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65001-7

CONSOLIDATED NO. 65001-7

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

DAVID C. THOMPSON, an individual,

Respondent / Cross-Appellant,

v.

DATAMARINE INTERNATIONAL, INC, a Washington Corporation; NARROWBAND NETWORK SYSTEMS, INC, a Washington Corporation; and SEA INC. OF DELAWARE, a foreign corporation,

Defendants, and

DOLORES DRAINA, an individual, MARCUS DUFF, an individual, and JAMES SYLVIA, an individual.

Appellants / Cross-Respondents.

Appeal from King County Superior Court
No. 06-2-20885-4 SEA

APPELLANTS' BRIEF

Thomas J. Seymour, #39629
Seymour Law Office, P.S.
600 University St. # 902
Seattle, WA 98101
Telephone: (206) 621-2003

ATTORNEY FOR APPELLANTS

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I. INTRODUCTION

Appellants Dolores Draina, Marcus Duff, and James Sylvia ("Shareholders") respectfully ask the Court of Appeals to reverse or vacate portions of the trial court's January 14, 2010 judgment in favor of Respondent David Thompson ("Thompson"). Appellants' claims against Thompson, arising out of his time as the dominating officer and director of the companies, and the financial favoritism he showed himself and favored associates as the businesses crumbled. Appellant will show that the trial court erred in applying the law on a number of points, and clearly erred in evaluating the fair value of assets transferred to a business associate of Mr. Thompson's for inadequate compensation.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in entering judgment against Shareholders' claim that Thompson breached his fiduciary duty with respect to the sale of valuable assets.
2. The trial court erred in entering judgment against Shareholders' claim that Thompson breached his fiduciary duty with respect to preferential payments made while the Companies were insolvent.

3. The trial court erred in entering judgment against Shareholders' claim that Thompson breached his fiduciary duty with respect to payments made by the Companies on Thompson's credit cards.
4. The trial court erred in awarding Thompson attorney fees and costs.

B. <u>Issues Pertaining to Assignments of Error</u>.

1. Can a proper determination of good faith and fair value with respect to a sale of licenses be made based on a misreading of a document that undervalues the royalties generated by a factor of 5, when the evidence also shows there are likely additional royalties not reflected in the document, and when the document is used to make an improper calculation of gross revenues generated by the licenses? [Assignment of Error 1]
2. Where an agreement places no restraint on the parties to sell assets covered by their agreement, may a party establish the existence of such restraint based on simple say so, although the practices of the parties was to sell assets free and clear of that agreement? [Assignment of Error 1]
3. Where the evidence shows that 220 MHz "Narrowband" licenses generating little or no revenue sold for more than the subject LA Licenses, which generated more royalties for NNS than any other

licenses, did the trial court err by overemphasizing limited and erroneous information of income for the subject licenses, and dismissing, without relevant findings, the factors of comparable sales and income generated by other licenses? [Assignment of Error 1]

4. Is it appropriate to apply federal bankruptcy law to preference claims based on breach of fiduciary duty? [Assignment of Error 2]
5. Is the burden of proof for affirmative defenses properly placed on the party advancing those defenses? [Assignment of Error 2]
6. Where there are no specific determinations or findings of fact made with respect to the affirmative defenses of new value and ordinary course of business, is there any way to properly allow the defenses? [Assignment of Error 2]
7. Does the burden of proof with respect to determining whether transactions between an officer/director and his company are fair to the company fall on the officer/director or on the company? [Assignment of Error 3]
8. Where company policy requires expense reports and receipts to be reimbursed for expenses, is it appropriate to reimburse an officer/director for charges made to his cards when he cannot provide such evidence of the business nature of those charges? [Assignment of Error 3]

9. May a party be awarded attorney fees and costs, based on a clause in promissory notes, for fees and costs not expended in collecting on those notes? [Assignment of Error 4]
10. Does an award of attorney fees and costs need to be based on findings of fact and conclusions of law? [Assignment of Error 4]

III. STATEMENT OF THE CASE

Procedural Background

Plaintiff David Thompson filed a complaint against the Defendants Datamarine International, Inc. ("Datamarine"), SEA, Inc. of Delaware ("SEA"), and Narrowband Network Systems, Inc. ("NNS") in this matter on June 28, 2006 in King County Superior Court, seeking recovery on three promissory notes and certain personal credit card debt, and to enforce a security agreement for one of the promissory notes. **CP 1-28**[1]. Datamarine, SEA, and NNS (collectively, "Companies") answered and counterclaimed, asserting claims of breach of fiduciary duty and fraud

[1] Shareholders' appeal (Appeal No. 65001-7) and Thompson's appeal (Appeal No. 65102-7) were consolidated on April 20, 2010, under Appeal No. 65001-7. The initial Designations of Clerk's Papers in the separate appeals had already been filed with the Superior Court. As a result, there are two separate Indexes to Clerk's Papers, one for each appeal, with duplicate numbers. Unless otherwise noted, citations to CP in this brief refer to the Index filed 4/09/10 in King County Superior Court for Appeal No. 65001-7.

against Mr. Thompson for various actions taken in his capacities as officer and director of the companies.

On April 24, 2007, Judge Hilyer granted partial summary judgment in favor of the companies, ruling that a May 28, 2001 Security Agreement in favor of Thompson was invalid and dismissing the claims to enforce it. On September 7, 2007, Judge Hilyer granted partial summary judgment with respect to Thompson's claims on three promissory notes.

On October 29, 2007, Thompson and the Companies stipulated to dismiss Defendants counterclaims without prejudice. On March 13, 2008 Judge Heller granted Datamarine shareholders' Mitchell Draina, Marcus Duff and James Sylvia motion to intervene, allowing them to assert derivative counterclaims against Thompson, including many claims that had been part of the earlier dismissal without prejudice. Mr. Draina died in a logging accident in 2008, and his widow Dolores Draina was substituted as a party. (The appellants are referred to collectively as "Shareholders").

