proceeds), 1632-33 (letters confirming disbursement of sale proceeds), CP 1346 (showing fees owed by LLC), 724:21-725:6 (judgment referencing prior satisfied judgments).

⁶⁸ “Where money has been paid or collected to satisfy a judgment, a party entitled to restitution ... is normally entitled to interest on the money from the date of payment.” 1 Restatement (Third) of Restitution and Unjust Enrichment § 18 cmt. h at 254 (2011). See, e.g., *Webb v. Ada Cnty.* 285 F.3d 829, 840-41 (9th Cir. 2002) (affirming award of interest from date of payment rather from date of judgment). See 47 C.J.S. *Interest & Usury* § 35 at 49 (2005) (stating “[a] party determined to have overpaid fees is entitled to an award of interest on its overpayment” and citing *Webb*).

⁶⁹ Br. of Resp’ts at 34.

judgment that he regards as invalid, without waiting for issuance of levy of execution.”⁷⁰

Under compulsion of law, Humphrey satisfied awards that were not legally enforceable, resulting in the unjust enrichment of the respondents and creating a prima facie right to recovery in restitution. The LLC members were warned early in this case: “The right of the dissenters to payment takes precedent over the right of other shareholders to distribution.”⁷¹ “It is well-settled that a creditor of a corporation can satisfy his claim against a corporation out of assets distributed to a shareholder upon distribution.”⁷² Here, each LLC member received a preferential distribution before the dissenter was paid.⁷³ They acted despite “a known risk”⁷⁴ that their conduct violated the rights of the dissenter as memorialized in a memorandum stating “the company must tender payment of the value of the interest, plus interest . . . within 30 days after the merger becomes effective.

⁷⁰ 1 Restatement (Third) of Restitution and Unjust Enrichment § 18 cmt. c at 247; *id.* at 246-47 (comment c, entitled “Voluntary payment.”).

⁷¹ 2007 CP 329:7-8 & nn.5-6, Appendix A.8. 12B *Fletcher Cyclopedia of the Law of Private Corporations* § [5]906.90 at 382 (2000 rev. ed.).

⁷² *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 360, 662 P.2d 385 (1983).

⁷³ *See supra* n.65. *See also* 2011 CP 293 n.53 (summarizing pleadings on direct distribution, notice before additional distribution; and mootness from lack of funds), 1027-28.

⁷⁴ 2 Restatement (Third) of Restitution § 51(3) (defining a “conscious wrongdoer” as a defendant enriched by misconduct and who acts “despite a known risk that the conduct in question violates the rights of the claimant.”).

... if payment is demanded, the company will engage an appraiser.”⁷⁵ They assumed that risk of the ruling that: “A six-month deferral of payment is not ‘substantial compliance’ with a statute that unambiguously requires payment ‘within thirty days.’” 170 Wn.2d at 506, ¶ 8.

Clay Street argues Humphrey has unclean hands preventing restitution. But Clay Street is recycling the claims that were superseded by this Court’s Opinion.⁷⁶ The LLC members are not in the position of the lawyer in the *Ehsani* decision.⁷⁷ There, the judgment creditor received funds in satisfaction of a judgment and paid those funds to its lawyer who was cloaked with the defense of a bona fide payee owed an antecedent debt. In contrast, the LLC members are cloaked with direct liability; they are parties in the suit, directly benefitting from the trial court’s errors. Since the LLC distributed the remaining proceeds from the sale of its sole asset a year before trial,⁷⁸ the members were on the hook to make contributions to pay LLC’s attorneys who were also representing the

⁷⁵ Trial Ex. 28; 2011 CP 1107:18-21.

⁷⁶ Br. of Resp’ts at 33-34.

⁷⁷ *Ehsani v. McCullough Family P’ship*, 160 Wn.2d 586, 594-95, 159 P.3d 407 (2007); Br. of Resp’ts at 37 (arguing a judgment debtor “cannot pursue those to whom its judgment creditor distributed the payment ...”).

⁷⁸ 2011 CP 666:5-10 & n.19 (argument based on that order), 658:21-23 (“Clay Street disbursed and liquidated the remaining sales proceeds in November 17, 2006 approximately a year before judgment was entered in this case.”). “It was reasonable to join the individual members as parties, where company admitted most all of the funds had been distributed, the company was inactive ...” 2011 CP 293 & n.51 (citing Humphrey declaration, Ostroff declaration, order, and pleadings).

manager/members.⁷⁹ The LLC had made liquidating distributions to the members shortly before the extremely tardy fair value payment was made to Humphrey in May 2005 and long before Humphrey satisfied the fee awards in November 2007.⁸⁰

When a single-asset LLC sells its only asset and distributes the proceeds to the members (while the LLC is in substantial violation of the dissenters' rights provisions and is bypassing a unanimous consent provision and arbitration provision),⁸¹ then a statutory trust attaches to those proceeds – one provided in RCW 25.15.155(2). RCW 25.15.155(2) (“must account to the limited liability company and hold as trustee for it any profit or benefit ...”). Further, RCW 25.15.235’s limitations on distributions to members impose liability on the members, when they were paid first and before a ‘fair value’ calculation” was made.⁸² Finally, the “other applicable law” provision in RCW 25.15.235(2) preserves common law claims against the LLC members for constructive trust, breach of fiduciary duty, and piercing the corporate veil,” which are properly brought in one action.⁸³

⁷⁹ 2011 CP 956 (Jun. 29, 2007 Draft Bill for \$148,828 showing prior balance of \$105,010 and no retainer), 914 (showing late fees and total amount of \$185,315).

⁸⁰ *See supra* n.67.

⁸¹ 170 Wn.2d at 508 ¶ 24; *id.* at 506 ¶ 17.

⁸² *See supra* n.67 (distributions); 2011 CP 1028 n.45.

⁸³ 2011 CP 1028 n.45. *Accord, Sound Infiniti, Inc. v. Snyder*, 169 Wn.2d 199, 212, 237 P.3d (continued . . .)

In short, the LLC members were unjustly enriched: (1) when they used for their own benefit the company equity, information, and funds and the dissenter's interest during the six-month delay in the payment to the dissenter;⁸⁴ (2) when they made liquidating, preferential distributions to themselves of \$277,013 (while later paying the dissenter \$181,192.64) (Findings Nos. 42-44);⁸⁵ and (3) when they benefitted from the \$220,959 payment satisfying the reversed awards.⁸⁶

Restitution should be granted jointly and severally from the LLC members for the reversed fee awards totalling \$220,954 (plus interest), the prior supplemental judgment of \$98,191, and any additional fee awards for enforcing the mandate.

E. This Court should award Humphrey appellate fees.

There are three alternative bases for the award of appellate fees: (1) RCW 25.15.480(2)(a)-(b), (2) the negligent breach of fiduciary duty/constructive fraud exception to the American rule, (3) the LLC

(. . . continued)

241 (2010) (ruling claims for breach of fiduciary duty can be litigated only in the appraisal proceeding).

⁸⁴ 170 Wn.2d at 509, ¶ 26 (six month delay in payment).

⁸⁵ 170 Wn.2d at 499 n.1 (\$181,192.64 paid to Humphrey), 2011 CP 93 (Finding 93 of defective merger process), 186-877 (Finding 44 about \$266,529.67 paid to other members), 884 (additional \$10,484 paid to each).

⁸⁶ 2011 CP 724:21-725:6 (judgment referencing prior satisfied judgments). The request to reassign the case to another judge is most probably moot, since the trial judge did not seek re-election.

Agreement's mandatory fee-shifting provision to the prevailing party.⁸⁷ Fees are awardable under § 2(a) because this appeal enforces the prior Opinion's rulings in favor of Humphrey. Fees are awardable under alternative bases as well.

After the LLC members moved to enforce the arbitration provision,⁸⁸ they participated in the trial, ultimately moving for reconsideration of this Court's Opinion.⁸⁹ The complaint triggered contractual fee provision: "in the event, a lawsuit is initiated to enforce the terms of this Agreement, the prevailing party shall be entitled to recover his attorney fees and costs."⁹⁰ The member's waiver and timing defenses to the contractual claim for fees fail for several reasons.⁹¹ First, there was no implied waiver of those claims; they fully ripened when this Court reversed the fee awards against Humphrey. Second, the claims were preserved when the complaint both invoked the contractual fee provision and member liability. Third, no limitations period bars claims that are subject to a very broad arbitration

⁸⁷ Appendix A.2 to this brief (LLC Agreement); 2011 CP 1175:8-10 (Compl.).

⁸⁸ 2011 CP 646-49 (order), 727-29 (Rogel request for arbitration).

⁸⁹ 2011 CP 62 n.7 (members moving for reconsideration of the Opinion); CP 70 (seeking clarification Humphrey may not seek fees against them).

⁹⁰ Appendix A.2, Company Agreement, § XXI, 2011 CP 1175:8-10.

⁹¹ Br. of Resp'ts at 40 (arguing claims are time barred and new suit must be filed); *id.* at 44 (claiming waiver of fee claim).

clause and the relation back doctrine.⁹² Accordingly, appellate fees may be granted under the contractual provision.

Alternatively, their actions constitute constructive fraud supporting a fee award under the common law.⁹³ Finally, the LLC members are “vexatiously,” relitigating the reversed awards. RCW 25.15.480(2)(b).

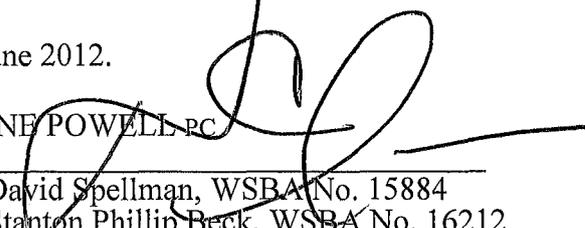
III. CONCLUSION

Clay Street on remand attempted to refight the battle it already lost in this Court. Remarkably, the trial court on remand let them do so. The result is a trial court decision that virtually overturns this Court’s Opinion. The decision violated this Court’s mandate and mutilated the law of the case. This Court should reverse the reinstated awards. Humphrey should not be required to file a second suit to be made whole, as Clay Street and its members contend. Restitution should be granted or very particular instructions made regarding restitution and other relief.

DATED this 15th day of June 2012.

LANE POWELL PC

By


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⁹² 2011 CP 648:1-2. *Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d 231, 236 P.3d 182 (2010) (arbitration is not an action subject to state statutes of limitations).

⁹³ 2011 CP 972 nn.1-2 (citing *Green v. McAllister*, 103 Wn. App. 452, 468, 14 P.3d 795 (2000)).

Appendix to Reply Br. of Petitioner/Appellant

APPENDIX A 2007 Clerk's Papers cited in Brief of Petitioner	
A1	2007 CP 41-47 (Dkt. 6) (Decl. of George Humphrey in Supp. of Pl.'s Mot. for Inj. Relief).
A2	2007 CP 52-60 (Dkt. 6) (Clay Street LLC Agreement, §§ XVI-XXI).
A3	2007 CP 230-231 (Dkt. 56)(Order Quashing Subpoenas).
A4	2007 CP 238-41 (Dkt. 63) (Clay St. Assocs. LLC's Resp. to Pl.'s Mot. Declaring Waiver of Company Privilege/Immunity and for a Prelim. Inj.)
A5	2007 253-57 (Dkt. 67) (Reply in Supp. of Prelim. Inj. And Other Relief).
A6	2007 CP 259-60 (Dkt. 67) (Dec. 31, 2004 income statement).
A7	2007 CP 284 (Dkt. 75) (May 15, 2006 Chicago Title Ins. Co. Seller's Settlement Statement).
A8	2007 CP 329 (Dkt. 87) (Reply in Supp. of Partial Summ. J. and Other Relief).
A9	2007 CP 1632-33, 1644-45 (Dkt. 282) (Humphrey's Mot. to Alter, Amend, Correct or Recons. the Oral Ruling).
A10	2007 CP 1944-47 (Dkt. 295) (Decl. of Spellman in Supp. of Fees).
A11	2007 CP 1996-2000, 2004 (Dkt. 298) (Humphrey's Opp'n to Rogel Fee Mot.)
A12	2007CP 2351-54 (Dkt. 346)(Final Judgment for Clay St. and Rogel).
A13	2007 CP 2523 (Dkt. 332) (Humphrey's Edits to Findings and Conclusions by Clay St. and Joe and Ann Lee Rogel).
APPENDIX B – Trial Exhibit 113, Summary Appraisal Report of Allen Brackett Shedd.	
APPENDIX C – Trial Exhibit 46.	
APPENDIX D – Trial Exhibit 139.	
APPENDIX E – Correlating 2007 CPs and 2011 CPs with Appendices.	

APPENDIX A

APPENDIX A.1

**2007 CP 41-47 (Dk.6)(Decl. of George Humphrey
in Supp. of Pl.'s Motion for Inj. Relief**

1 20. On May 21, 2004, Lori Goldfarb's lawyer sent Scott Rogel's lawyer a letter
2 suggesting that the sale of Clay Street Phase I at that time did not make good business sense
3 and suggested "a mediation encompassing the disposition of all real property or escrow funds
4 held by the various LLCs be scheduled immediately." Scott Rogel declined to participate in a
5 global mediation concerning all the properties and consistently refuses to do so. On July 22,
6 2004, Clay Street Phase I's first lawyer, Alan Judy, sent a notice to members requesting they
7 approve a lease with Closets, Etc. and commissions being paid Turbak. Mr. Judy's actions
8 were consistent with the terms of the operating agreement which required approval from the
9 members for such actions.

10 21. In an August 9, 2004 letter, Scott Rogel's lawyer advised the arbitrator of
11 property disputes in Scott's divorce that "George Cowan, counsel for Clay Street Associates
12 LLC has advised that a vote of the members will be required in the next 10 days." HI was not
13 advised about the impending vote or that the company had hired new counsel. In an
14 August 9, 2004 letter, Scott Rogel's lawyer informed the arbitrator that the company's new
15 lawyer advised that he would issue advice on how to proceed and "advises that the members
16 will have to vote on his advice, requiring a majority to vote on his advice, requiring a majority
17 to succeed." The letter also stated that "Clay Street Associates contains the most equity for
18 the parties and is Scott's best hope of getting his lien [against Lori's house] paid off." This
19 letter and subsequent events demonstrate that Scott Rogel and management of the Clay Street
20 Phase I breached their fiduciary duties to HI by failing to have a formal vote on a dissolution,
21 merger or other alternatives, failing to disclose their secret plans, failing to disclose that new
22 company counsel was hired and failing to disclose all of his advice. If management has used
23 company assets and resources for their personal purposes, that is additional breach of
24 fiduciary duty. Their actions deprived me of the opportunity to avoid capital gains, swap out
25 my interest and take other necessary actions. They have caused damage to the company and
26 me.

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1 22. After their first effort to pretend that the 615 Commerce Operating Agreement
2 did not exist resulted in near litigation, the Rogels choose a new tact, a sham squeeze-out
3 merger. First Joe Rogel, Scott Rogel and ABO each contributed \$1.00 as the initial capital
4 contribution for WXYZ, LLC, formed on August 17, 2004. Then as members of Clay Street
5 Phase I, they "voted" to merge Clay Street Phase I with WXYZ, LLC.

6 23. I first learned of the Rogels' plan when I received a telephone call from Bob
7 Luciano of Bank of America in August 2004. The bank held a deed of trust against Clay
8 Street Phase I's real property. HI and I were guarantors of the long-term note with the bank.
9 Mr. Luciano informed me that Clay Street Phase I's attorney asked the bank to consent to the
10 proposed merger. Mr. Luciano informed me that he told Cowan that the bank would not go
11 along with him.

12 24. On August 20, 2004 Lori Goldfarb's lawyer received a letter regarding the
13 merger and a notice of dissenter's rights. In an August 23, 2004 letter, Lori's lawyer asked
14 Clay Street Phase I's new lawyer why they did not receive prior notice of the proposed
15 merger and its purpose. In response, Clay Street Phase I's lawyer opined that the Separation
16 and Property Settlement Agreement in the divorce provided "the parties agree that the
17 following limited liability companies (including Clay Street . . .) shall be dissolved, wound-up
18" Clay Street Phase I's lawyer admitted that the sole purpose of the merger was to
19 "eliminate the dissenting vote" and "to avoid litigation required to permit the sale of the
20 property, thereby avoiding the diminution in net proceeds available to all parties." See letter
21 of George T. Cowan to David Tift, dated August 24, 2004. A true and correct copy of the
22 letter is attached as Exhibit B. Scott Rogel, in a sworn statement, asserted that Clay Street
23 Phase I hired a lawyer who advised the less costly method to effect the goal of dissolving the
24 company was a merger. On August 25, Clay Street's lawyer wrote another letter regarding
25 his interpretation of the Rogel/Goldfarb Property Settlement Agreement. He may have also
26 provided a declaration in the Rogel/Goldfarb arbitration. He did not copy HI on any

1 communications the lawyer had with the other members or on any communications with the
2 bank.