The claims were tried before the honorable Bruce Heller in King County Superior Court from September 29 to October 10, 2009. On January 14, 2010 the court entered judgment against the Companies on Thompson's promissory notes and credit card claims, against Thompson on his secured claim, against Thompson on the Companies' claims related to misuse of employee tax withholdings and 401(k) deposits, and against the Companies on their remaining claims. **CP 525-29**[2]. The court denied the Shareholders' motion for reconsideration. **CP 545-546** On February 15, 2010, the Shareholders filed their notice of appeal. **CP 47-81.** On March 1, 2010 David Thompson filed his appeal. **CP 82-85.**

Factual Background

David Thompson was the CEO and sole director of SEA from about 1986 into March, 2003. **RP 9/29/09 a.m.**, pp. 15-16. Thompson approached Datamarine in about 1985 with the idea of a merger between the two companies. **Id.,** pp.11, 14. In 1986 Datamarine acquired 100% ownership of SEA, Inc. **Id.,** p. 14.

From 1989 through 2003, Thompson was a director on the Datamarine Board. In approximately 1990 David Thompson was named the acting CEO of Datamarine, and later was officially named the CEO of Datamarine. **Id.** at p.17.

Investment in 220 MHz 'Narrowband' Communications

Mr. Thompson led SEA, Inc. into a new industry, land mobile "narrowband" communications, also known as specialized mobile radio or

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[2] Index to Clerk's Papers, Appeal No. 65102-1.

"SMR". **Ex. 451**, p.2. SEA began to manufacture radio equipment for the land mobile market. **Id.**

NNS was incorporated in November, 1994 in the State of Washington, as a subsidiary of SEA. **Id.**, p.30. From its incorporation until the time of his resignation, Mr. Thompson was the sole officer and director of NNS. NNS was to be involved in the operation of SMR systems for the 220 MHz licenses. **Ex. 451**, p.30. NNS entered into management agreements with persons who had obtained 220 MHz licenses[3]. **Id.** Those licenses that were subject to Management Agreements are referred to herein as the "NNS Licenses".

The Management Agreements required NNS to equip, construct and operate SMR systems for the licensees. **Id.** In exchange for these services, NNS had the right to retain all revenues from the system, except for a percentage remitted to the license holder. **Id.** After construction, the Management Agreements gave NNS the option to acquire the system, including the license, subject to continuing rights of the original licensee. **Id.** Upon ultimate disposition, NNS would be required to pay the licensee a percentage of NNS's profit. **Id.** The disposition of the systems was solely at NNS's discretion. **Id.**

NNS AGREEMENT WITH INCOM

[3] Some management agreements were originally entered into under SEA's name.

While NNS was obligated by the Management Agreements to have an SMR system operating for each license, they were not intending to be an operator, but instead to enter relationships with qualified operators. **RP 10/01/09** at p.231. To this end, on April 19, 1995, NNS entered into an agreement (known as the "Operating Agreement") with Incom Communications Corporation ("Incom"). **Ex. 437**. The Operating Agreement concerned the construction and operation of SMR systems for 82 NNS Licenses, and the integration in some markets of NNS and Incom licenses. **Ex. 437**. The Operating Agreement divided the NNS Licenses into "A" and "B" markets, with the obligations of Incom and NNS varying for the licenses in each market. **Id.** The "A" licenses tended to be in the larger markets.

For "A" licenses, NNS was required to provide some equipment, and Incom handled all aspects and costs of operations. Incom retained 70% of the "A" license gross revenues; NNS and the license holder were entitled to 30%. **Id.** at pp. 11-12. In "B" markets, Incom provided no equipment, and its primary obligation was to invoice and collect from customers. Incom had the right to 40% of the gross revenues, and was obligated to forward NNS and the license holder 60%. **Id.** at p. 12. Incom collected all revenue for the 82 NNS Licenses covered by the Operating

Agreement. **Clothier, RP 10/08/09** at p.45; **Ex. 437** at pp. 11-12, ¶¶6.1-6.2.

Incom had licenses or agreements with licensees throughout the country. The Operating Agreement reflected an integration of NNS licenses and Incom licenses in certain markets, primarily markets with NNS "A" licenses. It called for pooling and dividing revenue of Incom Licenses[4] and NNS licenses in those markets. **Id**. at p.12, ¶6.3 & "Ex. C". Gross revenues collected in such markets would be pooled and distributed to Incom or NNS based on the number of channels they each owned in that market. **Id**. NNS and Incom each owed the other the right of first refusal if they wanted to sell any of their assets covered by the Operating Agreement. **Id**. Thompson testified this was the only restriction the Operating Agreement placed on the ability of the companies to sell their assets. **RP 09/29/09,** p.54.

PERFORMANCE IN THE 220 MHz MARKET

The performance of the 220 MHz market did not go as hoped, for either Incom or NNS. Datamarine's 1998 Annual Report described NNS's revenues through 1998 as "immaterial". **Ex. 451**, p.31. The market in Southern California however was something of an exception. In

[4] Identified in Exhibit C to the Operating Agreement.

the second quarter of 1996, the Incom and NNS licenses[5] in the Southern California/Los Angeles market generated about $50,000 in subscriber revenue. **Ex. 87**, p.1. By the end of May 1997, the market was reportedly generating approximately $160,000 per quarter, with Incom looking to add "needed capacity for its busiest sites". **Ex. 443,** p.1. Thompson indicated SEA's willingness to participate with other investors in buying 3 additional licenses in the market at a total cost of $800,000. **Id.,** p.3.

THE COMPANIES' INSOLVENCY

Despite receiving a $2 million dollar investment in December 1995 (**Ex. 451**, p.28) the Companies' financial health deteriorated rapidly following the investment into land mobile. After 1995, Thompson testified the Companies filed no tax returns, due to lack of money. **RP 9/29/09** at p.64. No later than 1998, the Companies were unable to pay their debts as they came due, including failing to make payment on invoices in the approximate amount of $300,000 to Maxon, its supplier of land mobile radios. **Ex. 427**. Those invoices were never paid; the accounting department supervisor Debbie Vandermyn testified they were written off in 2001. **RP 10/05/09 p.m.**, at p. 21-22.

As of February, 1999, fewer than 30% of their accounts payable were current. **Ex. 462**, p.14. One year later, 8.1% of their accounts

[5] WPCR220 and WPBQ871 in San Diego, WPCP591 in Corona, CA (collectively, the "LA Licenses"), which are subject of one of the Shareholders' claims.

payable were current, with over $600,000 in accounts payable more than 90 days past due. **Ex. 464**, p.16. In the 1999 Annual Report, the Companies' auditor, Grant, Thornton, issued an opinion that there was "substantial doubt about the Company's ability to continue as a going concern." **Ex. 452**, p.16. From 1997-2000 the Companies lost approximately $8.6 million as their sales dropped almost in half. **Ex. 451,** p.24, n. 3**, Ex. 453,** p.17.

In April 2001 the Companies had a large layoff of employees, reducing the number to about 40. **RP 09/30/09** pp.12, 19. In May, 2001, Kallshian signed a security agreement in Thompson's favor for the loans he had made Datamarine in 2000, purporting to grant him a security interest in all Datamarine's assets. **Ex. 477**. He had not consulted the board of directors or obtained a resolution before doing so. **Ex. 170**. Following these layoffs, Thompson and his CFO Jan Kallshian began using employee tax withholdings and 401(k) contributions in the operation of the company. From July, 2001 through December, 2001, the companies made no federal payroll deposits whatsoever, neither FICA nor withholding. **RP 09/30/09** pp.14, 16. In November 2001, the Companies went through an even more devastating round of layoffs, leaving about 7 or 8 employees, including Thompson, Kallshian, and Vandermyn. **RP 09/30/09** p.19.

The employees laid off in November, 2001 did not receive their final paychecks or benefits. **Id.** The total unpaid liabilities to laid off employees through September 2002 was over $180,000 in wages and vacation benefits alone. **Ex. 169**. There was over $150,000 in liabilities for unpaid federal income tax withholding, FICA contributions, and unemployment contributions. **Id.** Over $200,000.00 was owed in unpaid rent and over $1 million to various vendors. **Id.**

PREFERENCES

Beginning in January, 2002, Mr. Thompson increased payments to Jan Kallshian, the Datamarine CFO, paying him personally $3,750 a week. $1,250 a week of this amount was specifically for "back pay". **RP 09/30/09 a.m.** p.22. At trial, Thompson testified he did this because Kallshian threatened to quit if he didn't start receiving back pay. **RP 10/05/09 p.m.** p.50.

Throughout this time frame, Datamarine was making payments on Thompson's credit card debt and personal mortgages, the latter of which the company treated as payments on his August 28, 2000 unsecured loan. Those payments were made virtually every month, totaling $156,288.36 from September 1999 – November 2002 alone. **Ex. 469**.

Payments on Thompson's August 4, 2000 loan (in the original amount of $312,000) and Bank of America credit line were irregular. **Ex.**

490, p.1. The payments varied in timing and amount, totaling approximately $48,000 from October 2000 to April 2, 2003. The Bank of America line received payments as low as $36.00, and as high as $10,000. **Ex. 490,** pp.1-2. The payments on the August 4, 2000 loan ranged from $1,750 to $5,850.00, with 8 payments over 3 years. **Id.,** p.1.

THE END OF THOMPSON'S TENURE

On or about September 17, 2002 the board informed Mr. Thompson that he was being replaced as CEO and President of Datamarine, effective immediately. Thompson wrote the board a letter of September 19, 2002, where he decried the Board's lack of sophistication and professionalism, made demand for immediate repayment of all amounts owed him, emphasizing that the notes were secured and that he had discussed the matter with his attorney. **Ex. 164.**

Thompson stayed on as President of Datamarine until October 4, 2002. On October 15, 2002 he withdrew all of his personal 401(k) funds from the Plan. **RP 09/30/09 a.m.** p.77. He submitted his resignation as Plan Trustee on October 16, 2002. **Ex. 421**.

THE SALE OF NNS's RIGHTS TO THE LA LICENSES

On November 17, 2002, Thompson signed an agreement to sell all of NNS's property rights in the licenses, management agreements, and equipment for the LA Licenses to Gene Clothier, the head of Incom, for a total price of $75,000.00 (The "Clothier License Sale"). **Ex. 441**. Two days earlier, Clothier had written a $7,500 check as down payment for the "LA Licenses". **Ex. 440**. Thompson did not seek out any other buyers. At trial he testified that Gene Clothier was the only one it made sense to sell to. **RP 10/05/09,** p. 62.

The LA Licenses were an integral part of Incom's Southern California 220 MHz system, and for NNS generated the most income of all their licenses. Clothier testified that Incom did not have the funds to acquire the licenses. **RP 10/08/09,** p.23 On November 15, 2002, Incom waived its right of first refusal with respect to the sale of these assets. The sale closed on March 31, 2003.

At the time of the transaction, two of the licenses were still owned by the original licensees, while one of the licenses was owned by SEA outright (subject to the obligation to pay a percentage to the former licensee). **Ex. 524**, p.2; **Ex. 441**, at "Ex. I". The sales price for the rights transferred to Clothier was extremely low compared to sales of other licenses. Just 8 months earlier, Thompson had sold a single NNS license with equipment near Seattle for $125,000. **Ex. 509**. At trial the Shareholders put on expert testimony as to 13 sales of licenses and equipment, comparing them by price and population coverage of the license. **Exs. 494, 495**.

IV. ARGUMENT

A. THE COURT ERRED IN CONCLUDING THAT THOMPSON AND CLOTHIER NEGOTIATED THE SALE OF THE LICENSES IN GOOD FAITH AND THAT THE COMPANIES RECEIVED FAIR VALUE.

The Shareholders brought a claim against Thompson for his sale, at the close of his tenure, of NNS's interests in the LA Licenses and related equipment for a fraction of their fair value. The Court of Appeals should reverse the judgment of the trial court with respect to the sale of the LA Licenses and grant a new trial on the issue of breach of fiduciary duty with respect to the sale. The trial court's decision as to good faith and fair value rested almost entirely on an error which caused the trial court to underestimate the income NNS received from those licenses by a factor of five. The court also completely failed to make findings with respect to the comparable sales the Shareholders entered into evidence, and provided no explanation for focusing exclusively on a single factor in determining value.

1. ***The Evidence Showed the LA Licenses Generated at Least 5 Times More Royalties for NNS than the Court Found.***

Findings of fact are typically reviewed on a "substantial evidence" standard. A finding of fact will not be overturned if it is supported by substantial evidence sufficient to persuade a fair-minded, rational person of the truth of the declared premise. King County v. Wash. State Boundary Review Bd., 122 Wn.2d 648, 675, 860 P.2d 1024 (1993). Where a finding is based entirely on documentary evidence, however, that finding is reviewed de novo, because the appellate court is as well situated as the trial court to evaluate the documents. Jenkins v. Snohomish County Pub. Util. Dist. No. 1, 105 Wn.2d 99, 102, 713 P.2d 29 (1986). The court's Finding of Fact Q.4 (**CP 68**)[6], on which the finding of fair value was based, relied on a misreading of a single document: **Exhibit 41**. This finding should be reviewed on a de novo basis.