3 25. Also on August 20, 2004, Clay Street Associates Phase I sent my lawyers two
4 letters. One enclosed an August 20, 2004 request for approval of the merger and a notice of
5 dissenters' rights with respect to the merger plan. These were similar to the documents
6 received by Lori Goldfarb's lawyer. The second enclosed the Notice of Dissenters' Rights
7 and the form for demanding payment. Enclosed in the second letter, the Notice of Dissenters'
8 Rights was post-dated "September 7, 2005" and stated: "The Plan of Merger was duly
9 approved and . . . effective as of September 5, 2005." The notice required that the demand for
10 payment by a dissenting member be received by October 11, 2004.

11 26. On October 1, 2004, HI sent Clay Street Phase I a letter requesting an
12 explanation why HI was the only member receiving Class B membership units in the merger.
13 HI also stated that it appeared the merger did not meet the requirements of Washington law
14 because it (1) did not comply with Washington's LLC statute, (2) was a fraudulent as to HI,
15 (3) violated the Clay Street I operating agreement and (4) violated the BOA loan agreements.
16 HI requested the merger be rescinded. Three weeks later, on October 22, 2004, Clay Street
17 Phase I's lawyer responded: "my client will not agree to pursue rescission of the merger."
18 Clay Street Phase I's lawyer failed to respond to the written question regarding why HI was
19 receiving a different form of equity interest than the other members or to the additional
20 questions, including, whether the merger violated the loan documents. Clay Street Phase I
21 again breached its fiduciary duties by failing to provide this information to HI.

22 27. On October 3, 2004, on the form the company provided HI sent Clay Street
23 Phase I a timely and signed demand for payment. The signed document stated: "The
24 undersigned hereby demands payment of the fair value of the undersigned's interest . . ."
25 After receiving this demand, Clay Street Phase I committed two immediate violations of the
26 dissenter's right statute. First, Clay Street Phase I did not give HI notice after the effective

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1 merger date. Although Washington's LLC statute requires the notice of merger be sent
2 10 days before and 10 days after the effective merger date, the only notices HI ever received
3 were the August 20, 2004 and October 22, 2004 letters from the company's lawyer. The
4 post-dated September 7, 2004 notice of the merger (attached to Cowan's August 20 letter),
5 indicated the merger became effective September 5, 2004, 15 days after the date of Cowan's
6 letter. The notice also states that the merger was approved by the members of both WXYZ,
7 LLC and Clay Street Phase I. Second, the dissenters' rights statute requires that "[w]ithin
8 thirty days of the later of the date the proposed merger becomes effective, or the payment
9 demand is received, the limited liability company shall pay each dissenter . . . the amount the
10 limited liability company estimates to be the fair value of the dissenting member's interest."
11 RCW 25.15.460(1). However, Clay Street Phase I failed to make any payment on
12 November 3, thirty days after receiving HI's demand for payment, or on October 5, 30 days
13 after the effective merger date.

14 28. Instead of receiving the required payment and notice, HI received from Clay
15 Street Phase I, a partner call for \$10,000. Scott Rogel sent HI a November 17, 2004 e-mail
16 stating he heard HI had not received financial statements for Clay Street Phase I. The e-mail
17 continued: "I have made copies for you for August through October (the period of time at
18 Morris Piha Real Estate Services). Tell me where we can meet to exchange the statements for
19 your \$10,000.00 check." HI's lawyer responded: "You should not withhold documents in
20 exchange for a payment. Send them ASAP. There will be no negotiations or further
21 discussions on the topic. Thank you."

22 29. In response to the partner call and Clay Street Phase I's prior actions and
23 inactions, HI sent a November 17, 2004 letter which included a notice of intention to arbitrate
24 and a demand for arbitration. The letter confirmed that the company had earlier declined to
25 rescind the merger and that public records indicated that company was now "inactive." The
26 letter also confirmed the misleading partner call and that the company was dissolved in

1 They never informed BOA of the merger, keeping the existing accounts. Since I was the
2 primary contact on the loan, BOA informed me that the company failed to make its May
3 payment and there appeared to be no funds available.

4 33. On May 16, 2005, HI's lawyer e-mailed Clay Street Phase I's lawyer and
5 requested a check for funds from the sale and "copies of the closing documents, the finalized
6 merger docs and any documents relating to the companies since Sept 04, which would
7 probably include an[y] notices to members, an[y] actions, communications, etc. Pls do not
8 postpone sending the check while the documents are being gathered."

9 34. Clay Street Phase I's lawyer responded that HI's interest needed to be valued
10 as of December 7, "I will make deductions for costs and uncertainty associated with the
11 vacant space; e.g., brokerage commissions, tenant improvements, free rent, legal expenses in
12 connection with leasing activities, marketing expenses, administrative time and effort and the
13 uncertainty of the vacancy period." By this statement, Clay Street Phase I's lawyer waived
14 any attorney-client privilege and became a material witness in this case. His firm should
15 therefore not represent the company in any case related to merger and dissenter's rights.

16 35. On May 27, 2005, 264 days after the effective merger date (as stated by Clay
17 Street I) and 236 days after HI sent its demand for payment, Clay Street I finally made to HI a
18 \$181,192.64 payment versus the over \$277,000 paid to the other members (who also received
19 an additional \$10,484 each, perhaps for reimbursement for the partner call made the previous
20 year).⁵ The actual sales price in May 2005 was \$3,300,000. However, Clay Street Phase I
21 contends the fair value of the property in December 2004 was only \$2,500,000. This
22 valuation makes no sense. In December 2004, Rogel asked \$3,350,000 or more for the
23 property (according to a later appraisal). In February 2005, he signed an agreement to sell the
24

25 ⁵ An additional \$85,337 appears to remain in Clay Street Phase I lawyer's control which may
26 be distributed to the other members.

1 violation of the loan agreement. Clay Street Phase I never responded to HI's demand, just as
2 Scott Rogel failed to respond to the notice for arbitration with respect to 901 Tacoma.

3 30. Except its refusal to rescind the merger, Clay Street Phase I did not send HI
4 any other communication regarding the proposed merger plan, the sale of the property or
5 satisfaction of HI's demand for payment. During this period, HI and I remained guarantors on
6 the loan from the bank. The company took no action to remove us from the loan. Although
7 Clay Street Phase I was effectively dissolved by the Rogels by October 2004, they retained
8 the tax identification number for that company.

9 31. In mid-May 2005, HI filed a motion in the 901 Tacoma suit for leave to amend
10 and supplement that complaint to include claims that the merger of Clay Street Phase I
11 violated HI's rights for several reasons, "[m]ore than 200 days have passed, and Humphrey
12 Industries has not received the required payment and the accompanying documents, and the
13 company has not filed suit pursuant to RCW 25.15.475, nor has it rescinded the merger. The
14 management of Clay Street . . . is identical to that of 901 Tacoma Avenue: Scott Rogel and
15 ABO Investments."⁴ The motion also requested the parties be compelled to participate in a
16 global mediation for all the companies. The Rogels successfully opposed the motion.

17 32. In mid-May 2005, I learned from Lori Goldfarb that Clay Street Phase I's
18 property was sold and that she had received payment from the sale. I immediately contacted
19 the escrow company handling the sale. They advised me that Scott Rogel, Joe Rogel and
20 ABO had each taken, directly from the closing, approximately \$277,014 and sent a similar
21 amount to its lawyer's trust account (which was presumably for my interest). The sale of
22 Clay Street I's real property closed under an old tax number for Clay Street. The Rogels
23 never created a new tax number for WXYZ LLC. They continued to use the old bank account
24 formed under the expired Washington State UBI and federal tax numbers for Clay Street I.

25 ⁴ Proposed Amended Complaint ¶ 20 (May 16, 2005) in Humphrey Indus. et al. v. 901
26 Tacoma, Case No. 04-2-12006-3 SEA.

1 property for \$3,300,000. In my opinion, this property had a market-based interest of over
2 \$4,000,000.

3 36. Again, another quick sale to liquidate assets in a market bringing premium
4 prices. Effectively selling low to get cash and hurt Ms. Goldfarb was Scott Rogel's intent, as
5 he told me from the time of his separation in Spring 2003. In the quick sale, Scott earned a
6 \$82,500 sales commission. The company's reduced value for HI's interest was based upon
7 estimated forecast costs of \$287,041 to fill the property using \$114,852 in free rent, \$70,000
8 in improvements, \$57,426 in free rent and \$38,762 in lease commissions — which may not
9 have been incurred and appear to be unreasonable.

10 37. Along with the check, Clay Street Phase I provided a copy of the settlement
11 from the closing, a calculation of the value of HI's interest and a December 30, 2004 income
12 statement. However, RCW 25.15.460 required the company to provide along with the
13 payment "Copies of the financial statements for the limited liability company for its most
14 recent fiscal year." Clay Street Phase I violated the statute by providing only an income
15 statement and not the other financial statements required by the statute. Furthermore, Clay
16 Street Phase I ignored HI's request for the finalized merger and other documents relating to
17 the company since September 2004, including e-mails, notices and other communications.
18 This was inconsistent with the company's November 2004 call for payment.

19 38. On June 1, 2005, HI sent Clay Street Phase I a letter advising that the fair value
20 of HI's interest was not less than \$4,109,920. After satisfaction of the \$1,834,616 owed to
21 BOA, the balance should have been \$2,275,304. HI's 25 percent share would be \$568,826
22 plus interest (\$36,973.69), for a total of \$605,799.69. Thus, the amount due and owed to HI is
23 \$424,607.05 (\$605,799.69 minus \$181,192.64). A true and correct copy of the June 1, 2005
24 letter is attached as Exhibit C.
25
26

DECLARATION OF GEORGE HUMPHREY IN SUPPORT OF
PLAINTIFF'S MOTION FOR INJUNCTIVE RELIEF - 15
120144.0004/1221058.2

LANE POWELL PC
1420 FIFTH AVENUE, SUITE 4100
SEATTLE, WASHINGTON 98101
(206) 223-7000

1 39. On June 6, 2004, HI's lawyer sent Clay Street Phase I's lawyer an e-mail
2 requesting copies of the leases for the property ASAP. Clay Street Phase I did not provide
3 copies of the property leases.

4 40. On June 21, 2005, HI filed this suit. Paragraph 20 of the complaint states in
5 part:

6 Although 20 days have passed since Humphrey Industries made its own
7 estimate of the fair value, Clay Street has not responded to the estimate sent by
8 Humphrey Industries. There is no just reason to delay the filing of this suit to
9 await the company's decision on whether the prior payment was less than the
10 fair value and on whether the interest was incorrectly calculated. The assets of
11 Clay Street appear to have been fully disbursed to the other members, the
12 company is inactive, and when the sale of the company's sole asset closed, the
13 company did not make the May 2005 installment to Bank of America. The
14 ability of Humphrey Industries to trace the proceeds and collect from the
15 company or from the other members the fair market value is hindered and
16 decreases with the passage of time. Humphrey Industries' suit is recover an
17 unsettled demand for payment, and, due to the company's failure to comply
18 with the statute, the Court should appoint an appraiser and grant fees and costs
19 to Humphrey Industries pursuant to RCW 25.15.480 or the operating
20 agreement.

21 41. HI sent the lawyers who represent most of the other members of the company
22 copies of the suit and asked them to accept service. The majority declined. I was informed
23 that Scott Rogel declined to meet with the process server who called him to arrange service of
24 process. Scott stated: "find me when you find me" and hung up. Scott Rogel is the registered
25 agent for Clay Street Phase II and should accept service of process.

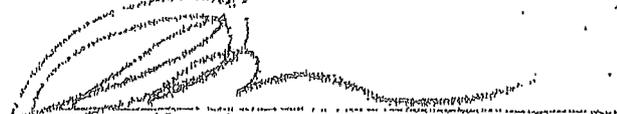
26 42. On July 14, 2005, Clay Street Phase I received a \$3,150,000 appraisal for the
property based upon the December 7, 2004 date. This is \$150,000 less than the price the
property was sold for two months later, but is \$650,000 more than the \$2,500,000 used by the
company to value HI's shares. The market value for the company was based upon a
marketing time of nine months. The cost basis is low. The appraisal states that the property
was placed under contract in March. However, it appears that the property was under contract
in February.

BEST AVAILABLE IMAGE POSSIBLE

43. On July 27, 2005, Clay Street Phase I sent III's lawyer a letter enclosing the new appraisal, offered to pay III \$525,376 (having paid only \$181,193) with the offer to remain open until August 5 and stated the company would file suit on July 29, if III did not agree to the offer by that date. On July 29, 2005, Clay Street Phase I filed suit against III. Clay Street Phase I has not tendered the amount that it admits is owing.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct, to the best of my knowledge.

EXECUTED this 31st day of August, 2005 at Seattle, Washington.


George Humphrey

DECLARATION OF GEORGE HUMPHREY IN SUPPORT OF
PLAINTIFF'S MOTION FOR INJUNCTIVE RELIEF - 17
25339699260

LAST POWERED BY
ELECTRONIC SIGNATURE
IN THE WASHINGTON STATE
COURTS

1 They never informed BOA of the merger, keeping the existing accounts. Since I was the
2 primary contact on the loan, BOA informed me that the company failed to make its May
3 payment and there appeared to be no funds available.

4 33. On May 16, 2005, HI's lawyer e-mailed Clay Street Phase I's lawyer and
5 requested a check for funds from the sale and "copies of the closing documents, the finalized
6 merger docs and any documents relating to the companies since Sept 04, which would
7 probably include an[y] notices to members, an[y] actions, communications, etc. Pls do not
8 postpone sending the check while the documents are being gathered."

9 34. Clay Street Phase I's lawyer responded that HI's interest needed to be valued
10 as of December 7, "I will make deductions for costs and uncertainty associated with the
11 vacant space; e.g., brokerage commissions, tenant improvements, free rent, legal expenses in
12 connection with leasing activities, marketing expenses, administrative time and effort and the
13 uncertainty of the vacancy period." By this statement, Clay Street Phase I's lawyer waived
14 any attorney-client privilege and became a material witness in this case. His firm should
15 therefore not represent the company in any case related to merger and dissenter's rights.

16 35. On May 27, 2005, 264 days after the effective merger date (as stated by Clay
17 Street I) and 236 days after HI sent its demand for payment, Clay Street I finally made to HI a
18 \$181,192.64 payment versus the over \$277,000 paid to the other members (who also received
19 an additional \$10,484 each, perhaps for reimbursement for the partner call made the previous
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21 contends the fair value of the property in December 2004 was only \$2,500,000. This
22 valuation makes no sense. In December 2004, Rogel asked \$3,350,000 or more for the
23 property (according to a later appraisal). In February 2005, he signed an agreement to sell the
24

25 ⁵ An additional \$85,337 appears to remain in Clay Street Phase I lawyer's control which may
26 be distributed to the other members.

APPENDIX A.2

2007 CP 52-60 (Dk.6)
(Clay Street LLC Agreement, §§ XVI-XXI)

ORIGINAL

LIMITED LIABILITY COMPANY AGREEMENT

OF

CLAY STREET ASSOCIATES, L.L.C.

This Limited Liability Company Agreement (hereinafter "Agreement") is made and entered into effective as of May 8, 1997, by and among the persons or entities whose signature appear on the signature page(s) hereof.

I.

DEFINITIONS

1.1 "Company": Clay Street Associates, L.L.C.

1.2 "Certificate of Formation": The Certificate of Formation pursuant to which the Company was formed, as originally filed with the Office of the Secretary of State in Washington, 1997, and as amended from time-to-time.

1.3 "Member": Each person or entity who executes a counterpart of this Agreement as a Member and each person/entity who may hereafter become a Member.

1.4 "Managing Members": The Managing Members shall be Scott Rogel and Humphrey Industries, Ltd.

1.5 "Registered Office and Registered Agent": The Company's initial Registered Agent and address of its initial Registered Office in the Secretary of State are as follows:

Name: Humphrey Industries, LTD.

Address: 899 West Main Street
Auburn, WA 98001

The Registered Office and Registered Agent may be changed by a unanimous vote of the members from time-to-time by filing an amendment to the Certificate of Formation.

1.5 "Term": The Term of the company shall be until the year 2029; unless the Company is earlier dissolved.

II.

MEMBERS

The following are members of Clay Street Associates:

- A. Humphrey Industries, a Washington corporation;
- B. Scott Rogel;
- C. Joseph Rogel; and
- D. ABO Investments, a Washington partnership.