COL D.1 (**CP 73**) incorporated FOF Q.4, stating:

> The Court finds that Thompson and Clothier negotiated the sale of the licenses in good faith and that the companies received fair value. In reaching this conclusion, the Court notes that between 1997 and 2002, the three licenses generated a total of $71,923.50, of which SEA was entitled to 20%.

The trial court performed a sort of informal income analysis, focused on a single document of unknown authorship. **Ex. 41** shows NNS's revenue *from* the 3 LA Licenses from 1997-2002, not the gross revenue generated by the licenses themselves. To the extent it would be possible (which it isn't) to calculate the revenue *generated* by these

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[6] Hereinafter, specific Findings of Fact and Conclusions of Law are cited as "FOF __, **CP** __" and "COL __, **CP** __", respectively.

licenses from that data, **Ex. 41** itself shows the figure would be at least *five times* the figure determined by the court--approximately $357,000.

Ex. 41 came from the Companies' files. Beyond that, it speaks for itself. No witness was called to provide foundation or context. It is titled "Southern CA revinues for 3 licenses", and includes a table of quarterly revenue figures for most of the quarters from 1997-2002. **Ex. 41**. The annual totals are identified in a row running underneath the columns containing the quarterly revenues for each year. with a final figure representing the sum of those annual totals: 71,923.50. *Id.* The trial court took this number as gross revenues generated by the 3 licenses, believing NNS was entitled to 20% of that number, or about $14,400. That was clear error.

Underneath the table showing the calculation of annual revenue, the author of Ex. 41 identifies the nature of that calculation:

> Revenue ***due to*** NNS for a 5 channel system at 20% is calculated and that # is multiplied by the 3 systems.
> ***So the totals above divided by 3*** would be the amount ***paid*** per system (or call sign) in SO. CAL.

Ex. 41 (emphasis added). It goes on to identify those systems (or call signs), which are the three transferred to Clothier. *See* **Ex. 430,** at "Ex. I".

Most significantly, the author of Ex. 41 then attempted to calculate the gross revenues generated by the three licenses, ignoring a few issues discussed below. The notations on the right-hand side of Ex. 41 read:

> apx 17,000 in revenue per qtr for the three licenses
> avg 1900 per license per month or 5700 per month
> which we received 20%.

Understanding the numbers reflected in this notation is a matter of simple math. The average quarterly revenue figure and average monthly revenue figures reveal the same basic result. There are 21 quarters displaying revenue[7]. 21 * $17,000 = $357,000. 20% of $357,000 is $71,400, a very close approximation to the figure of $71,923.50 shown in Ex. 41 as the total revenue.

For the monthly figure, if the licenses were each averaging $1900 per month in revenue, over 21 quarters their revenue would have been:

63 months x $1900 x 3 licenses = $359,100

20% of $359,100 is $71,820--an even closer approximation to the total of $71,923.50 shown on Ex. 41.

There is no room for interpretation: $71,923.50 is the amount of money NNS received (or was due) from Incom for the 3 licenses for the time shown. Ex. 41 shows that the LA Licenses generated at least five times more royalties for NNS than the trial court found. It's conclusions

[7] Ex. 41 does not reflect revenue figures for Q3 1997 or Q3 and Q4 for 2002.

of law as to fair value and good faith were based on that error. **CP 73**. The judgment should be reversed on this count on this basis alone.

2. A Meaningful Determination of Gross Revenue Generated by the LA Licenses Cannot be Made From Exhibit 41.

A further error in relying on Ex. 41 in the manner the court did is that the document cannot properly be used to determine gross revenue generated by the three licenses. This is so for at least two reasons: (1) Ex. 41 almost certainly does not reflect all royalties generated by the LA Licenses; and (2) the royalties to NNS for the LA Licenses reflected pooled income in Incom's Southern California market, divided between Incom and NNS based upon their respective number of channels in that market. **Ex. 87**.

The trial court's opinion represents an informal income approach to valuation based exclusively on **Ex. 41**. It was not even a part of any theory of valuation provided by testimony, but was instead argued by Thompson's counsel through cross-examination. Thompson testified that he arrived at the price for the sale to Clothier through "logrolling" and couldn't identify any particular basis that made the prices for the LA Licenses appropriate. **RP 10/05/09**, p.65. According to Thompson, the price was arrived at because "we needed as much money as we could get, they had X amount of money they could pay, and when push comes to shove, we ended up with $75,000." *Id.* Clothier's testimony was in a similar vein. **RP 10/08/09,** p.20. Both struck a theme of *ipse dixit* that Thompson used throughout the trial: the value is what we say it is.

The first problem with using **Ex. 41**, even properly read, to determine the proper value of the licenses, is it has obvious, unexplained gaps in the table of NNS revenue. The 1999 payments are 1/3 to 1/6 the amount of payments for other years, and there are no payments at all for the 3rd Quarter of 1997. Incom was struggling financially and had fallen woefully behind on royalty payments. As of 2001, Incom owed NNS over $53,000 in royalties for the LA Licenses alone. **Ex. 183**. That was more than Incom owed NNS for the rest of the NNS Licenses combined. *Id.* In short, there is no reason to believe Ex. 41 reflected all royalties owed NNS for the LA Licenses for that time period, and plenty of reason to conclude it did not.

Far more fundamentally, the gross revenues generated by the LA Licenses cannot be reverse-calculated from the royalty payments received by NNS, because of the pooling of revenue between NNS and Incom in markets where they shared licenses. Pursuant to the Operating Agreement, the gross revenue from subscribers in such markets was pooled and royalties were paid based on the number of channels in the market. **Ex. 437**, p.12. For example, the payments to NNS for the 3 LA

Licenses were based on the gross revenue generated by the combined 85 channels for NNS and Incom in the Southern California market. **Ex. 87**. NNS's 20% for each of its 5-channel licenses was identical to the 20% for any of Incom's licenses. **Id**. It simply is not possible to determine the gross revenues generated by the LA Licenses from Ex. 41—the data does not support it. The trial court's informal income theory of valuation was based on mistaken premises.