III.

BUSINESS OF COMPANY

The business of the Company shall be:

- A. To carry on any lawful business or activity which may be conducted by a Limited Liability Company organized under the Act; and
- B. To exercise all other powers necessary to or reasonably connected with the Company's business which may be legally exercised by Limited Liability Companies under the Act.

IV.

REAL PROPERTY

Clay Street Associates has entered into an option agreement to purchase a parcel of real property located in Auburn, King County, Washington, legally described as on Exhibit A attached hereto, for a total purchase price of Three Hundred Seventy Eight Thousand Five Hundred and no/100 (\$378,500.00) Dollars.

V.

PROPOSED IMPROVEMENTS

The Members shall secure financing and take all other appropriate measures to purchase the property referenced above and to construct an approximate 48,352 square foot warehouse on the property.

VI.

LOAN TO COMPANY

ABO Investments will loan up to Four Hundred Thousand and no/100 (\$400,000.00) Dollars to Clay Street Associates, L.L.C., for the purpose of assisting the Company to secure the purchase of the property and for costs in connection with constructing the proposed warehouse facility.

VII.

FINANCING

Upon securing financing by a mutually agreeable and acceptable lender, the lender's equity requirement will be shared equally among the Members minus the individual contributions by the Members prior to obtaining financing by the lender.

VIII.

SALE OF THE PROPERTY

8.1 The property described in Paragraph IV above owned by Clay Street Associates, L.L.C., shall not be sold, conveyed, and/or assigned without the mutual consent of each of the members to this Agreement.

8.2 In the event a lien or other encumbrance attaches to the title of the property and which relates to or involves an individual Member and not the operation or ownership of the property, the individual Member or Members which the lien or encumbrance relates to shall indemnify and hold the Company harmless for all damages, diminution in value of the property, or other costs associated with or in connection to satisfying or removing said lien or encumbrance upon title of the property.

8.3 Upon the sale or other disposition of the property and any improvements thereon, the individual members shall be entitled to their respective pro-rata share of equity.

IX.

TAXES

The Company shall be liable for all taxes in connection with the subject property including assessments or levies by government agencies which relate to the subject property.

X.

EXPENDITURES

10.1 Operational Expenditures. Operational expenditures, including all necessary expenditures to operate the subject property upon construction shall be authorized and paid for at the discretion of Scott Rogel and Humphrey Industries. Mutual consent of each of the Members shall not be necessary.

10.2 Capital Expenditures. Capital expenditures exceeding \$1,000 shall be approved by each of the individual Members before expenses or liabilities can be incurred for any and all capital improvements to the subject property. Otherwise, capital expenditures under \$1,000 in value may be completed without the mutual consent of each of the parties.

XI.

LEASE

11.1 The managing Members may authorize and enter into a lease agreement for the purposes of leasing space in the proposed warehouse only in the event the gross annual rent from the lease does not exceed \$10,000.

11.2 Any leasehold agreements which provide for a gross annual rent a sum exceeding \$10,000 shall be approved by all of the Members of this Agreement.

XII.

DISPUTES

In the event all of the Members cannot agree or come to a consensus on any issue or determination relating to Company business, each of the Members agree to submit to binding arbitration in King County, Washington. Each of the Members shall agree to the arbitrator or arbitration service retained to resolve the dispute.

XIII.

DISABILITY

In the event a Member shall become disabled or be unable to complete its obligations under this Agreement, the remaining Members shall be authorized to act for the disabled Member for the specific purposes of carrying out the obligations of said Member.

XIV.

DEATH

14.1 Upon the death of a Member, the terms of this Agreement shall be binding upon said Member's heirs, successors, agents, insurers, and assigns.

14.2 In the event of the death of one or more of the Members, the remaining Member or Members may purchase the deceased Member's interest within forty-five (45) days of the death of the Member by providing a notice of election to purchase the Member's interest pursuant to Paragraph XV of this Agreement.

14.3 The value of the deceased Member's interest in the partnership shall be determined by a mutually agreed upon real estate appraiser or business valuation specialist who shall be provided with all information and records of the partnership in order to assess the market value of the deceased Member's share.

XV.

NOTICES

Any and all notices provided for herein shall be given in writing by registered or certified mail, return receipt requested, and shall be addressed to the last address known to the sender or delivered to the recipient in person.

XVI.

MODIFICATIONS

No modifications of this Agreement shall be valid unless such modification is in writing and signed by the parties hereto.

XVII.

WAIVER

No waiver of any provision of this Agreement shall be valid unless in writing and signed by the person or party against whom charged.

XVIII.

APPLICABLE LAW

This Agreement shall be subject to and governed by the laws of the State of Washington.

XIX.

ASSIGNMENT

This Agreement shall be binding upon and entered to the benefit of the parties hereto and the respective heirs, legal representatives, executors, administrators, successors and assigns.

XX.

ARBITRATION

Any controversy or claim arising out of or relating to this Agreement shall be settled by Arbitration in accordance with the rules of the American Arbitration Association, one arbitrator, or a private arbitration or mediation service selected by the parties, and shall be enforceable in any court having competent jurisdiction.

XXI.

ATTORNEYS

In the event a lawsuit is initiated to enforce the terms of this Agreement, the prevailing party shall be entitled to recover his attorneys fees and costs.

HUMPHREY INDUSTRIES, LTD.

ABO INVESTMENTS,
a Washington corporation

By [Signature]
George Humphrey
Its President

By [Signature]
Gerald Ostroff
Its Managing Partner

[Signature]
Joseph Rogel

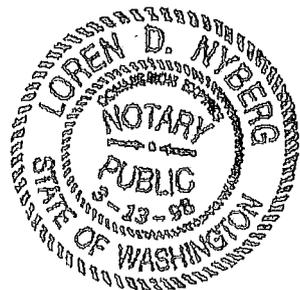
[Signature]
Scott Rogel

STATE OF WASHINGTON)
COUNTY OF King) ss.

On this day personally appeared before me George Humphrey, who acknowledged himself to be the President of Humphrey Industries, Ltd., a Washington corporation, and that he as such President, being authorized to do so, executed the within and foregoing Limited Liability Company Agreement of Clay Street Associates, L.L.C., and acknowledged that he signed the same as his free and voluntary act and deed, for the uses and purposes mentioned therein, by signing the name of the corporation by himself as President.

SUBSCRIBED AND SWORN to before me this 15th day of Oct, 1997

[Signature]
NOTARY PUBLIC in and for
the State of Washington,
residing at KENT
My commission expires: 3-13-98



STATE OF WASHINGTON)
) ss.
COUNTY OF _____)

On this day personally appeared before me Gerald Ostroff, who acknowledged himself to be the Managing Partner of ABO Investments, a Washington partnership, and that he as such Managing Partner, being authorized to do so, executed the within and foregoing Limited Liability Company Agreement of Clay Street Associates, L.L.C.; and acknowledged that he signed the same as his free and voluntary act and deed, for the uses and purposes mentioned therein, by signing the name of the corporation by himself as Managing Partner.

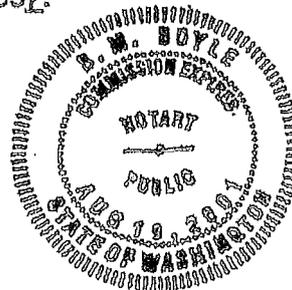
SUBSCRIBED AND SWORN to before me this ___ day of _____, 199_.

NOTARY PUBLIC in and for
the State of Washington,
residing at _____
My commission expires: _____

STATE OF WASHINGTON)
) ss.
COUNTY OF King)

On this day personally appeared before me Joseph Rogal, to be known to be one of the individuals described herein and who executed the within and foregoing Limited Liability Company Agreement of Clay Street Associates, L.L.C., and acknowledged that he signed the same as his free and voluntary act and deed, for the uses and purposes mentioned therein.

SUBSCRIBED AND SWORN to before me this 13th day of December, 1997.

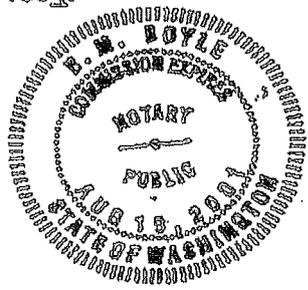


B.M. Boyle B.M. Boyle
NOTARY PUBLIC in and for
the State of Washington,
residing at Shoreline
My commission expires: 8-19-01

STATE OF WASHINGTON)
)
COUNTY OF King) ss.

On this day personally appeared before me Scott Rogel, to be known to be one of the individuals described herein and who executed the within and foregoing Limited Liability Company Agreement of Clay Street Associates, L.L.C., and acknowledged that he signed the same as his free and voluntary act and deed, for the uses and purposes mentioned therein.

SUBSCRIBED AND SWORN to before me this 18 day of December, 1997.



P. M. Boyle
NOTARY PUBLIC in and for
the State of Washington,
residing at Shoreline
My commission expires: 8-19-01

APPENDIX A.3

2007 CP 230 (Dkt. 56)(Order Quashing Subpoenas)

The Honorable Michael Hayden
Hearing Date: September 13, 2005
Hearing Time: 8:30 a.m.
With Oral Argument
FILED
KING COUNTY, WASHINGTON

SEP 13 2005

SEP 14 2005

CERTIFIED COPY TO MOVANTS

SUPERIOR COURT CLERK
JUYA GHANAIE
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

HUMPHREYS INDUSTRIES LTD.,

Plaintiff,

No. 05-2-20201-7 SEA

vs.

(PROPOSED) ORDER QUASHING THREE
SUBPOENAS

CLAY STREET ASSOCIATES LLC; 615
COMMERCE; CLAY ASSOCIATES PHASE II
LLC; SCOTT ROGEL, LORI GOLDFARB;
JOSEPH ROGEL and LEE ANN ROGEL,
husband and wife; ABO INVESTMENTS;
and AVRAM INVESTMENTS,

Defendants.

ORIGINAL

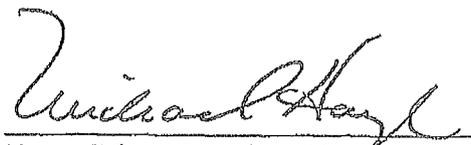
Upon the joint motion of non-party Morris Piha Real Estate Services, Inc. ("Morris Piha") to quash the subpoena of plaintiff that was directed to it and by defendants Joseph & Ann Lee Rogel to quash the subpoenas of plaintiff directed Morris Piha, the Karr Tuttle law firm, and to Stanley Real Estate (the "Three Subpoenas"), and having reviewed the files and records in this case, including the joint motion, the response of Humphrey Industries, _____, and the reply of the movants, it is hereby:

ORDERED that the Three Subpoenas are quashed. *The defendants are directed to produce documents that are requested under RCW 25.15.135 within 7 business days of receipt of the last four plaintiffs' counsel.*

ORDER QUASHING THREE SUBPOENAS - 1

JAMESON BABBITT SMITHS & LOMBARD, P.L.L.C.
ATTORNEYS AT LAW
999 THIRD AVENUE, SUITE 1900
SEATTLE, WA 98104-4001
TEL 206 292 1994 FAX 206 292 1995

1 Dated: September 13, 2005



Hon. Michael Hayden, King County
Superior Court Judge

2
3
4 Presented By:

5 JAMESON BABBITT STITES
6 & LOMBARD, P.L.L.C.

7
8 By: 
Alan Bornstein, #14275

9 abornstein@jbsl.com
10 Attorneys for Morris Piha &
defendants Joseph & Ann Lee Rogel

11
12
13 Approved
14 
15
16 WSBA NO. 15244
17
18
19
20
21
22
23
24
25
26

ORDER QUASHING THREE SUBPOENAS - 2

JAMESON BABBITT STITES & LOMBARD, P.L.L.C.
ATTORNEYS AT LAW
999 THIRD AVENUE, SUITE 1900
SEATTLE, WA 98104-4001
TEL 206 292 1994 FAX 206 292 1995

APPENDIX A.4

**2007 CP 238-41 (Dk.63)(Clay St. Assocs. LLC's
Resp. to Pl.'s Mot. Declaring Waiver of Company
Privilege/Immunity and for a Prelim.**

2005 SEP 21 PM 12:06

The Honorable Michael Hayden
Hearing Date: September 23, 2005
Hearing Time: 11:00 a.m.

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA.

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

HUMPHREY INDUSTRIES, LTD.,

Plaintiff,

v.

CLAY STREET ASSOCIATES, L.L.C.; et al.,

Defendants.

No. 05-2-20201-7SEA

CLAY STREET ASSOCIATES, L.L.C.'S
RESPONSE TO PLAINTIFF'S MOTION
DECLARING WAIVER OF COMPANY
PRIVILEGE/IMMUNITY AND FOR A
PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiff has noted a hearing on two Motions on September 23, 2005. The Motions are (1) to Declare a Waiver of Company Privilege/Immunity and (2) for a preliminary injunction. These two motions are combined in a 26 page summary judgment motion that is scheduled for hearing on October 7, 2005. Plaintiff apparently asks the court to separate these two motions from the summary judgment motion and rule on these two motions on September 23. These two motions should be denied because the issues should be decided by the arbitrator rather than the court, no facts support Plaintiff's Motion seeking waiver of the attorney/client privilege and the requirements for a preliminary injunction have not been met.

FACTS

The issue in this case concerning Clay Street Associates, L.L.C. is simple. It is to determine the value of Plaintiff's interest in the company as of December 7, 2004, in accordance

ORIGINAL

CLAY STREET ASSOCIATES, L.L.C.'S RESPONSE
TO PLAINTIFF'S MOTION DECLARING WAIVER
OF COMPANY PRIVILEGE/IMMUNITY AND FOR
A PRELIMINARY INJUNCTION - 1

VANDEBERG JOHNSON & GANDARA
A PARTNERSHIP OF PROFESSIONAL SERVICE CORPORATIONS
ONE UNION SQUARE, SUITE 2424
600 UNIVERSITY STREET
SEATTLE, WASHINGTON 98101-1192
(206) 484-0404 (SEATTLE)
FACSIMILE (206) 464-0484

1 with Washington statutes regarding a dissenting member's choice to dissent from a plan of
2 merger.

3 Plaintiff commenced this action against numerous defendants including Clay Street
4 Associates, L.L.C. and its managing member, ABO Investments. Clay Street Associates, L.L.C.
5 is a "one asset company" that owned one primary asset consisting of commercial real property
6 located at 116 Clay Street NW, Auburn, WA. Prior to December 7, 2004, Plaintiff was a
7 member of Clay Street Associates, L.L.C. along with three other members. In August 2004, a
8 new limited liability company was formed called WXYZ LLC. In August 2004, the three other
9 members of Clay Street Associates, L.L.C. voted to approve a Plan of Merger by which Clay
10 Street Associates, L.L.C. and WXYZ LLC were merged into a new entity. Plaintiff voted
11 against the merger.

12 RCW 25.15.400 provides that a plan of merger shall be adopted if voted upon by
13 members who had contributed at least fifty per cent of the capital contributions. The three
14 members who voted for the merger had contributed more than fifty per cent of the capital
15 contribution and, accordingly, the plan of merger was adopted. The Plan of Merger became
16 effective on December 7, 2004.

17 On September 7, 2004, Clay Street Associates, L.L.C. sent to Plaintiff a Notice of
18 Dissenter's Rights in accordance with RCW Chapter 25.15 advising that the Plan of Merger was
19 adopted. Clay Street Associates, L.L.C. also provided Plaintiff with a procedure and form for
20 demanding payment for his membership interest in Clay Street Associates, L.L.C. should he
21 choose to do so. Plaintiff completed the form and demanded payment for the fair value of his
22 interest on or about October 3, 2004. Plaintiff's demand did not specify a price or estimate of
23 fair value for his interest.

24 The merger became effective on December 7, 2004, in accordance with the Plan of
25 Merger. RCW 25.15.450 provides that a member of the LLC who demands payment retains the
26 rights of a member only until the proposed merger becomes effective. By dissenting and

CLAY STREET ASSOCIATES, L.L.C.'S RESPONSE
TO PLAINTIFF'S MOTION DECLARING WAIVER
OF COMPANY PRIVILEGE/IMMUNITY AND FOR
A PRELIMINARY INJUNCTION - 2
FAS1706-6179961799-00001RESPONSEMTPRELIMN.DOC

VANDEBERG JOHNSON & GANDARA
A PARTNERSHIP OF PROFESSIONAL SERVICE CORPORATIONS
ONE UNION SQUARE, SUITE 2424
800 UNIVERSITY STREET
SEATTLE, WASHINGTON 98101-1192
(206) 464-0404 (SEATTLE)
FACSIMILE (206) 464-0484

1 demanding payment for his interest in Clay Street Associates, L.L.C., Plaintiff did not become a
2 member of the new LLC. The entity that was formed as a result of the merger was renamed Clay
3 Street Associates, L.L.C. which is the defendant in this lawsuit. Its primary asset was the
4 commercial real property located at 116 Clay Street NW, Auburn, WA. Plaintiff was not and has
5 never been a member of this entity.

6 On May 16, 2005, Clay Street Associates, L.L.C. sold the real property located at 116
7 Clay Street NW, Auburn, WA. On July 18, 2005, Clay Street Associates, L.L.C. communicated
8 to Plaintiff its estimate of the fair value of Plaintiff's interest in the former company and the
9 interest due to him in the amount of \$181,192.64. On that same day, Clay Street Associates,
10 L.L.C. paid that amount to Plaintiff. On June 1, 2005, Plaintiff sent a notice to Clay Street
11 Associates, L.L.C. disputing the determination of fair value and demanding a greater sum. The
12 dispute in these actions between Plaintiff and Clay Street Associates, L.L.C. is regarding the
13 value of Plaintiff's interest in Clay Street Associates, L.L.C. as of December 7, 2004, the
14 effective date of the merger.

15 RCW 25.15.475 provides that when a dissenting member makes a demand for payment
16 seeking a greater sum than was paid goes unresolved, the limited liability company shall
17 commence an action within sixty days after receiving the demand and petition the court to
18 determine the fair value of the dissenting member's interest. Clay Street Associates, L.L.C.
19 commenced such an action naming Humphrey Industries, Ltd. on July 29, 2005, in King County
20 Superior Court, Cause No. 05-2-24967-6SEA. David Spellman accepted service for Humphrey
21 Industries, Ltd. but no Answer has been filed. Clay Street Associates, L.L.C. served a Notice of
22 Intent to Arbitrate in that action on August 23, 2005. No objection or motion has been served in
23 response to the Notice of Intent to Arbitrate.

24 Plaintiff apparently filed this action in June 2005. Clay Street Associates, L.L.C. was
25 served with Summons and Complaint on August 15, 2005. Plaintiff filed a 26 page Motion for
26 Partial Summary Judgment and additional relief on August 8, 2005. Plaintiff's Motion to

CLAY STREET ASSOCIATES, L.L.C.'S RESPONSE
TO PLAINTIFF'S MOTION DECLARING WAIVER
OF COMPANY PRIVILEGE/IMMUNITY AND FOR
A PRELIMINARY INJUNCTION - 3
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VANDEBERG JOHNSON & CANDARA
A PARTNERSHIP OF PROFESSIONAL SERVICE CORPORATIONS
ONE UNION SQUARE, SUITE 2424
600 UNIVERSITY STREET
SEATTLE, WASHINGTON 98101-1192
(206) 464-0404 (SEATTLE)
FACSIMILE (206) 464-0464

1 Declare a Waiver of Company Privilege/Immunity and for a preliminary injunction is contained
2 within that larger motion. Plaintiff has scheduled a hearing on the Motion to Declare a Waiver
3 of Company Privilege/Immunity and for a preliminary injunction for September 23. The hearing
4 on the Motion for Partial Summary Judgment is scheduled for October 7.

5 Clay Street Associates, L.L.C. served a Notice of Intent to Arbitrate the issues in this
6 action on August 23, 2005. Plaintiff filed and served a Motion to Deny Arbitration. That motion
7 is also scheduled to be heard by this Court on October 7.

8 By these two motions, Plaintiff seeks a "preliminary ruling" that it is entitled to review all
9 communications between the company and its counsel because either (1) the privilege does not
10 apply because of Plaintiff's claims that Clay Street Associates, L.L.C. somehow breached a
11 fiduciary duty to Plaintiff or (2) Clay Street Associates, L.L.C. has somehow waived the
12 privilege. Plaintiff seeks this ruling even though Plaintiff has not sought any records and has not
13 identified any records that it seeks and Clay Street Associates, L.L.C. has not objected or
14 asserted the privilege. Plaintiff is not entitled to such a ruling because there is no evidence that a
15 fiduciary duty exists or was breached, there is no evidence that the privilege was waived,
16 Plaintiff has not identified what records it seeks and no objection has been made based on the
17 privilege. Further, the issue regarding what records the parties are entitled to should be ruled
18 upon by the arbitrator, not the court.

19 Plaintiff also seeks a preliminary injunction enjoining Clay Street Associates, L.L.C.
20 from transferring or dissipating the proceeds from the sale of "Clay Street Phase I" without
21 providing 28 days notice to Plaintiff. The motion is moot as to any proceeds from the sale of the
22 property located at 116 Clay Street NW, Auburn, WA, because that sale closed in May 2005, and
23 nearly all of the proceeds were dissipated, including a substantial sum paid to Plaintiff for his
24 interest in Clay Street Associates, L.L.C.¹ In addition to being moot, the motion should be
25 denied because the requirements for a preliminary injunction have not been met.

26 ¹ A relatively small sum from the proceeds is being held in the Vandenberg Johnson & Gandara
trust account pending resolution of the actions discussed herein.

CLAY STREET ASSOCIATES, L.L.C.'S RESPONSE
TO PLAINTIFF'S MOTION DECLARING WAIVER
OF COMPANY PRIVILEGE/IMMUNITY AND FOR
A PRELIMINARY INJUNCTION - 4
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APPENDIX A.5

2007 CP 253-57 (Dk.67)

(Reply in Supp. of Prelim. Inj. And Other Relief.)

FILED

2005 SEP 22 PM 12:49

THE HONORABLE MICHAEL HAYDEN

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA.

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

HUMPHREY INDUSTRIES, LTD.,

Plaintiffs,

v.

CLAY STREET ASSOCIATES LLC; 615
COMMERCE; CLAY ASSOCIATES
PHASE II LLC; SCOTT ROGEL, LORI
GOLDFARB; JOSEPH ROGEL and LEE
ANN ROGEL, husband and wife; ABO
INVESTMENTS; AND AVRAM
INVESTMENTS,

Defendants.

No. 05-2-20201-7 SEA

REPLY IN SUPPORT OF
PRELIMINARY INJUNCTION AND
OTHER RELIEF

Noted for September 23, 2005

On October 7, the Court will hear Humphrey Industries' (1) motion for partial summary judgment on its dissenters' rights claim against Clay Street Associates ("Clay I"), (2) motion to stay the duplicate appraisal suit that was filed after this action, and (3) motion to stay the arbitration demand by Clay I. In August, when Humphrey originally filed its motions, Humphrey naively believed that the defendants would consent to some voluntary interim relief and discuss the scope of the company's attorney-client privilege.

An Order to Preserve Evidence Should Be Granted. RCW 7.04.130, "Order to preserve property or secure satisfaction of award,"¹ grants the Court the authority to preserve

¹ At any time before final determination of the arbitration the court may upon application of a party to the agreement to arbitrate make such order or decree or take such proceeding as it may deem necessary for the preservation of the property or for securing satisfaction of the award.

REPLY IN SUPPORT OF PRELIM. INJ. - 1

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ORIGINAL

1 evidence. There is good cause for an order preserving evidence, because company records are
2 missing,² the companies are liquidated. The order is common sense and is not burdensome.³
3 Humphrey is entitled to the preservation of records for tax and governmental ^{purp} and for the
4 purpose of this litigation. ^

5 Mandatory Written Notice Prior to Further Transfer of Assets Is Proper Equitable
6 Relief After the Liquidation of Clay I. Humphrey asks for an injunction that requires twenty-
7 eight days prior notice of any act that transfers or dissipates the sales proceeds from the other
8 companies. Humphrey seeks this relief because Clay I owes Humphrey funds for his interest
9 pursuant to the dissenters' rights statute.

10 In May 2005, in violation of the letter and spirit of RCW 25.15.160(1), Clay I made a
11 *tardy and incomplete* payment to Humphrey based upon Clay's *delinquent* internal valuation
12 of the company at \$2.5 million.⁴ In July, Clay I re-adjusted the value to \$3.1 million⁵ but
13 failed to pay the minimum additional sum for Humphrey's interest—underpaying by roughly
14 half what Clay I's appraisal.

15 Clay I argues that because the company has been looted and virtually all of its assets
16 distributed, an injunction to prevent any disbursements of funds is *moot*.⁶ This is nonsensical.
17 The company acknowledged owing additional money yet it now claims interim relief is too
18 late. Bluntly, the company violated the statute, admits owing more money, and admits the
19 company is now broke and cannot pay.

20 ² Decl. of David Spellman

21 ³ Humphrey also asked for an injunction that compelled Clay Street to produce its records and
22 communications of its members, counsel, consultants, leasing agents, and appraisers. When
23 the Court decides the status of statutory claims on October 7, Humphrey's request for
24 discovery can be resolved.

25 ⁴ Decl. of George Humphrey In Support of Pl's Motion for Inj. Relief ¶ 35 (Aug. 5, 2005).
26 The payment and valuation was made in May 2005 instead of October/November 2005 when
Humphrey made his demand for payment and when the company represented the merger
became effective. (*Id.* ¶ 27.) RCW 25.15.460(1) requires payment within 30 days from the
demand for payment or the effective date of the merger.

⁵ Decl. of George Humphrey In Support of Pl's Motion for Inj. Relief ¶ 42, 43 (Aug. 5, 2005).

⁶ Clay Street Associates LLC's Response to Plaintiff's Motion Declaring Waiver of Company
Privilege/Immunity and For Preliminary Injunction at 6-7.

REPLY IN SUPPORT OF PRELIM. INJ. - 2

1 Clay I admits that “[m]ost of the proceeds from the sale . . . was distributed Some
2 money was paid into the trust account of Vandenberg Johnson & Gandara.”⁷ Thus, Clay I
3 appears to be insolvent and its assets have been distributed to its property managing member,
4 Scott Rogel, his parents, and ABO Investment. The members may be liable for excessive
5 distributions. RCW 25.15.235. “The assets of an insolvent corporation constitute a trust fund
6 for the payment of creditors.”⁸ When there is a winding up of a company, the assets are to be
7 distributed first to the creditors. RCW 25.15.300. Humphrey is a creditor of the company,
8 was not paid prior to the time the assets are distributed to the owners, and thus may recover
9 those distributions from the owners—meaning the other members.⁹ The distributions from
10 the insolvent company may constitute fraudulent transfers pursuant to RCW 19.40 that trigger
11 equitable remedies including an injunction against the transferee, the appointment of a
12 receiver, and other relief. See, e.g., RCW 19.40.071.

13 Scott Rogel received distributions and commissions from Clay I and is a members in
14 Clay II, 901 Tacoma, Westwood Village, and 899 West Main.¹⁰ The proceeds from the sale
15 of Clay II, 901 Tacoma, and Westwood are to be in escrow. There is a pending buyout of
16 Scott Rogel’s interest and his parents’ interest in 899 West Main.

17 Humphrey merely for prior written notice before the transfer of funds. Humphrey is
18 both minority member of the companies and a creditor of Clay I. As stated in Humphrey’s
19 motion, Scott Rogel in the past has made disbursements to himself and family members,
20 without sending notice to Humphrey.¹¹

22 ⁷ Decl. of Gerald Ostroff Responding to Motion for Preliminary Injunction and Other Relief
¶ 9.

23 ⁸ Gaunce v. Schoder, 145 Wash. 604, 261 P. 393, 393 (1927).

24 ⁹ Lonsdale v. Chesterfield, 99 Wn.2d 353, 360, 662 P.2d 385 (1983); Smith v. Sea Ventures,
Inc., 93 Wn. App. 613, 969 P.2d 1090, review denied, 138 Wn.2d 1003 (1999).

25 ¹⁰ Joe Rogel is a member of 899. ABO is a member of 901 Tacoma and Westwood.

26 ¹¹ Decl. of George Humphrey In Support of Pl’s Motion for Inj. Relief ¶ 18 (Aug. 5, 2005).

REPLY IN SUPPORT OF PRELIM. INJ. - 3

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1 Consistent with the motion to quash and the motion to compel arbitration, Scott Rogel
2 is *pro se* and has not responded to the pending motion. Instead, he has the companies'
3 lawyers and his parents' lawyers respond for him. The result is a shell game. Clay II and
4 Scott's parents respond that any interim relief must be decided by arbitrators in one of three or
5 four hearings and not by the Court. However, the Court has authority under RCW 7.04.130 to
6 grant interim relief prior to any final arbitration award. Clay II and Joe Rogel do not have
7 standing in some instances. For example, Clay II is not a party to an arbitration.¹² Pursuant to
8 the terms of the stipulation and order entered last week, the only claims asserted and that are
9 now subject to arbitration are Humphrey's derivative and direct claims against Scott Rogel
10 pursuant to the Clay II operating agreement--not *claims against Scott Rogel as a liquidator of*
11 *Clay I*. The same applies to the other members who act in the capacity as members of the
12 other companies and as members of Clay I. The Court should not sanction their shell game.

13 Scott's parents argue that the dissenters' rights statute does not require Clay I to create
14 a fund to "pre-pay the balance of the dissenters' claim, or set aside a payment fund to satisfy
15 the balance of a dissenters' claim, prior to adjudication."¹³ Their argument fails, because Clay
16 I and the company into which it was merged are effectively insolvent companies. Clay I
17 breached its fiduciary duty to Humphrey as a dissenting member and left Humphrey looking
18 at an empty shell. Money damages do not suffice when the company has been stripped of its
19 assets. That is why equity authorizes injunctive relief and the imposition of a constructive
20 trust¹⁴ upon the merged company and its members.¹⁵

21
22 ¹² Joe Rogel is not a member of Clay II, 901 Tacoma, or Westwood. Joe Rogel does not have
standing to argue what claims against Scott are arbitrable.

23 ¹³ Response of Joseph & Ann Lee Rogel to Preliminary Injunction Motion at 3, 4.

24 ¹⁴ As Justice Cardozo in Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545, 548, 62 A.L.R. 1,
said: "A constructive trust is, then, the remedial device through which preference of self is
made subordinate to loyalty to others."

25 ¹⁵ Defendants argue that although this suit was filed in June—they were not served until
26 August and this belies any claim of immediate or substantial injury to Humphrey. Their
argument is disingenuous. They declined to accept service in June. Decl. of George
Humphrey In Support of Pl's Motion for Inj. Relief ¶ 41 (Aug. 5, 2005).

REPLY IN SUPPORT OF PRELIM. INJ. - 4

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120144.0004/1234897.1

1 Clay Street has failed to fully comply with your order to produce company records
2 pursuant to RCW 25.15.135. For example, the only financial statement provided was a one
3 and a quarter page income statement, a copy of which is attached. Although the merged
4 company asserts that there is "some money" in their attorney's trust account, the company has
5 not disclosed the dollar amount. We can address the discovery issues on October 7; however,
6 during the interim, a limited injunction is appropriate to prevent the further loss of records and
7 transfer of funds and to preserve the *status quo*.

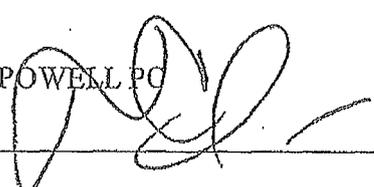
8 A Determination of the Scope of the Company Attorney-Client Privilege and of the
9 Conflicts Is Appropriate Now or Later. As stated in Humphrey's declaration:

10 Clay Street Phase I's lawyer responded that HI's interest needed to be valued
11 as of December 7, "I will make deductions for costs and uncertainty associated
12 with the vacant space; e.g., brokerage commissions, tenant improvements, free
13 rent, legal expenses in connection with leasing activities, marketing expenses,
14 administrative time and effort and the uncertainty of the vacancy period." By
this statement, Clay Street Phase I's lawyer waived any attorney-client
privilege and became a material witness in this case. His firm should therefore
not represent the company in any case related to merger and dissenter's
rights.¹⁶

15 Based upon the quoted statement, the company's lawyer is a necessary witness about business
16 advice, not legal advice.¹⁷ The company has also breached its fiduciary duties, and thus, under
17 the fiduciary breach doctrine, there is no attorney-client privilege for some communications.
18 Suffice it to say the company is now on notice. The Court may resolve these issues now or at
19 a later hearing.

20 DATED this 22nd day of September, 2005.

21 LANE POWELL PC

22 By 

23 ¹⁶ Decl. of George Humphrey In Support of PI's Motion for Inj. Relief ¶s 34, 34 (Aug. 5,
24 2005). See also new Decl.

25 ¹⁷ RPC 3.7 (Witness/Advocate). He is a witness about his retention and the conflicts of
26 interest and about communications with the members about whether the members followed
his advice with respect to the dissenters' rights statute—such as paying Humphrey last year,
paying him the appraised value—communications about the insolvency of the company, the
records and information used to value the company.