3. The Court Erred by Ignoring the Evidence of Comparable Sales.

The trial court relied exclusively on Ex. 41 in determining the value of the interests sold to Clothier. *See CoL D.1*, **CP 73**. The court made no findings whatsoever as to the comparable sales put into evidence by the Shareholders, most of those sales by NNS or Incom, all in evidence, all sold at a higher price (when license and equipment is combined), none generating anywhere near the income of the LA Licenses.

Making a determination of value "contemplates a consideration of all the facts and circumstances pertinent to a particular case in an effort to arrive at a fair and reasonable compromise … which may in some degree be lacking in mathematical exactness or certitude." In re: West Waterway Lumber Co., 59 Wn.2d 310, 321, 367 P.2d 807 (1962). A trial court commits reversible error by overemphasizing one factor affecting value, and dismissing other factors of considerable importance. *Id.*

a. ***Thompson and Clothier had Never Sold any Licenses for as Little as the LA Licenses.***

The Shareholders provided evidence of 13 comparable sales of 220 MHz licenses and equipment. **Ex. 493,** appendix. For each of the licenses, Fred Palidor, an expert in radio communications, determined the area of reliable radio coverage, and the population that was covered within those areas. **RP 10/01/09,** at pp.107-109; **Ex. 432**. All but two of the sales were made by either NNS or Incom. The other two were single *channel* license sales in the New York area, the two of which sold for a higher price than the LA Licenses. **Ex. 493,** "appendix".

The overwhelming evidence showed that, when they were not dealing with each other, both Thompson and Clothier sold licenses with much smaller coverage areas at much higher prices than the LA Licenses. In fact, just 8 months before Thompson agreed to the sale to Clothier, NNS sold a license with equipment in the Seattle area for $125,000. **Ex. 508**. The following are those reference transactions considered by Shareholders' expert witnesses, Mr. Palidor and Dr. Andrade [See **Exs. 432, 493, 495**], in which Mr. Thompson or Mr. Clothier participated:

Market	Pop. Coverage	License+Equip. Price[8]
Birmingham, AL	606,277	$35,000
San Diego, CA	654,457	?
Middleburg, FL	751,638	$35,000
San Diego, CA	794,401	?
Jacksonville, FL	980,158	$40,000
St. Louis, MO	1,185,812	$45,000
Longwood, FL	1,610,784	$45,000
Tampa, FL	1,693,441	$45,000
Preston (Seattle), WA	2,130,114	$125,000
Miami, FL	2,772,426	$115,000
Atlanta, GA	2,812,021	$55,000
Dallas, TX	4,496,140	$150,000
Corona (Los Angeles), CA	6,972,288	?
Chicago, IL	7,188,206	$235,000

It is impossible to combine *any* three of these sales and come up with a price lower than the price for which Thompson sold the LA Licenses. (Birmingham + Middleburg + Jacksonville = $110,000). The total population covered by the Birmingham, Middleburg, and Jacksonville licenses is about 2.3 million. **Ex. 432**. The total population covered by the LA Licenses is about 8.4 million. *Id.*

If you combine the sales prices of the licenses closest in population coverage to the LA Licenses, the total is $305,000. (Chicago +

[8] Mr. Palidor valued the licenses using the prices identified for the licenses in sale documentation. He valued the equipment separately. Gene Clothier testified for Thompson that while equipment was sometimes for legal or technical reasons identified separately, "the value was all in the license." **RP 10/08/09**, pp. 57-58. These figures reflect the combined license and equipment prices. **See Exs. 496-516**.

Birmingham + Middleburg). The total population covered by these licenses is about 8.5 million. The record is not entirely clear, but NNS probably did not have the right to all equipment associated with the LA Licenses. Pursuant to Mr. Palidor's testimony, the minimum amount of equipment provided by NNS reflected more than 60% of the value of a full set of equipment. **RP 10/01/09 a.m.**, p. 162.

The evidence of comparable sales was the only direct evidence of the value that the market placed on 220 MHz licenses. It was error for the court to entirely disregard that evidence, make no findings of fact with respect to the sales, and fail to explain why the sales of other licenses weren't relevant to a valuation of the LA Licenses.

b. ***The LA Licenses Generated the Most Royalties for NNS.***

While the court based its opinion on the allegedly low amount of revenue generated by the three LA Licenses, the evidence showed that the 3 LA Licenses were easily the most successful of the NNS licenses. The Los Angeles market was a rare success story for Incom and NNS. In May 1997, Incom was generating approximately $650,000 in gross revenue from the 220 MHz Los Angeles market, and it was looking to purchase 3 other licenses at a price of over $250,000 each. **Ex. 443**. Thompson committed to the deal, pledging to provide equipment from SEA. *Id.,* p.3

Revenue for the industry as a whole, however, was an entirely different story. For the fiscal years 1997-2001 total revenue to NNS for narrowband operations[9] was $133,287. **Ex. 452** at p. 36, **Exs**. 552-554[10] If NNS received all the revenue identified in Ex. 41 for the LA Licenses, at least $66,067 (49.6%) of NNS's total revenue for narrowband operations in that time would have come from the LA Licenses. Moreover, as of 2001, Incom had not paid NNS over $53,000 of royalties due for the LA Licenses. **Ex. 183.** This compared to about $27,000 of unpaid NNS royalties for ***all*** the 79 remaining A and B market licenses. ***Id.*** Clothier testified that all revenue that NNS received for those 82 licenses would have come through Incom. **RP 10/08/09** at p. 45.

The sales identified above are all sales which either Thompson or Clothier negotiated and/or approved. The LA Licenses generated the most revenue for NNS—why are they worth the least amount of money? Given the prices paid for licenses that generated no or little revenue, the court's finding that NNS received fair value for the LA Licenses because they generated so "little" revenue is overwhelmingly contrary to the evidence.