REPLY IN SUPPORT OF PRELIM. INJ. - 5

APPENDIX A.6
2007 CP 259-60 (Dkt. 67)
(Dec. 31, 2004 income statement)

Clay Street Business Park

INCOME STATEMENT

PERIOD ENDING DECEMBRE 31, 2004

	CURRENT PERIOD	YEAR TO DATE
Unit Rental	19,073.39	165,684.58
Common Area Charges	2,756.09	29,841.32
Interest Income	0.17	6.40
TOTAL REVENUES	21,829.65	195,532.30
COMMON AREA EXPENSES		
Water/Sewer/Metro	0.00	3,445.20
Electricity	0.00	74.60
Telephone	0.00	905.59
Gas	0.00	10.64
Landscaping	0.00	2,603.04
Non-Contract Landscape	0.00	942.49
Repairs	86.99	2,318.20
Electrical Repairs	0.00	359.86
Supplies / Lighting	0.00	338.69
Drainage	0.00	777.70
Security	0.00	122.65
Fire & Life Safety	198.00	461.13
Management Fees	500.00	6,355.81
Real Estate Taxes	11,799.75	23,599.51
Insurance	0.00	3,530.19
Miscellaneous	0.00	3,477.51
TOTAL CAM EXPENSES	12,584.74	49,322.81
OWNERS EXPENSES		
Electricity	0.00	343.76
Real Estate Taxes	(11,799.75)	0.00
Office Supplies	0.00	39.46
Postage/Courier	15.05	86.17
Bank Charge	150.00	202.00
Accounting Fees	0.00	650.00
Legal Fees	672.72	2,230.59
Misc. Admin. Fees	0.00	45.00
TOTAL OWNERS EXPENSE	(10,961.98)	3,596.98
TOTAL OPERATING EXPENSE	1,622.76	52,919.79
NET OPERATING INCOME	20,206.89	142,612.51
NON-OPERATING EXPENSES		
Interest Expense	11,825.54	157,157.05
Lease Comm. / Renewl	103.61	13,999.59
Refurbish Tenant Space	0.00	881.73

Clay Street Business Park

INCOME STATEMENT

PERIOD ENDING DECEMBRE 31, 2004

	CURRENT PERIOD	YEAR TO DATE
TOTAL NON-OPERATING EXP.	11,929.15	172,038.37
NET INCOME	\$ 8,277.74	\$ (29,425.86)

APPENDIX A.7

**2007 CP 264 (Dkt. 75)(May 15, 2006 Chicago
Title Ins. Co. Seller's Settlement Statement).**



CHICAGO TITLE INSURANCE COMPANY
SELLER'S SETTLEMENT STATEMENT

PAGE: 01

ESCROW NUMBER: 00633-001152184-001 ORDER NUMBER: 00633-001152184

CLOSING DATE: 05/16/05 CLOSER: PAULA K. ADAMS

BUYER: FAVRO INVESTMENTS, LLC
F&C PARTNERSHIP #1
EXCHANGE FACILITATOR CORPORATION

SELLER: CLAY STREET ASSOCIATES, L.L.C.

PROPERTY: 116 CLAY STREET NORTHWEST, AUBURN, WASHINGTON 98001

	CHARGE SELLER	CREDIT SELLER
Sales Price	\$	\$ 3,300,000.00
Loan Payoff to BANK OF AMERICA	1,822,159.09	
Interest from 05/11/05 to 05/18/05 @ \$ 392.2700/day	2,745.89	
Recon/Release Fee	65.00	
Pre-Payment Fee	79,726.75	
Statement Fee	60.00	
INTEREST TO 5/11	3,922.70	
UCC TERMINATION FEE	13.28	
ADDITIONAL PREPAYMENT PENALTY	4,476.55	
LEGAL FEES TO VANDERBERG JOHNSON	5,000.00	
TRANSFER 25% TO VANDERBERG TRUST ACCOUNT	266,529.67	
PAYMENT TO COLLIERS INTERNATIONAL	5,713.50	
PAYMENT TO TURBAK LLC	2,285.40	
PAYMENT TO MORRIS PIHA REAL ESTATE	1,142.70	
PAYMENT TO CBRE C/O KRAIG HEETER	4,328.28	
PAYMENT TO TURBAK, LLC	3,462.62	
PAYMENT TO MORRIS PIHA	865.66	
PAYMENT TO ABO INVESTMENTS	10,484.37	
PAYMENT TO JOSEPH ROGEL	10,484.37	
PAYMENT TO SCOTT ROGEL	10,484.37	
PROCEEDS TO ABO INVESTMENTS	266,529.67	
PROCEEDS TO JOSEPH ROGEL	266,529.67	
PROCEEDS TO SCOTT ROGEL	266,529.67	
REMAINING COMMISSION TO HEETER - HOLDBAC	4,328.28	
Prorations And Adjustments		
County Taxes from 05/16/05 to 07/01/05		3,004.76
Total amount \$ 23,842.11 for 365 days		
SECURITY DEPOSITS	12,528.49	
CAM CHARGE from 05/16/05 to 06/01/05	2,091.92	
Total amount \$ 4,053.09 for 31 days		
MAY RENT from 05/16/05 to 06/01/05	6,450.58	
Total amount \$ 12,498.00 for 31 days		
Total commission \$ 165,000.00		
MORRIS PIHA REAL ESTATE	82,500.00	
CB RICHARD ELLIS	82,500.00	
Commission paid at Settlement	165,000.00	
Settlement or Closing Fee	1,686.40	
Title Insurance	5,276.80	
WIRE/TRUST ACCOUNTING/DELIVERY/UPS	81.60	
Recording Fees	22.00	
EXCISE TAX 1.78% TO KING COUNTY TREASURER	58,740.00	
ESTIMATED FINAL UTILITY BILLS	1,000.00	
1ST 1/2 2005 REAL ESTATE TAXES TO KING COUNTY TREASURER	12,159.48	
RECONVEYANCE FEE	100.00	
TOTALS	\$ 3,303,004.76	\$ 3,303,004.76

APPENDIX A.8

**2007 CP 329-331 (Dkt.87)(Reply in Supp.
of Partial Summ. J. and Other Relief).**

1 A. Clay Street Owes HI Fiduciary and Statutory Duties. Clay Street I owes HI both
2 fiduciary duties and statutory duties.³ “In an L.L.C., the [fiduciary] duty exists between the
3 company, its members, and its managers.”⁴ “Fiduciaries seeking to ‘cashout’ minority
4 shareholders of a corporation in a non-arms length merger, have to be entirely scrupulously
5 fair to the minority shareholders in all respects.”⁵ “The right of dissenters to payment takes
6 precedent over the right of other shareholders to distribution.”⁶ “The assets of an insolvent
7 corporation constitute a trust fund for the payment of creditors.”⁷ Humphrey is a creditor of
8 the company, was not paid prior to the time the assets are distributed to the owners.⁸ The
9 distributions from the insolvent company may constitute fraudulent transfers pursuant to
10 RCW 19.40 that trigger equitable remedies including an injunction against the transferee, the
11 appointment of a receiver, and other relief. See, e.g., RCW 19.40.071.

12 B. Clay Street I Violated HI’s Statutory Dissenters’ Rights and Breached Its
13 Fiduciary Duties. The company’s fiduciary duty to HI became enhanced once HI asserted its

14 ³ Clay Street I’s reliance on RCW 25.15.155(1) is misplaced for two reasons. First, the statute
15 is entitled “Liability of managers and members” and does not address the liability of the
16 company for violation of the dissenters’ rights statute. Second, statute imposes liability on the
17 members for gross negligence, intentional misconduct, or a knowing violation of the law and
18 the next subsection of the statute requires the members to “account” and “hold as trustee” for
19 the company any profits or benefits derived without the consent of the majority of the
20 disinterested members arising from the winding up of the company.

21 ⁴ Dickens v. Alliance Analytical Labs., 127 Wn. App. 433, 440, 111 P.3d 889 (2005).
22 Credentials Plus, LLC v. Calderone, 230 F. Supp. 2d 890, 898-900 (N.D. Ind. 2002) (granting
23 partial summary judgment to plaintiffs regarding defendant’s breach of fiduciary duty claim
24 and looking to partnership law and corporate law as sources); Boyy v. Graham, Cohen &
25 Wampold, 17 Wn. App. 567, 570-71, 564 P.2d 1175 (1977) (fiduciary duty among partner
26 imposes “the obligation of candor and utmost good faith” and “undivided loyalty” and
“abstain from any and all concealment” and the “duty of full disclosure” and this duty
continues during the winding up of partnership affairs).

⁵ 15 William Meade Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 7160
at 382 (2000).

⁶ 12B Fletcher Cyclopedia of the Law of Private Corporations § 906.100 at 382 (2000).
When there is a winding up of a company, the assets are to be distributed first to the creditors.
RCW 25.15.300.

⁷ Gaunce v. Schoder, 145 Wash. 604, 261 P. 393, 393 (1927).

⁸ Lonsdale v. Chesterfield, 99 Wn.2d 353, 360, 662 P.2d 385 (1983); Smith v. Sea Ventures,
Inc., 93 Wn. App. 613, 969 P.2d 1090, review denied, 138 Wn.2d 1003 (1999).

REPLY IN SUPPORT OF PARTIAL SUMM. J. AND OTHER
RELIEF - 3

120144.0004/1237715.1

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1 dissenters' rights. The purpose of these statutory rights is to protect minority owners from
2 "victimization."⁹ RCW 25.15.480(5) grants to the court jurisdiction that is "plenary and
3 exclusive" over an unsettled demand for payment, and the effect of the statute is that HI's
4 claim for partial summary judgment is for the court to decide and not for an arbitrator.

5 "A shareholder has the right to financial information in order to value his or her
6 interest."¹⁰ Its failure to provide a complete company records deprives HI of this right. The
7 company's failure to provide material information relevant to the freeze-out sale of HI's
8 interest is analogous to securities fraud.

9 The dissenters' rights statute sets very short timelines: ten to thirty days to sixty days.
10 If a party fails to take action, it loses its rights. The company cannot simply ignore the
11 deadlines and requirements to benefit the majority and to the detriment of a dissenting,
12 minority member protected by statutory rights. The multiple breaches of its fiduciary duty
13 and failures to comply with dissenters' rights statute, Clay Street I lost the right to petition the
14 court for the appointment of an appraiser or to recover its fees, costs and expenses. Clay
15 Street I made a delinquent and partial payment in late May, liquidated the company, and filed
16 a delinquent appraisal suit in late July. Clay Street has systematically violated HI's statutory
17 rights and the company's fiduciary duties. For every wrong, there is a remedy. Neither bank
18 rate interest paid by Clay Street nor requiring HI to arbitrate claims that arise from the freeze-
19 out merger are sufficient remedies. The plain language of RCW 25.15.475 is "If the limited
20 liability company does not commence the [appraisal] proceeding within the sixty day period
21 [after the payment demand], it shall pay each dissenter whose demand remains unsettled the
22 amount demanded."

23
24 ⁹ China Products N. Amer., Inc. v. Manewal, 69 Wn. App. 767, 773, 850 P.2d 565, 568
25 (1993) (statutes were adopted to permit the dissenting minority to recover the appraised value
26 of shares and protect against victimization of the minority).

¹⁰ 12B Fletcher § 5906.120 at 396.

REPLY IN SUPPORT OF PARTIAL SUMM. J. AND OTHER
RELIEF - 4

120144.0004/1237715.1

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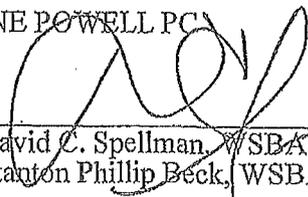
1 C. Humphrey's Opinion About the Value of Clay Street Is Admissible. Black letter law
2 is the owner may testify about the value of property. "[T]he decisional law leaves no room
3 for doubt that the owner may testify as to the value of his property because he is familiar
4 enough with it to know its worth." 5B Karl B. Tegland Washington Practice: Evidence Law
5 & Practice § 701.18 at 23 (1999) (citations omitted).¹¹ When Clay Street I delivered the tardy
6 "fair value" check, it already had sold the property had sold for \$3.3 million but valued HI's
7 interest at \$2.5 million—the appraised value in 1998/99¹² and less than the \$3.5 million that
8 Scott Rogel had used on prior financial statements submitted to banks in 2001-03.
9 Furthermore, no documentation was provided supporting the company's calculation of
10 deductions. Although the statute requires the payment to be accompanied by "copies of the
11 financial statements for the limited liability company for its most recent year"—an income
12 statement was provided.

13 Humphrey is buying out the Rogels in the property next door, 899 West Main, which
14 Judge Soukup has ordered the Rogels to sell him at a price of \$980,000 which is over
15 \$89/sq.ft, based upon the footprint of the building. The Rogels had asked for a value of
16 roughly more than \$100/sq.ft. Yet, they are offering HI less than \$ 52/sq.ft for Clay Street I.

17 In summary, HI should be granted partial summary judgment, because Clay Street has
18 violated the letter and the spirit of the dissenters' rights statute. Partial summary judgment on
19 the liability issues will expedite the resolution of the case.

20 DATED this 3rd day of October, 2005.

21 LANE POWELL PC

22
23 By 

24 David C. Spellman, WSBA No. 15884
Stanton Phillip Beck, WSBA No. 16212

25 ¹¹ See, e.g., Risdon v. Hotel Savoy Co., 99 Wash. 616, 170 P. 146 (1918) (owner of business
26 testified about its goodwill value).

¹² See Declaration In Support of Reply.

REPLY IN SUPPORT OF PARTIAL SUMM. J. AND OTHER
RELIEF - 5

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APPENDIX A.9

**2007 CP 1632-33, 1644-45 (Dkt. 282)(Humphrey's Motion
To Alter, Amend, Correct or Recons. The Oral Ruling**

1 II.

2 Statement of Relevant Evidence.

3 The mysteriously omitted office space. In March 2001, Scott Rogel sent the members
4 a letter and memo regarding Calkins Power Company retenanting the Suite A-3 space and for
5 partner call to reimburse Humphrey for the office improvements made to Suite A-3. Ex. 8.
6 Rogel's partner call states "Humphrey Industries has funded the Tenant Improvement work,
7 total cost \$33,631.56." Ex. 8 at Clay I 00001. The memo confirmed that the office space had
8 been built out to "2,200 sq feet and is two stories." Ex. 8 at Clay I 00003. The memo refers
9 to a five year lease with a cash flow of \$46,000. Id. The lease had an expiration date of
10 November 2005—the year after the merger. Ex. 204 (Calkins lease). The memo states:
11 "After that date the office space shall be fully leased at \$19,000 + per year." Ex. 8 at Clay I
12 00003. This business record confirms the company's intention to charge for the additional
13 office space starting in October 2005. Three years later, Scott Rogel's marketing flyer
14 mysteriously omitted 1,200 square feet of office space in Suite A-3. Ex. 40 at MPC 11.

15 Prior to trial, Shedd testified that his understanding was that Calkins helped build out
16 the office space and that was why they were not being charged for the space. Shedd Dep. at
17 45:17-46:11. Part of his task was to address the fact that his partner, Allen, omitted the office
18 space. Id. at 22:13-20. Shedd relied on Allen's and his associate (Greg)'s inspection, talked
19 to a member of Favro's group, concluded "it is pretty nice office space," and adjusted the
20 values. Id. at 22:15-19; 23:12-21; 24:14-22. In contrast, Barnes made no inspection and no
21 due diligence interviews about the new information.

22 The partner call funds should be treated as loans—not a capital investment—and the
23 tenant improvement and other costs should be traceable expenses. In September 2004, three
24 days the approval of the merger and the filing of the articles of merger (Ex. 37), Gerry Ostroff
25 sent a call for \$10,000 from each member to fund a mortgage shortfall, lease commissions,
26 tenant improvements, and taxes. Ex. 39 (Sept. 13, 2004 letter); Ostroff Dep. at 35:7-36:3,

HUMPHREY'S MOTION TO ALTER, AMEND,
CORRECT OR RECONSIDER THE ORAL RULING - 5

120144.0004/1401075.1

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1 Dec. 3, 2006. The letter confirmed that "we have offers to lease out Suite A-1 and B-2" and
2 estimated that there would be \$20,000 in new tenant improvements and commission. Ex. 39
3 (Sept. 13, 2004 letter).² The prospective request for funds was less than 1/3 of the \$33,632
4 that Humphrey had alone advanced for tenant improvements three years earlier for several
5 months and which had been treated as an interest free loan. Ex. 8. Furthermore, the amount
6 of the call should be viewed the context of the \$58,000 in cash distributions each members
7 had already received during the prior years.³ Later, in October 2004, Humphrey offered to
8 intervene and pay the mortgage, if required. Ex. 46. The new evidence produced during trial
9 demonstrates that the capital call was part of the legal strategy as to the effect on
10 "Humphrey's position." Ex. 123, Cowan's billing records state:

11
12 "Telephone conference with Scott Rogel regarding cash requirements
13 and capital call, and effect on Humphrey's position" on September 10, 2004[
14 *raising the issue of whether the cash call was part of the merger/litigation*
15 *strategy.*]

16 "Telephone conference with Scott Rogel regarding PSA, capital calls,
17 terms for extension of tenancy and anticipation of Humphrey issues" on
18 February 8, 2005, shortly after signing the final agreement with Favro.

19 Months later, when Clay Street's appraiser asked for the tenant improvement breakdowns,
20 Scott Rogel directed the appraiser to contact Clay Street's lawyer. Ex. 80 (June 23, 2005
21 emails to and from Scott Rogel). The income statements starting on October 1, 2004 and
22 ending on December 31, 2004 do not indicate any sums were incurred for lease commissions
23 and tenant improvement amounts during the relevant period. Compare Ex. 224 (Oct.

24 ² Gerry Ostroff's intention was to have Clay Street pay for Mr. Cowan's legal expenses.
25 Ostroff Dep. at 35:25-36:1, Dec. 3, 2006. Gerry Ostroff later sent George Humphrey an email
26 that stated "legal fees and commissions will show up in the financials." Ex. 40, Oct. 8, 2004
email. In an email, Scott Rogel later demanded that Humphrey pay \$10,000 to receive Clay
Street's financial statements. Ex. 54, Nov. 17, 2004 email, first document.

³ Ex. 97D at HIC/Clay 514, 520 (\$239,130 in gross rents and distribution of \$4,000 in 2003);
Ex. 96C at HIC/Clay 497, 503 (\$267,115 in gross rents and distribution of \$20,364 in 2002),
Ex. 96F and Ex. 242 (\$277,025 gross rents and \$14,000 distribution in 2001); Ex. 96B
(\$265,394 gross rents and \$24,000 distribution in 2000); Ex. 96A (distributions of \$10,833 in
1999).

HUMPHREY'S MOTION TO ALTER, AMEND,
CORRECT OR RECONSIDER THE ORAL RULING - 6

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1 offer of \$3.19 million—an amount in excess of the appraised value—nor did he receive the
2 information about the additional office space.

3 Next, in addition to the misinformation supplied to Barnes, Court should consider the
4 violations of the statute. “Additionally, courts may examine wrongful actions in gauging or
5 impeaching the credibility of minority shareholders with respect to their valuation
6 contentions.” HMO-W, Inc. v. SSM Healthcare Sys., 234 Wis.2d 707, 729, 611 N.W.2d 250
7 (2000). The billing records of its lawyer and his legal memo reflect the company’s strategic
8 maneuvering and intentional violation of the statute—that denied Humphrey’s statutory right
9 to “immediate use” of the fair value money.¹⁶ But yet the Court’s rationale for the deduction
10 of the transaction expenses was the other members “took the risk of marketing it and paying
11 the expenses.” There is no evidence in the record of such a risk—and Humphrey shared the
12 risk by remaining the involuntary guarantor of the company’s bank loan.

13 Finally, the definition of fair value is intended to protect the dissenter while he is in
14 the “twilight zone.” The MBCA (RCW 23B.13.010(3)) and the LLC statute (RCW
15 25.15.425(3)) define “fair value” as the value “immediately before the effectuation of the
16 merger to which the dissenter objects excluding any appreciation or depreciation in
17 anticipation of the merger unless exclusion would be inequitable.” The purpose of this
18 “inequitable exception” is explained in the official comment to MBCA:¹⁷

19
20 . . . It specifically preserves the language in the old law excluding
21 appreciation and depreciation in anticipation of the proposed corporate act [i.e.
22 the merger] but permits an exception for equitable considerations. The
23 purpose of this exception is to permit consideration of factors similar to those
24 approved by the Supreme Court of Delaware in Weinberger v. UOP, Inc., 457
25 A.2d 701 (Del. 1983), a case in which the court found that the transaction did
26 not involve fair dealing or fair price. . . . Consideration of appreciation or
depreciation which might result from other corporate actions action is

¹⁶ 2 Senate Journal, 51st Leg., app. A at 3091 (Wash. 1989)

¹⁷ The official comments to the MBCA were part of the bill when the Legislature adopted the
MBCA in 1989. Matthew G. Norton Co., 112 Wn. App. at 874 citing 2 Senate Journal, 51st
Leg., app. A at 3086 (Wash. 1989).

HUMPHREY’S MOTION TO ALTER, AMEND,
CORRECT OR RECONSIDER THE ORAL RULING - 17

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1 permitted; these effects in the past have often been reflected either in market
2 value or capitalized earning value.

3 "Fair value" is to be determined immediately before the effective date
4 of the [merger], instead of the date of the shareholder's vote, as is the case
5 under most state statutes that address the issue. This comports with the plan of
6 this chapter to preserve the dissenter's prior rights as a shareholder until the
7 effective date of the [corporate action], rather than leaving the dissenter in a
8 twilight zone where the dissenter has lost former rights, but has not yet gained
9 new ones.

10 Humphrey remained in that "twilight zone" long after the effective date of the merger—being
11 an involuntary guarantor for six months. Clay Street later failed to supply Humphrey with
12 material information before the suit was filed—in violation of its fiduciary duties and the
13 requirements of the statute and first fought and then ignored discovery requests. Clay Street
14 reaffirmed the \$2.5 million valuation in October 2005 only to retreat from it at trial. In the
15 meantime, Humphrey did not have the use of the funds and is now penalized further because
16 the fair value ruling excludes the appreciation from market growth that increased the market
17 value and the appreciation from leasing up the property that increased the capitalized earning
18 value.

19 Fair value is a best value determination.¹⁸ The Court's ruling prevents Humphrey
20 from recapturing the complete investment in the form of the "fair value" that requires by
21 definition—an orderly transaction, known as a "fair sale" where "the buyer and seller are each
22 acting prudently, knowledgeably, and under no necessity to buy or sell – i.e. other than a
23 forced or liquidation sale."¹⁹ The sale to Favro/Claeys did not meet even the requirements of
24 a fair market sale.²⁰

21 ¹⁸ In re 75,629 Shares of Common Stock of Trapp Family Lodge, Inc., 169 Vt. 82, 725 A.2d
22 927, 931 (Vt. 1999) ("Thus, to find fair value, the trial court must determine the trial court
23 must determine the best price a single buyer could reasonably be expected to pay for the
24 corporation as an entirety and prorate this value equally among the shares of its common
25 stock. Under this method, all shares of the corporation have the same fair value.").

26 ¹⁹ 12 C.F.R. 7.3025(d) cited in Ex. 115 at 13 (Hess appraisal); see also In re Monica Road
27 Assocs., 147 B.R. 385 (1992) (citing Financial Accounting Standards Board ("FASB"): FASB
28 Statement No. 13 Accounting for Leases, Effective January 1, 1977; Statement No. 15
29 Accounting by Debtors and Creditors for Troubled Debt Restructuring, Effective December
30 31, 1977; and FASB Statement No. 67 Accounting for Costs and Initial Rental Operations of
31 (continued . . .)

HUMPHREY'S MOTION TO ALTER, AMEND,
CORRECT OR RECONSIDER THE ORAL RULING - 18

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APPENDIX A.10
2007 CP 1944-47 (Dkt. 295)
(Decl. of Spellman in Supp. of Fees).

1 Only by filing this suit did Humphrey secured the records and even then those records fail to
2 include information that is material to valuing the company.

3 Clay Street's position was the merger eliminated Humphrey's rights in the company
4 and thus Humphrey had no inspection rights in the original company or the successor – even
5 though Humphrey remained a guarantor of both companies. The further inconsistency was
6 months after this suit was filed Clay Street later asserted that the arbitration provision in the
7 company agreement survived the arbitration and compelled the arbitration of the dissenters'
8 rights claims.

9
10 Part B: The Alternative More Fact Intensive Basis for Awarding Fees: Clay
11 Street's arbitrary, vexatious and bad faith conduct in violation of the dissenter's
12 rights.

13 The second more fact intensive ground for an award of fees requires the evaluation of
14 whether Clay Street acted arbitrarily, vexatiously or in bad faith. Washington courts have
15 looked to two types of bad faith conduct as warranting an award of fees: (1) "prelitigation
16 misconduct" and (2) "substantive bad faith."³ This declaration will use those two categories
17 of bad faith as a framework for outlining Clay Street's bad faith and identifying areas where
18 its conduct increased fees and costs.

19 Prelitigation Misconduct as Bad Faith. Prelitigation misconduct" such as obstinate
20 conduct that necessitates legal action to enforce a clearly valid claim or legal right is a type of
21 bad faith supporting a fee award.⁴ A fiduciary's negligent breach of duty to keep records is
22 another type of bad faith that supports a fee award,⁵ and a fiduciary's failure to make material

23 ³ Rogerson Hiller Corp. v. Port of Port Angeles, 96 Wn. App. 918, 927, 982 P.2d 131 (1999)
24 (discussing three types of bad faith conduct recognized in federal court: (1) prelitigation
25 misconduct, (2) procedural bad faith, and (3) substantive bad faith). Substantive bad faith
26 means bringing a frivolous claim with an improper purpose. Id. at 929. The Rogel's and
Clay Street's claims for fees against Humphrey are based upon a claim for substantive bad
faith.

⁴ Rogerson Hiller Corp., 96 Wn. App. at 927-28.

⁵ Hsu Ying Li v. Tang, 87 Wn.2d 796, 557 P.2d 342 (1976) (partnership winding up); cf.,
Guarino v. Interactive Objects, Inc., 122 Wn. App. 95, 86 P.2d 1175 (2004) (finding
(continued...)

1 disclosures is another basis for bad faith or other liability. Finally, there is an element of
2 vexatiousness when a party avoids ADR which is intended to be less vexatious, speedier, and
3 less costly than litigation.⁶ Each base supports an award of fees to Humphrey in this case.

4 (1) Clay Street's lack of candor/failure to disclose its plan not to comply with
5 mandatory "immediate payment" requirement and to deny Humphrey's
6 right "to immediate use of the money."

7 (2) Clay Street's tardy and lowball fair value payment was created by a lawyer
8 who was not an appraiser or even an accountant or business professional.
9 Genesco, Inc. v. Slotznick, 871 S.W.2d 487, 491 (Tenn. Ct. App. 1993)
10 (affirming fee award for bad faith when company failed to consult an
11 established appraiser, destroyed some information necessary to test
12 assumptions used by investment banker that made the calculation, and was
13 less than forthcoming in discovery). The tardy payment failed to include
14 financial statements, Ex. 73 (payment document). Clay Street later ignored
15 a request by Humphrey's lawyer for information -- while sending some of
16 that information to Ken Barnes. Compare Ex. 74 (Humphrey's lawyer
17 requesting information and documents); Ex. 77 (requesting leases) with Ex.
18 255 (sending leases to Barnes). Clay Street's violation of Humphrey's
19 clear right to an "immediate payment," "immediate use of the money" and
20 to company information necessitated the legal action that was filed.

21
22
23 (... continued)

24 defendant liable for fraud, negligent misrepresentations and violations of the Washington
25 State Securities Act by failing to disclose material, nonpublic information relating to a share
26 repurchase).

⁶ Jones v. Personnel Resources Bd., 134 Wn. App. 560, 568, 140 P.3d 636 (2006) (stating "the
very purpose of arbitration is to submit disputes to a process that is less formal, speedier, and
generally less vexatious than litigation." [omitting citation]).

DECL.OF SPELLMAN IN SUPP. OF FEES - 7

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(3) Clay Street's subsequent failure to disclose its plan to retain an appraiser in June 2004 (Ex. 78), its use of an appraiser who was involved in the lowball fair value calculation⁷ and its subsequent failure to supply the appraiser with all the information that he requested (and all company information as required by the company agreement) -- violated Humphrey's rights.⁸

(4) Clay Street's failure to respond to Humphrey's two demands for arbitration which were made two months before the effective date of merger. (Exs. 44, 47 (arbitration demands); Ex. 139 at VJG 7 (Clay Street's counsel time records showing conference with Joe and Scott Rogel and review arbitration demand and "analyze effect of any response.") Arbitration would have created a speedier, less vexatious forum for the appointment of an appraiser mutually selected by the parties and with all company's information -- as required in the company agreement. The arbitration would have resulted in the timely disclosure of the plan not to make the "immediate payment" and might have resulted in the release of funds for a possible buyout of other properties such as Westwood which was not sold until the next year. However, Clay Street decided avoid arbitration consistent with its stated intention "not to . . . negotiate" with Humphrey (Ex. 24, Ostroff letter to Robin Schachter, attorney for Lori Goldfarb) and

⁷ Barnes' trial testimony; Cowan Dep. at 10:4-11; 14:15-16:25, Feb. 7, 2006 (stating had discussions with a Cushman & Wakefield appraiser about how he would appraise property).
⁸ Ex. 132 (listing information needed to complete the assignment -- including 3 years of financial statements and 2005 budget); Ex. 80 (email with additional requests for tenant improvements which Rogel refers to his attorney); Ex. 258 (Barnes' appraisal which does not contain 3 years of financial information or a 2005 budget/financial statement but does contain inaccurate information about the start of marketing -- December -- and contract date for the sale -- March); Ex. 256 (June 2005 income statement which were not provided to Barnes).

1 not to distribute funds to Humphrey for taxes already due from the prior
2 sales of 901 Tacoma and Clay Street II in December 2004.⁹

3 (5) Clay Street's failure to agree to my April and May 2005 proposals and later
4 motion for global mediation (Ostroff Dep. at 64:16-65:5, Dec. 3, 2006;
5 Ostroff trial testimony; Ex. 139 at VJG 20, 23, 25 [Apr. 7 -- attorneys
6 review correspondence from me, May 17 -- request to add third-party
7 defendant, May 19 -- analyze Humphrey's motion]). A mediation would
8 have been less vexatious and speedier and could have remedied Clay
9 Street's failure to disclose material information -- including its later plan to
10 retain an appraiser. Clay Street's opposition to Humphrey's motion to join
11 the Clay Street claim to a pending suit caused two more lawsuits to be filed
12 with additional costs and fees.

13 (6) Clay Street's merger with a phantom company having no tax identification
14 number and no capitalization (see Ostroff and Rogel trial testimony) and
15 the liquidation of the company with the direct distributions to members had
16 the badges of avoidance of payment of creditors and raised concerns about
17 future payment.¹⁰

18 Each of these actions caused Humphrey to incur fees and costs.

19
20 Procedural Bad Faith Basis for Fees.

21 ⁹ For example, three months earlier in March 2005—shortly before tax payments were due,
22 Scott Rogel and Ostroff as managing members of 901 Tacoma declined to make an interim
23 distribution from the proceeds of the sale which closed in December 2004. Ex. 61, Mar. 28,
2005 letter from Hollon; Humphrey and Ostroff trial testimony.

24 ¹⁰ When there is a winding up of a company, the assets are to be distributed first to the
25 creditors. RCW 25.15.300. Humphrey was a creditor of the company who is not paid prior to
26 the time the assets are distributed to the owners may recover those distributions from the
owners—meaning the other members. Lonsdale v. Chesterfield, 99 Wn.2d 353, 360, 662
P.2d 385 (1983); Smith v. Sea Ventures, Inc., 93 Wn. App. 613, 969 P.2d 1090, review
denied, 138 Wn.2d 1003 (1999).

DECL. OF SPELLMAN IN SUPP. OF FEES - 9

APPENDIX A.11
2007 CP 1996-2000, 2004 (Dkt. 298)
(Humphrey's Opp'n to Rogel Fee Mot.)

1 In response to the Rogels' motion for more definite statement, Humphrey
2 distinguished the statutory dissenters' rights claim against the company from the fiduciary
3 duty claim against the managers or members of the dissolved company:

4 The complaint alleges that Joe Rogel engaged in the squeeze-out
5 merger to disenfranchise Humphrey Industries' rights in Clay Street Phase I.
6 (Complaint ¶¶ 15-20.) Although he was not a managing member of the
7 company, he may have acted in concert with the two managing members, his
8 son and Gerry Ostroff. The Rogels subsequently received funds from the sale
9 and liquidation of Clay Street Phase I, leaving the company penniless, when
10 the company still owed Humphrey Industries moneys required to be paid under
11 the dissenters' rights statute. Humphrey Industries' pending motion for partial
summary judgment identifies the specific violations of the dissenters' rights
statute and the breaches of fiduciary duties. Depending upon the extent of his
12 involvement in Clay Street I's misconduct, Joe Rogel may have some direct
13 liability for the breaches. The complaint also alleges that, because the
companies have been liquidated, Humphrey Industries may assert setoff claims
and seek prejudgment remedies such as the preliminary injunction motion that
is now pending.