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[9] Defined as revenues "derived from the Company's share of SMR operations on those sites where the Company owns, or has an ownership interest in, the license and/or base station equipment." [Ex. 453 at p.9, ¶2]

[10] The revenue for 2000 was $98,339, which the annual report explains was not due to one incredible year, but rather that the company had delayed recognition of much of this revenue from early 1997 through 1999. [**Ex. 453** at p.9, ¶2]

4. ***The Court Erred in Holding that Any Purchaser of the Management Agreements Would Be Subject to the Provisions of the Operating Agreement.***

Finding of Fact Q.2 (**CP 68**) contains an error with respect to the terms of the Operating Agreement. The court erroneously found that "Any purchaser of the management agreements would be subject to the provisions of the Operating Agreement." The meaning of a contract is an issue of law, subject to de novo review. Chem. Bank v. Wash. Pub. Power Supply Syst., 102 Wn.2d 874, 894, 691 P.2d 524 (1984). The Court of Appeals should direct the court on remand that the Operating Agreement would not apply to purchasers of the assets.

The management agreements, of course, were agreements between NNS and the license holders. NNS assigned to Clothier the rights in the management agreements for the LA Licenses. The management agreements included the right to acquire and sell the licenses free and clear, subject only to the obligation to pay the licensee a percentage of the profit on the sale.

There is no language in the Operating Agreement that indicated that if NNS or Incom sold any of its assets, that the purchasers would be subject to the Operating Agreement. To the contrary, the only restriction the Operating Agreement put on Incom and NNS's ability to sell their assets, was the right of first refusal given to each party. **Ex. 437**, at p.13;

While counsel for Thompson elicited testimony from Clothier that the assets would be subject to the Operating Agreement even after such a sale, as the court noted numerous times, the contract speaks for itself.

For every NNS license sale on the record, the purchasers received unrestricted rights in the licenses and equipment, and all that was necessary to attain this freedom was to provide Incom with notice of its right of first refusal.

The correspondence and purchase agreements transferring the licenses and equipment to such purchasers contain standard provisions assuring the purchasers that the assets are *free* of any liens, obligations, or encumbrances. *See, e.g.*, **Ex. 508**, **Ex. 511**, p.2, **Ex. 512**, p.1, etc. All that was needed to accomplish this was to inform Incom of the terms of the sale and their opportunity to exercise their right of first refusal, which was always waived. *See, e.g.* **Ex. 447**, **Ex. 511**, p.3. There is no evidence to support the third sentence of FOF Q.2. **CP 68**.

Reaching this erroneous conclusion may well have compounded the court's error in interpreting Ex. 41—the court may have believed that the only rights being transferred were the rights to receive 20% percent of revenue generated by the LA Licenses. In fact, NNS could have sold the LA Licenses at any time, free and clear of the Operating Agreement, and free and clear of the management agreements (although obligated to pay the former license holders a percentage of the profit).

B. THE TRIAL COURT ERRED IN UPHOLDING THE PREFERENCES PAID TO THOMPSON AND FAVORED ASSOCIATES.

The trial court erred by placing the burden of proof for establishing affirmative defenses on the Shareholders rather than Thompson. *See* COL F.3, 4, 6, & 7, at **CP 75**. When a trial court applies the wrong legal standard, or bases its ruling on an erroneous view of the law, it abuses its discretion. Gildon v. Simon Prop. Group, Inc., 158 Wn.2d 483, 494, 145 P.3d 1196 (2006) The Court of Appeals should reverse the judgment of the trial court with respect to the payments made to Thompson in preference over other creditors, and refer the matter to the trial court for a new trial.

1. *The Trial Court Erred in Applying Federal Bankruptcy Law Defenses to Washington State Fiduciary Duty Claims.*

The trial court concluded that preferences are an aspect of federal bankruptcy law, and so looked to federal bankruptcy law for guidance, citing a paucity of Washington law. Preferences, however, have been barred for years by common law or statute in virtually every jurisdiction, and there is a fair amount of Washington jurisprudence on preferences.

The great majority of jurisdictions hold that when a company is insolvent, officers and directors may not prefer themselves in the payment of company debts. 15A Fletcher, Cyclopedia of the Law of Private Corporations, §§7468-9 (2000).

> Generally, the rule prohibiting preferences to directors is not founded upon the trust fund doctrine, but upon the theory that it is inequitable that directors, whose knowledge of conditions and power to act for the corporation give them an advantage, should be permitted to protect their own claims to the detriment of others at a time when it is apparent that all the unsecured debts of the corporation are equally in peril and that all of them cannot be paid.

15A Fletcher, *supra*, §7469.

One who creates a preference is not acting in good faith and may be held liable therefor. Whiting v. Rubinstein, 10 Wn.2d 5, 22, 116 P.2d 305 (1941). Washington emphasizes that the fiduciary duties of officers and directors are at their *highest* when they have made loans to their companies. Saviano v. Westport Amusements, 144 Wn.App. 72, 180 P.3d 874 (Wash. 2008). Washington law has multiple legal bars to preferences being paid to officers or directors; it is certainly not merely a creature of federal bankruptcy law. Such preferences may be voided pursuant to the statutory power of a receiver, as violations of RCW 19.40 --the Washington Fraudulent Conveyance Act, or as breaches of fiduciary duty.

Block v. Olympic Health Spa, 24 Wn.App. 938, 950, 604 P.2d 1317 (1979), citing Tacoma Association of Credit Men v. Lester, 72 Wn.2d 453, 433 P.2d 901, (1967). The court erred in importing defenses from federal bankruptcy law to be used as a defense to a breach of fiduciary duty claim.

2. *The Trial Court Erroneously Placed the Burden of Proof on the Shareholders with Respect to Thompson's Affirmative Defenses.*

The Shareholders established the existence of preferences paid to Thompson and Kallshian. Payments were made to Thompson, his credit card companies, or his mortgage company on unsecured loans he had made to the companies, all while the companies were clearly insolvent. The creditor has the burden of establishing defenses to a preference under 11 U.S.C. §547(c). Chrysler Credit Corp. v. Hall, 312 B.R. 797, 803 (E.D.VA 2004). The court erred in COL A.7 (**CP 72**), COL F.3, F.6, and F.8 (**CP 75**) by placing the burden of establishing these transactions and affirmative defenses on the Shareholders.