14 More recently, the Rogels have filed a motion to prevent their son's past and
15 present employers from producing records that relate to the companies—these
16 documents include Scott Rogel's email messages. The records are material
17 evidence that will flesh out the allegations in complaint.

18 Resp. at 4:9-21 (Sept. 7, 2005). An order for more definite statement was granted in favor of
19 the Rogels and Avram.

20 But earlier, in August 2005, Clay Street and Joseph and Ann Lee Rogel had filed a
21 notice of intention to arbitrate all disputes relating the Clay Street company agreement. In
22 response to that notice, Humphrey filed a motion to stay the arbitration of the statutory
23 appraisal claim – and in the process Humphrey clarified the possible, contingent claims
24 against the members and explained:

25 Depending upon the outcome of HI's pending motion for summary
judgment on the valuation of its interest, the court may not need to reach the
claims against the other members.² For example, when there is a winding up

26 ² In the summary judgment motion asking for the appointment of an appraiser, Humphrey
alleged the violations of the dissenters' rights statute along with non-statutory claims such as
Clay Street, its managers and members breached their fiduciary duties by using Humphrey as
a bank, took dilatory actions and provided a lowball value of Humphrey's interest, violated
the loan agreement with the bank to ensure a quick sale, and requested full disclosure about
(continued . . .)

1 of a company, the assets are to be distributed first to the creditors. RCW
2 25.15.300. HI as a creditor of the company who is not paid prior to the time
3 the assets are distributed to the owners may recover those distributions from
4 the owners—meaning the other members. Lonsdale v. Chesterfield, 99 Wn.2d
5 353, 360, 662 P.2d 385 (1983); Smith v. Sea Ventures, Inc., 93 Wn. App. 613,
6 969 P.2d 1090, review denied, 138 Wn.2d 1003 (1999). The court has
7 authority to grant interim relief even if there are arbitrable claims. However,
8 there should be no delay in resolving HI's claim for payment of its interest in
9 the company.

10 Motion to Stay at 4:9-18.

11 In response to Humphrey's motion, the Rogels joined in Clay Street's cross-motion to
12 compel arbitration, appoint an arbitrator on all the claims, and stay the lawsuit. Clay Street's
13 Mot. to Compel Arb. and Resp. to Plf.'s Mot to Deny Arb. (Sept. 28, 2005); Joinder of Joseph
14 & Ann Lee Rogel in Supp. of Clay Str. Assocs.' (Clay I) Mot. to Compel Arb. (Sept. 29,
15 2005). The Rogels filed an additional brief which distinguished "the dissenter's Clay Street
16 appraisal claim" from "breaches of fiduciary duties against Clay I and other members." Resp.
17 at 1:23-24, 2:13-14 (Oct. 5, 2005).

18 During the October 2005 hearing on these motions, the summary judgment motion on
19 dissenters' rights concerning Clay Street, and the summary judgment motion on 615
20 Commerce, Judge Hayden split off the contingent direct claims against the members like the
21 Rogels. Judge Hayden stayed the arbitration of the statutory appraisal rights and ordered all
22 other claims to be arbitrated. See Order granting motion to stay arbitration of appraisal rights
23 and granting motion to compel arbitration on other claims relating to Clay Street (Oct. 7,
24 2005) ("The motion to stay arbitration of the appraisal remedy under the dissenters' rights

25 (. . . continued)
26 management's use of funds. Amended Mot. for Partial Summ. J. and Other Relief at 18:3013
(Aug. 25, 2005).

HUMPHREY'S OPP. TO ROGEL FEE MOTION - 5

1 statute is granted. The motion to compel arbitration is denied except to the extent of claims
2 outside the statute (RCW Ch. 25.15).”)

3 The Rogels’ counsel later nominated an arbitrator who Judge Hayden did not appoint.³
4 Judge Hayden appointed former judge Steve Scott as the arbitrator. In that arbitration
5 proceeding, Avram pursued its motion for more definite statement – the Rogels did not.
6

7 Shortly after the October hearing on arbitration/summary judgment motions, the
8 Rogels filed an unsuccessful CR 11 sanctions motion against Humphrey’s lawyers asserting
9 the 615 Commerce claim “was asserted for an improper purpose . . . namely to harass Joseph
10 & Anne Lee Rogel due to the health of Joseph Rogel and their age and, independently, . . .
11 asserting unsupported claims in prior arbitrations and the conduct of discovery quashed and
12 injunction and summary judgment motions of Humphrey Industries denied as pleadings in
13 this case by . . . counsel.” (Proposed) Order Granting CR 11 Sanctions. At 1:25-:2:4. The CR
14 11 motion was denied.
15

16 Since then Humphrey and its lawyers have attempted to avoid any interaction with the
17 Rogels. After summary judgment orders and the order compelling arbitration of non-
18 appraisal claims, Humphrey sent no discovery to the Rogels – consistent with the repeated
19 position that only Clay Street was the proper party to the statutory appraisal remedy. Nor did
20 Humphrey seek to enforce the written discovery that it had earlier sent the Rogels.⁴
21

22 ³ Letter to Hon. Michael Hayden from Alan Bornstein (Oct. 14, 2004) (recommending court
23 “appoint Mr. Thomas Brewer as arbitrator of the non-appraisal Clay I disputes”); Letter to
24 Hon. Michael Hayden from John Holmes at 2 (Oct. 14, 2005) (Clay Street’s lawyer
nominating arbitrator).

25 ⁴ A month earlier, in September 2005, before the summary judgment order that dismissed the
26 615 Commerce claim, Humphrey sent the Rogels one interrogatory which the Rogels refused
to answer the interrogatory on the basis of privilege. The Rogels objected to all nine
document requests about the nine companies (including specifically Clay Street) as either
(continued . . .)

HUMPHREY’S OPP. TO ROGEL FEE MOTION - 6

1 Ten months later, the Rogels sent Humphrey written discovery -- shortly before new
2 counsel for Clay Street appeared. Humphrey filed a protective order to prevent the escalation
3 of the case -- since the statute granted only the dissenter discovery. Humphrey's motion for a
4 protective was denied. The Rogels interjected themselves back into the suit -- to the chagrin
5 of Humphrey and its lawyers.

6
7 As Exhibit A to their motion for fees against Humphrey, the Rogels attached an
8 incomplete string of emails from the period while Humphrey's motion for a protective order
9 was pending. Humphrey's response to is Attachment A, a September 16, 2006 email--about
10 the broad stay. Later, Humphrey's responses to the Rogels' written discovery confirm
11 Humphrey's consistent positions: (1) only the company and Humphrey had claims for fees
12 and (2) there are no damage claims -- the members like the Rogels simply were holding trust
13 funds:
14

15 Interrogatory No. 1: Identify by name, address, telephone and fax
16 numbers, e-mail addresses, and employer of each person with knowledge
17 about the damages that you claim, and the basis for those damages, under the
18 RCW 25.15 dissenter's rights statute pursuant to this Court's October 7, 2005
19 "ORDER GRANTING MOTION TO STAY ARBITRATION OF
20 APPRAISAL RIGHTS AND GRANTING MOTION TO COMPEL
21 ARBITRATION ON OTHER CLAIMS RELATING TO CLAY STREET".
22 As to each such person, state the facts each person knows which support the
23 basis for the claims or the damages alleged by plaintiff, or both.

24 Answer: The judicial appraisal will determines the fair value of HI's interest.
25 The Court will then render a judgment for a sum based upon the fair value.
26 The judgment will be for the fair value of HI's interest, not for damages.

The statute authorizes the Court to award fees, costs and expenses. The
company agreement also authorizes the recovery of fees and costs. Thus, the
Court will determine whether HI or the company are entitled to fees and costs.

27 (. . . continued)
28 impermissible discovery, unduly burdensome, and overly broad. Objections (Sept. 30, 2005).
29 The Rogels failed to produce a single document.

1 At the time this suit was filed, Clay Street was an administratively dissolved
2 company which had liquidated and distributed substantially all of its assets to
3 the non-dissenting members. The members who received the liquidating
4 distribution hold the funds in trust subject to creditor claims such as HI. The
5 members may be liable for the full amount of the distribution and may seek
6 contribution from other members. (Emphasis added.)

7 Earlier this year, when opposing the motion for a continuance, Humphrey reiterated
8 the same position:

9 At this stage of the proceeding, the members of Clay Street are incidental
10 defendants. The company is the immediate defendant to Humphrey's appraisal
11 claim pursuant to RCW 25.15.480, which was pleaded in the suit filed by
12 Humphrey, a month before Clay Street's later suit. Complaint at 8:7-10, Dkt. #
13 1, June 21, 2005. Clay Street's "Petition to Determine Fair Value of
14 Dissenting Member's Interest in LLC," Case No. 05-2-24967-6 SEA, named
15 only Humphrey as a party and did not name the other members or managers of
16 Clay Street. (Judge Hayden has already ruled that Humphrey is the plaintiff in
17 the pending consolidated suit. Dkt. # 206.)

18 When Humphrey filed this suit, the corporate status of the original company
19 known as Clay Street was inactive. The company had been merged into a shell
20 company which later sold Clay Street's only asset, distributed the sale
21 proceeds, and at that time had failed to make a payment on the bank loan that
22 Humphrey had guaranteed. Complaint at 7:17-21, 8:1-5; Dkt. # 1. The prayer
23 for relief in Humphrey's complaint asks for judgment against the company but
24 makes a conditional prayer for relief concerning the other members:

25 Humphrey Industries may ask for relief from other members to the extent
26 that they have received assets from a particular company that no longer has any
assets. Humphrey may request prejudgment relief to prevent actions that
hinder its ability to collect.
Complaint at 10:15-18; Dkt. # 1.

In addition to the conditional prayer for relief relating to the other members
and possible prejudgment relief, the other members of Clay Street were named
for the purpose of asserting standing for a derivative claim against the
company pursuant to RCW 25.15.370 and to give them fair notice of the
prejudgment remedies such as Judge Hayden's later order that required the
preservation of evidence and written notice before the company transferred
funds. See, e.g., Complaint at 1:24-2:5 (standing allegations); 2:8-12
(identifying members: Scott Rogel and Lori Goldfarb [formerly Goldfarb],
Joseph and Ann Lee Rogel, and ABO Investments); Dkt. # 1; Dkt. # 70, Sept.
23, 2005 (order regarding notice prior to disbursement of funds and preservation of
evidence).

Humphrey's Opp. to Mot. for Continuance at 3:11-4:14.

3. Evidence Relied Upon. The pleadings on file and written discovery responses.

HUMPHREY'S OPP. TO ROGEL FEE MOTION - 8

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From: Spellman, David
Sent: Friday, September 15, 2006 5:14 PM
To: 'Alan Bornstein'; Gregory Schwartz
Cc: Caplan, Jacqueline
Subject: RE: Response

I may respond to this over the weekend.
You continue to use CR 11 language.

From: Spellman, David
Sent: Saturday, September 16, 2006 9:28 AM
To: 'Alan Bornstein'; Gregory Schwartz
Cc: Caplan, Jacqueline
Subject: RE: Response

Mr. Bornstein:

The stay affected all obligations in the lawsuit.
Joe was one of three person who set up the merged company WXYZ.
Further, there were derivative claims in the complaint.
The liquidated status of the company was pleaded in the complaint.
The sales price of the property is prima facie evidence that the company made a prepayment that was materially less than the actual fair value.
The company has already pleaded that it has virtually no funds, because they were distributed.
Emails produced by the co-manager/property manager show that there was a capital call last year to fund the litigation.
It is not clear whether the capital was raised.
There is a statutory presumption that the members owe creditors a fiduciary duty.
These circumstances alone create an issue about member liability for the liquidating distributions.
However, the immediate issue is simply the judicial appraisal of fair value and not the other issues unless the members have no intention of paying the appraised amount.

....

APPENDIX A.12
2007 CP 2351-54 (Dkt. 346)
(Final Judgment for Clay St. and Rogel)

Hon. Harry J. McCarthy
Noted for Presentation: Wednesday, October 31, 2007
Without Oral Argument

FILED
KING COUNTY, WASHINGTON

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SUPERIOR COURT CLERK
TONIA HUTCHINSON
DEPUTY

RECEIVED

OCT 24 2007

JUDGE HARRY J. MCCARTHY
DEPT 19

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

HUMPHREYS INDUSTRIES LLC,

Plaintiff,

v.

CLAY STREET ASSOCIATES LLC,

Defendant.

CLAY STREET ASSOCIATES LLC, a
limited liability company,

Petitioner,

v.

HUMPHREY INDUSTRIES, LTD, a
Washington corporation,

Respondent.

No. 05-2-20201-7 SEA

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

FINAL JUDGMENT FOR
DEFENDANTS CLAY STREET
ASSOCIATES, LLC AND JOSEPH
AND ANN LEE ROGEL

[Proposed]
Clerk's Action Required

I. SUMMARY OF FINAL JUDGMENT

1. Judgment Creditor #1: Clay Street Associates, LLC
2. Judgment Creditor #1's Attorney: Gregory J. Hollon
Gregory G. Schwartz
MCNAUL EBEL NAWROT &
HELGREN, P.L.L.C.
600 University Street, Suite 2700
Seattle, WA 98101

CLAY STREET ASSOCIATES, LLC AND JOSEPH AND ANN LEE ROGEL - Page 1

LAW OFFICES OF

MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

ORIGINAL
Page 2351

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3.	Judgment Creditor #2:	Joseph and Ann Lee Rogel	
4.	Judgment Creditor #2's Attorney:	Alan Bornstein JAMESON BABBIT STITES & LOMBARD, P.L.L.C. 999 Third Avenue, Suite 1900 Seattle, WA 98104	
5.	Judgment Debtor:	Humphrey Industries, Ltd.	
6.	Principal Judgment Amount		\$0
7.	Amount of Interest Owed to Date on Judgment:		\$0
8.	Attorneys' Fees to Clay Street Associates, LLC:	\$123,754.78	
9.	Expert Fees to Clay Street Associates, LLC:	\$3,375.00	
10.	Costs to Clay Street Associates, LLC:	\$24,961.55	
11.	Total Final Judgment to Clay Street Associates, LLC:		\$152,091.33
12.	Attorneys' Fees to Joseph and Ann Lee Rogel:	\$33,533.95 ^{241.25}	
13.	Costs to Joseph and Ann Lee Rogel:	\$292.70	
14.	Total Final Judgment to Joseph And Ann Lee Rogel:		\$33,826.65 ^{533.95}

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II. DESCRIPTION OF JUDGMENT

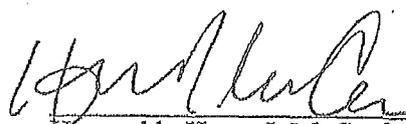
The Court tried this matter without a jury, from June 11-15, 2007, the Honorable Harry J. McCarthy presiding. Plaintiff Humphrey Industries, Ltd appeared at the trial, represented by attorney David Spellman. Defendants Clay Street Associates, LLC ("Clay Street"), ABO Investments, LLC, and Scott Rogel appeared at trial, represented by attorneys Gregory J. Hollon and Gregory G. Schwartz. Defendants Joseph and Ann Lee Rogel appeared at trial, represented by attorney Alan Bornstein.

The Court received the evidence and testimony offered by the parties, considered the pleadings filed in this action, and heard the oral argument of the parties' counsel. On June 20, 2007, at the conclusion of the trial, the Court rendered an oral decision, awarding plaintiff \$60,588.22 pursuant to RCW 25.15.475. The Court made findings of fact and conclusions of law, which were signed and entered on August 29, 2007. A copy of the findings and conclusions is attached as Exhibit A.

On October 17, 2007, the Court entered an Order granting defendants' motions for an award of attorneys' fees and costs, and awarding defendant Clay Street attorneys' fees of \$184,343.00, expert fees of \$3,375.00, and costs of \$24,961.55. (The attorney fee award to Clay Street is offset by the \$60,588.22 award to plaintiff, for a total attorney fee award to Clay Street of \$123,754.78.) The Court also awarded defendants Joseph and Ann Lee Rogel attorneys' fees of \$33,241.25 and costs of \$292.70. A copy of that Order is attached as Exhibit B.

The entire final judgment amount of \$185,^{625.28}~~917.98~~ shall bear post-judgment interest at the applicable statutory rate of twelve percent (12%) per annum.

DATED THIS 1 ^{November}~~October~~ day of ~~October~~, 2007.

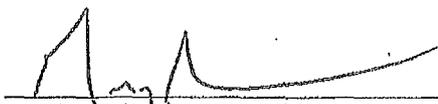


Honorable Harry J. McCarthy

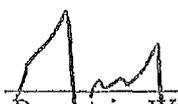
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Presented by:

McNAUL EBEL NAWROT & HELGREN,
PLLC

By: 
Gregory J. Hollon, WSBA #26311
Gregory G. Schwartz, WSBA #35921
Attorneys for Clay Street Associates LLC,
ABO Investments and Scott Rogel

JAMESON BABBITT STITES &
LOMBARD, PLLC

By:  *for A. Bornstein* WSBA 26311
per email authentic
Alan Bornstein, WSBA #14275
Attorneys for Joseph and Ann Lee Rogel

APPENDIX A.13

2007 CP 2523 (Dkt. 332)

**(Humphrey's Edits to Findings and Conclusions
submitted by Clay St. and Joe and Ann Lee Rogel)**

1 3. The statutory definition of fair value expressly permits the inclusion of
2 appreciation resulting from the merger, where, as where, the equities favor the dissenter.

3 The statutory definition of "fair value" is:

4 "Fair value," with respect to a dissenter's limited liability company interest,
5 means the value of the member's limited liability company interest
6 immediately before the effectuation of the merger to which the dissenter
 objects, excluding any appreciation or depreciation in anticipation of the
 merger unless exclusion would be inequitable.

7 RCW 25.15.425(3). The equities favor Humphrey. Clay Street has argued that there was
8 increased value from tenant improvements and leasing that resulted from \$30,000 paid by
9 Gerry Ostroff and the Rogels pursuant to a partners' call (Ex. 68, May 9, 2005 fax from
10 Scott Rogel) which was made after the adoption of the merger plan, Ex. 37. Transferring
11 to Clay Street the alleged increase value would be unfair at least for five reasons. First,
12 the merger itself was not properly effectuated. The company failed to obtain written
13 consent from the bank, and the new company never obtained a federal tax identification
14 number. The company agreement required Humphrey's consent to spend funds, and there
15 is circumstantial evidence that company funds were converted to the use of the new
16 company which had been capitalized with only \$3. Second, the other members were fully
17 compensated for \$30,000 payment when they were repaid at closing. Third, to classify the
18 payment as a capital contribution contradicted the prior course of conduct. Four years
19 earlier, Humphrey had advanced funds for tenant improvements, and the advance was not
20 treated as an additional equity contribution but was rather treated as a loan that was
21 repaid. Exs. 5, 6, 7, and 8. Fourth, Clay Street failed to provide Humphrey with an
22 accounting for the intended use of the funds and ignored Humphrey's arbitration demands.
23 Ex. 53. Fifth, it is unfair to charge Humphrey for funds that were used to take his rights
24 under the company agreement, to violate the written consent provision in the deed of trust,
25 and hold him captive as a guarantor.

APPENDIX B

**Trial Exhibit 113,
Summary Appraisal Report of Allen Brackett Shedd**

Allen Brackett Shedd

Summary Appraisal Report of
The Clay Street Associates Property

Location

116 Clay Street NW
Auburn, Washington

Date of Report

April 13, 2007

Date of Valuation

December 7, 2004

Appraised by

Darin A. Shedd, MAI
Gregory L. Goodman, Senior Associate

Shell	48,369 sf @	\$65.00 /sf =	\$3,143,985	
Office	6,890 sf @	\$75.00 /sf =	\$516,750	
			<u>\$3,660,735</u>	(\$73.85/sf)
Less: Depreciation @	10%		<u>(\$366,074)</u>	
DRCN			\$3,294,662	(\$66.46/sf)
Plus: Land Value			\$630,000	
Plus: Leasing Commissions			<u>\$70,000</u>	
Total			\$3,994,662	(\$80.58/sf)
			ROUNDED	\$3,995,000

— *Conclusion of Cost Approach*

Both the Marshall's Approach and the market extraction analysis support a value pursuant to the Cost Approach of \$3,925,000 to \$3,995,000. Considering both approaches, we conclude a value pursuant to the Cost Approach of \$3,950,000.

APPENDIX C

Trial Exhibit 46

Plaintiff Exhibit EXHIBIT 46

Cowan, George

From: George Humphrey [hilted@msn.com]
Sent: Friday, October 08, 2004 6:55 PM
To: Gasmstr@aol.com
Subject: Re: Fw: Clay Street Associates LLC

I received a set today in the mail on both properties. I noticed that 901 received no rent. Hope that clears up.

E-mail me your address for the partner call money.

I received a call from Bank of America, Bob Luciano (206-358-1987) on Tuesday. Since the all the properties are under my portfolio, he's also my business banker. The mortgage was not paid in September, but he over drafted the account to cover it, so it would not be in arrears. I told him to track down Scott, which he did, and it was promised it would be taken care of last month. It was not and when he called me on Tuesday, he informed me his unhappiness with the situation. I told him I would cover it if necessary to make sure it did not hit any fraud reports. Please verify the money has been deposited. If not I will intervene if necessary next week.

Finally, my offer to trade equities between 901 and Clay still stands. I am aware of the maneuver on the merger. I was informed by the bank immediately, long before the attorneys ever sent me a doc. I'll not go into this to much other then to say the bank themselves told me they wanted nothing to do with it and would not recognize it. It's a consensus opinion. Objectively, I understand your desire but that move unnecessarily exposed you personally and I still am not sure why anyone would have done something so flagrantly out there. Who knows, maybe it was a brilliant move. It'll be interesting.

----- Original Message -----

From: Gasmstr@aol.com
To: hilted@msn.com
Sent: Friday, October 08, 2004 3:57 PM
Subject: Re: Fw: Clay Street Associates LLC

Sorry it took me this long to get back to you, but I had shoulder surgery and it was hard to write or type.

As of today, I have not received your check for the partner call. I assume you are planning on sending it. Also, you have been mailed a financial statement every month. Somebody is getting it. I checked with Karen at Stan Piha's office and with Morris Piha. Legal fees and commissions will show up in the financials.

CLAY I 000189

10/12/2004

EXHIBIT D
TRIAL EXHIBIT 139

<u>INVOICE DATE</u>	<u>AMOUNT</u>
09/30/04	\$1,196.07
10/29/04	\$ 544.46
11/30/04	\$ 599.29
12/31/04	\$ 564.67
01/31/05	\$ 762.88
02/28/05	\$ 126.44
03/31/05	\$ 971.56
04/29/05	\$ 944.52
05/18/05	\$1,461.00
05/31/05	<u>\$ 763.40</u>
TOTAL	\$7,934.29

VANDEBERG JOHNSON & GANDARA, LLP

ATTORNEYS AT LAW

ONE UNION SQUARE, SUITE 2424
600 UNIVERSITY STREET
SEATTLE, WASHINGTON 98101-1192
FACSIMILE (206) 464-0484
(206) 464-0404

FEDERAL ID: 20-5179362

Clay Street Associates, LLC
c/o Gerald Ostroff
218 Main Street, PMB 488
Kirkland, WA 98033

ATTY: George T. Cowan

Re: Merger

September 30, 2004
Account: 61799-00001
Invoice: 36443

Previous Balance	2,620.70
Payments - Thank You	<1,747.12>
Balance Forward	873.58

For Services Rendered

Date	Atty	Description of Services	Hours	Amount
08-30-04	GTC	Review David Tift's materials for arbitration and review statutory duties of manager; telephone conference with Scott Rogel regarding result and Humphrey's current development project.	1.2	312.00
09-01-04	GTC	Telephone conference with Gerry Ostroff regarding status; review requirements for Articles of Merger and signature requirements; prepare Articles of Merger; draft statutory notice of dissenter's rights and form for demand for payment; e-mail client with documents.	1.6	416.00
09-09-04	GTC	Confirm Articles of Merger filing; letter to Humphrey's counsel		

PLEASE INDICATE ACCOUNT NUMBER WITH REMITTANCE

Balance owing due upon receipt. All amounts unpaid after thirty (30) days will be assessed an interest charge of one percent (1%) per month from the date of the billing. Any funds on deposit in the Vandenberg Johnson & Gandara, LLP Trust Account will be applied toward payment of this statement two (2) weeks after the date of this statement, unless otherwise agreed.

VJG-1

Clay Street Associates, LLC
Re: Merger

Page 2
September 30, 2004
Account: 61799-00001
Invoice: 36443

George T. Cowan

For Services Rendered

Date	Atty	Description of Services	Hours	Amount
		regarding Notice of Dissenters Rights and Certified Mail to member; e-mails to client and Bank of America regarding status; telephone conference with Scott Rogel regarding marketing building.	1.1	286.00
09-10-04	GTC	Telephone conference with Scott Rogel regarding cash requirements and capital call, and effect on Humphrey's position.	0.3	78.00
		For Current Fees		----- 1,092.00

EXPENSE DESCRIPTION

Filing Fee; Articles of Merger;	
Secretary of State	60.00
Messenger	39.42
Postage	4.65
Total Expenses	----- 104.07

TOTAL CURRENT CHARGES FOR THIS INVOICE 1,196.07

VJG-2

APPENDIX E

APPENDIX E

Correlating 2007 CPs and 2011 CPs with Appendices to Brief of Petitioner and Appendices to Reply Brief of Petitioner
(The Appendices to the Reply Brief are trial exhibits or 2007 CPs that are being included in a supplemental designation made on June 15, 2012.)

Brief of Petitioner	2007 Clerk's Papers	Appendix to Br. of Petitioner	2011 Clerk's Papers
P. 32	2007 CP 261 (Dkt. 70) (Order Denying Mot./Pet.) (requiring notice of disbursement)		2011 CP 639
P. 32 n. 54	2007 CP 241:19-25 n. (Dkt. 63) (Resp. to Pl. Mot./Clay Street)		Appendix A4 to Reply Brief.
P. 32 n. 56	2007 CP 3355 (Ex. M to Decl. of Gregory G. Schwartz in Supp. of Defs.' Mot. for Award of Fees and Costs, McNaul Draft Bill 52860)		2011 CP 956; 1346 (duplicate)
P. 33 n. 58	2007 CP 2353 (Dkt. 346)(Final J.)		Appendix A12 to Reply Brief
P. 33 n. 59		Appendix E at AX 244 (Humphrey Indus., Ltd.'s Post-Hearing Submission at 2)	2011 CP 972; 1362 (duplicate)
		Appendix E at AX 288-309 (Fee Award to Rogels Was Litigated on Appeal as Was the Theories of Liability Against the Individual Members)	2011 CP 1016-37; 1406-28 (duplicate)
P. 34 n. 61	2007 CP 46-47 (Dkt. 6) (Decl. of George Humphrey)		Appendix A1 to Reply Brief

	2007 CP 254-57 (Dkt 67) (Reply In Supp. of Prelim. Inj./Pl.)		Appendix A6 to Reply Brief
	2007 CP 329-30 (Dkt. 87) (Reply Supp. Mot. Partial Summ. J)		Appendix A8 to Reply Brief
P. 34 n. 62	2007 CP 1947 (Dkt. 295) (Decl./David Spellman),		Appendix A10 to Reply Brief
	2007 CP 1996-2001, 2004 (Dkt. 298) (Humphrey's Opp'n to Clay St.'s Mot. for Fees and Expenses)		Appendix A11 to Reply Brief
P. 34 n. 63		Appendix E at AX 291, 299-300 (Appellant's Revised Br. at 38-39)	2011 CP 1018-19; 1408-09 (duplicate)
P. 34 n. 64		Appendix E at AX 244 (Humphrey's Post-Hearing Submission at 2)	2011 CP 971; 1360 (duplicate)
P. 34 n.65	2007 CP 1644-45 (Dkt. 282) (Mot. for Recons.)		Appendix A9 to Reply Brief
P. 35		Appendix E at 291, 300 (Appellant's Revised Reply Br. at 19 n. 45)	2011 CP 1028; 1481 (duplicate)
P. 36		Appendix D (Dkt. 434) (Humphrey's Mot. for Fees at 12:11-14)	2011 CP 1098-1112; 1485-1500 (duplicate)
P. 36	2007 CP 329:7-8 & [should be nn. 5-6] (Dkt. 87) (Reply Br. in Supp. of Partial Summ. J. and Other Relief at 3)		
P. 36 n. 66		Appendix E at 244 (Humphrey's Post-Hearing Submission at 2)	2011 CP 972-73; 1362-631 (duplicate)
P. 36 n. 67	CP 329 (Dkt. 87) (Reply Br. in Supp. of Partial Summ. J. and Other Relief at 3 & n.6)		Appendix A8 to Reply Brief
P. 36 n. 68	CP 284 (Dkt. 75) (Decl. of G. Ostroff)(5/16/05 Settlement Statement)		2011 CP 884; 1274 (duplicate); 5/16/05 Settlement

			Statement
P. 36 n. 68	46-47 (Dkt. 6)(Decl. of George Humphrey in Supp. of Pl.'s Mot. for Injunctive Relief and Summ. J. ¶ 32)		Appendix A1 to Reply Brief
P. 37	CP 329 n. 3 (Dkt. 87) (Reply Br. in Supp. of Partial Summ. J. and Other Relief at 3 n.3 [referring to RCW 25.15.155(2)])		Appendix A8 to Reply Brief
P. 37	Trial Ex. 28 (Jul. 14, 2004 Memo. to Gerry Ostroff)		CP 1609-10
P. 37 n. 70		Appendix D (Dkt. 434) (Humphrey's Mot. for Fees) (quoting Trial Ex. 28)	CP 1494; CP 1107 (duplicate)
P. 38	2007 CP 257:1-5 (Dkt. 67) (Reply In Supp. of Prelim. Inj. At 5:1-7) 2007 CP 259-60 (Dkt. 67) (Income Statement)		Appendix A5 to Reply Brief Appendix A6 to Reply Brief
P. 38 n. 72	Trial Ex. 4[6] (Oct. 4, 2004 email); Tr. Ex. 1[39] (Vandeberg invoices); 2007 CP 1633 n.2		Appendix C and D to Reply Brief
P. 38 n. 72	CP 2523 (Dkt. 332) (Humphrey's Edits to Findings and Conclusions Submitted by Clay St. and Joe and Ann Lee Rogel)		Appendix A13 to Reply Brief
P. 40	CP 58 (Dk. 6)(Decl. of George Humphrey attaching LLC Agreement of Clay St. Assocs., LLC, § XXI)		Appendix A2 to Reply Brief
P. 41 n. 75	CP 41, 44-47 (Dk. 6)(Decl. of George Humphrey)		Appendix A1 to Reply Brief
P. 42 n. 76	CP 569 (Dkt. 158) (Mot. to Adopt Appraiser's Report at 3)		CP 1432
P. 42 n. 77	CP 347 (Dkt. 91)(Order Denying Mot. for Summ. J. at 2)		CP 635
P. 42 n. 78	CP 230 (Dkt. 56)(Order Quashing Subpoenas)		Appendix A3 to Reply Brief
P. 42 n. 79	CP 261 (Dkt. 70)(Order Denying		CP 639

	Mot./Pet.)		
P. 43 n. 82	CP 1944-45 (Dkt. 295)(Decl. of Spellman in Supp. of Fees)		Appendix A10 to Reply Brief
P. 43 n. 82	CP 42-44, 48 (Dkt. 6) (Decl. of George Humphrey in Supp. of Pl.'s Mot. for Injunctive Relief)		Appendix A1 to Reply Brief
P. 43 n. 83		Appendix D (Humphrey's Mot. for Fees at 12)	2011 CP 1112; 1499 (duplicate)
P. 43 n. 83		Appendix E (Humphrey's Post Hearing Submission at 2-3 (AX 244-45))	2011 CP 972-73; 1362-63 (duplicate)
P. 45 n. 95		Appendix E at AX 348-49 (Appellant's Revised Opening Br. at 36-37). Appendix E at AX 352 (Pet'r's Revised Supp. Br. at 19)	2011 CP 1076-77; 1466-67 (duplicate). 2011 CP 1080; 1470 (duplicate)
P. 46 n. 96		Appendix E at (Humphrey's Post Hearing Submission at 2-3 (AX 244-45)) Appendix E at AX 310-52 (Compilation, entitled "Pleadings Showing Humphrey Adopted Appraiser's Values and Humphrey's Testimony on Prelitigation Demand Was to Good Faith")	2011 CP 972-73; 1362-631 (duplicate) 2011 CP 1038-80; 1428-70 (duplicate)