3. *The Trial Court Erred by Accepting the New Value Defense Without Making Specific Findings.*

The new value defense contains two key elements. "First, the creditor must give unsecured new value and, second, this new value must be given *after* the preferential transfer." In re IRFM, Inc., 52 F.3d 228, 231 (9^{th} Cir. 1995). The new value defense does not inoculate an entire transaction because new value is provided, but only to the extent of the new value provided. *See* In re Grand Chevrolet, 25 F.3d 728, 733 (9^{th} Cir. 1994) (where release of lien constitutes new value, court must determine specific value of released lien). In effect, the new value constitutes a repayment of the preference. The party seeking the protection of the doctrine must prove the specific measure of the new value given to the debtor in the exchange. Id. The application of the new value defense thus requires the party asserting it to establish the dates and amounts of new value advances after the preferential transfer. In re: IRFM, 52 F.3d at p. 232.

Mr. Kallshian and Mr. Thompson were clear: $1250 of the $3750 weekly payment made to Mr. Kallshian beginning in January 2002 was expressly provided as payment of back pay. The new value defense cannot save that $1250 from its status as a preference. It does not constitute 'new value'; it is expressly and by acknowledgement of the parties a payment of antecedent debt. These preferences were being paid to Mr. Kallshian immediately after the company had dramatically downsized, and owed substantial amounts not only on normal accounts payable, but also on back taxes, unpaid 401(k) contributions and unpaid employee wages.

The trial court made no specific findings whatsoever as to the dates or amounts of new value advances after the payments to Thompson and Kallshian. There is no way to apply the "new value" defense.

4. *Regular Payments Made in the Ordinary Course of Business Must be Ordinary in the Business of Both Parties, and Must be Shown to Comport with Industry Standards.*

In order to receive protection from the ordinary course of business exception, a preferred creditor must establish that (1) the debt was incurred as an ordinary part of the business of the debtor and creditor; (2) the payments are ordinary with respect to past practices or a prior course of dealing between the creditor and the debtor, and (3) that the payment practice at issue comports with industry standards. In re: Inland Global Medical Group, Inc. 362 B.R. 459, 464 (C.D. Cal. 2006). Where no evidence of industry practices is introduced, the defense fails. *Id.* at p. 465.

Thompson offered no evidence of industry practices. The defense fails on that basis alone. Further, there are no findings of fact to sustain the conclusion of payments in the ordinary course. Simply looking at payments on Thompson's August 4, 2000 loan (in the original amount of $312,000) and Bank of America credit line show how irregular the payments were, and that there was no "ordinary course" of business at all.

Ex. 490, p.1. The payments varied in timing and amount, totaling approximately $48,000 from October 2000 to April 2, 2003. The Bank of America line received payments as low as $36.00, and as high as $10,000. **Ex. 490,** pp.1-2. The payments on the August 4 loan ranged from $1,750 to $5,850.00, with 8 payments over 3 years. **Id.** The court identifies nothing about the nature or habits of payment between the parties in making determinations as to the ordinary course of business defense. There is simply a conclusion of law stating that the payments were in the ordinary course of business. COL F.6, **CP 75**. The court should reverse the judgment of the trial court with respect to the preferences.

C. <u>PLAINTIFF FAILED TO MEET HIS BURDEN OF PROOF WITH RESPECT TO EXPENSES</u>.

The Court of Appeals should reverse the decision of the trial court with respect to expenses charged to Thompson's credit cards. The court held that "Interveners failed to meet their burden of proof that Thompson breached his fiduciary duties to the Companies when he received reimbursement for legitimate business expenses. The interveners failed to identify specific expenses that were personal to Thompson but not reimbursed by him." COL G.1 (**CP 76**). The trial court applied an improper legal standard by placing the burden of proof on the

Shareholders rather than Thompson. The dealings of directors with their own corporation "are subject to rigorous scrutiny, and, if challenged, the burden is on them not only to prove good faith in the transaction, but to show its inherent fairness." Merger Mines Corp. v. Grismer, 137 F.2d 335, 340 (9th Cir. 1943).

It of course was never the Shareholders theory that it was inappropriate for Thompson to be reimbursed for legitimate business expenses. The Shareholders' theory was straightforward: because the transactions were made on Thompson's credit cards, and because their use provided him personal benefits including frequent flier miles on his United Mileage Card, the burden fell on him to establish that the transactions were business related and fair to the company.

The findings of fact establishing the reimbursement of Thompson's business expenses (FOF O.1-O.4, **CP 66-67**) do not address the Shareholders' claim, as there is no dispute that Thompson is entitled to be reimbursed for his business expenses. As shown below, the evidence showed that Thompson's cards are replete with his own charges for which he did not submit expense reports, as well as charges not attributed to any individual.

Vandermyn testified that for employees to get expenses reimbursed, corporate policy required submission of an expense report, with receipts. **RP 10/05/09 p.m.,** p. 24. The policy applied to all employees, including Thompson. **Id.,** at p.25. Thompson claimed to have repaid all personal expenses, but provided no evidence to support that, beyond his and Vandermyn's bare assertions. **Id.**, at p. 32. However, Vandermyn testified that if Thompson reimbursed the company, he would have written it on his expense report. **Id.,** at p. 36-37. She also admitted she was unable to tell what most of the expenses on the records were for, that she would need to see the receipts and expense reports. **Id.,** at p.38.

Thompson's testimony was consistent with Vandermyn's, testifying that when he incurred expenses he submitted an expense report. **RP 10/05/09 a.m.,** p.105. The expense reports actually submitted by Thompson in the company records for the years 1999-2003 totaled $9,289.99. **Ex. 471**. Meanwhile, there were more than $150,000 in payments by the company on those cards, and a $30,000 increase in the balances on those cards. **Ex. 470**. Thompson may have sustained his burden with respect to some of these expenses, where there are indications on the record that they were incurred by others in the course of company business. The great majority of the transactions, however, are either charges attributed to Thompson without substantiation, or are not attributed to any individual at all.

A sampling of unsupported expenses include:

<u>Expenses on Ex.470A</u>

DCT flight to Paris (8/30/99);
DCT stay at Walt Disney Hilton (10/14/99);
Tickets to Denver/Chicago (02/15/00);
Factory Direct Tire Sale charges (04/10/00); (08/02/02)

<u>Ex. 470B</u>

D/Thompson travel charges/auto charges (06/01)
Thompson flights to Chi, Den, 'XAO' (11/01);
Unexplained airport charges (02/02);

<u>Ex. 470D</u>

Thompson/D flight to New York (5/17/00),
Charges totaling thousands of dollars to Arco stations (passim),
DCT Meal and hotel charges in London (7/7-8/00),
Payment to Headlands mortgage company (7/31/00),
Thompson/D flight to Los Angeles (10/26/00).

These are anything but exhaustive lists. No expense reports exist for these charges or the vast majority of other charges on the statements. **Ex. 471** Simply putting an account number on a charge to Thompson's card can hardly satisfy the burden of establishing the charges as business related and fair to the company, as any payment needs to be charged to an account. There are charges admitted to be personal to Thompson, which Vandermyn testified Thompson reimbursed **RP 10/05/09**, p. 31. Those charges of course have an account number associated with them, too. **Ex. 470B**, p.2. Moreover, the routine weekend flights to his house in San

Francisco and back were clearly not business related. They also could not be compensation since they are not reflected in his tax returns. *See, e.g.,* **Ex. 202**. Thompson failed to meet his burden of showing that they were reasonable business expenses, fair to the companies, particularly as the Companies slid further and further into insolvency. The Court of Appeals should reverse the trial court's judgment.

D. THE COURT ERRED IN AWARDING ATTORNEY FEES FOR THOMPSON'S DEFENSE OF THE COUNTERCLAIMS.

The trial court awarded Thompson costs and attorney fees in the amount of $278,848.97. **CP 526**. The Court of Appeals should reverse the trial court's award of attorney fees to Thompson with respect to fees and costs incurred defending against the counterclaims.[11] Generally, the American rule requires civil litigants to pay their own legal expenses unless so provided by contract, statute, or a recognized equitable ground. Dayton v. Farmers Ins. Group, 124 Wash.2d 277, 280, 876 P.2d 896 (1994). Defending against counterclaims based primarily on breaches of fiduciary duty provides no basis for an award of fees. The trial court granted Thompson's motion requesting attorney fees against the Companies, awarding Thompson $278,848.97 in attorney fees and costs.

[11] To the extent the Court of Appeals agrees with the Shareholders' claims on appeal, the judgment with respect to attorney fees should be vacated on that basis alone to allow for a determination of attorney fees consistent with proceedings on remand.

CP 51. $188,370.81 of that amount is for fees and costs after the Shareholders' intervention into the lawsuit. **CP 523**[12].

The Court of Appeals reviews an award of attorney fees and costs on an abuse of discretion basis. Mahler v. Szucs, 135 Wn.2d 398, 435, 957 P.2d 632, 966 P.2d 305 (1998). Courts must take an active role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought. Courts should not simply accept unquestioningly fee affidavits from counsel. Id. at p. 434-5. Discretion must be exercised on articulable grounds, and awards must be based upon proper findings of fact and conclusions of law. Id. When a trial court applies the wrong legal standard, or bases its ruling on an erroneous view of the law, it abuses its discretion. Gildon v. Simon Prop. Group, Inc., 158 Wn.2d 483, 494, 145 P.3d 1196 (2006).

Thompson brought his motion for attorney fees against the Companies on two grounds: (1) a claim for indemnification pursuant to company by-laws; and (2) on the grounds that he was entitled to attorney fees based on the attorney-fee provision in his promissory notes. **CP 511-512**[13]. While the court did not identify the basis for the ruling, Thompson withdrew his claim for fees based on indemnity against Datamarine. **CP 511.** The judgment awarded fees and costs equally against the three

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companies in the amount requested by Thompson (**CP 526**), so the court's award presumably was made on plaintiff's theory of the promissory notes. The trial court entered no findings of fact or conclusions of law with respect to Thompson's motion for attorney fees.

Thompson's claims were based on a promissory note of his own, two other notes he had purchased from other creditors, and a claim for payment on credit cards. The claim for payment on credit cards was not based on a written contract, and there was no attorney fee provision. The three notes contained identical language stating:

> If any payment obligation under this Note is not paid when due, the Borrower promises to pay all costs of collection, including reasonable attorney fees, whether or not a lawsuit is commenced as part of the collection process.
>
> **Ex. 4**.

Summary judgment was entered on the promissory notes on September 7, 2007. Few of the fees or costs incurred after that date can be attributed to collection on the Note. *See* King County Superior Court docket Sub# 360, **Supplemental CP** ____. Many of the fees incurred before that date were related to Thompson's security agreement or the counterclaims. The trial court erred by awarding fees based on contract provisions when the clear language of the contract provided for costs of collection on the promissory notes only.

The Trial Court Should have Deducted for Matters Not Related to the Success of Plaintiff's Claims.

The trial court also erred by failing to properly apply the lodestar method. A reasonable fee for a prevailing party is ordinarily calculated under the lodestar method. Singleton v. Frost, 108 Wn.2d 723, 742 P.2d 1224 (1987). Under the lodestar methodology, the Court should exclude any hours pertaining to unsuccessful theories or claims. Mahler, 135 Wn.2d at 433-34. It is appropriate to deduct fees for unsuccessful motions or other matters not reasonably related to the success of the claims. Pham v. City of Seattle, 159 Wn2d. 527, 539, 151 P.3d 976 (2007). Hours which are unnecessarily expended, unproductive, or not sufficiently related to the successful claim, should not be allowed under the *Bowers* test. Not only was defense of the counterclaims not related to the success of Thompson's claims, Thompson also brought two unsuccessful motions for summary judgment, and caused the Shareholders to obtain a protective order to keep from being forced to travel across the country for depositions when they had no knowledge of the claims. Given the success of the Companies and Shareholders against Thompson's security agreement and the Tax Claim, and the portions of the litigation that were not part of their successful claims, the court should have reduced Thompson's requested fees by more than $21,000. The Shareholders request the Court of Appeals vacate the portion of the judgment with respect to attorney fees, and remand for a new determination of fees and costs, consistent with the Court's rulings on appeal, and based upon express findings of fact and conclusions of law.

E. RAP 18.1 REQUEST FOR ATTORNEY FEES.

Shareholders believe the trial court should not have awarded attorney fees with respect to fees and costs not incurred in collection of the notes. If the Court of Appeals disagrees with Shareholders on this point, but not on other matters raised in this appeal, Shareholders request their fees and costs on appeal pursuant to RCW 4.84.330, which states, in pertinent part:

> In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

V. CONCLUSION

The Shareholders respectfully request that the Court of Appeals

(1) Reverse the trial court's judgment and remand for new trial with respect to the Shareholders' claims related to the transfer of the LA Licenses and the preferences paid to Thompson;

(2) Reverse the judgment with respect to the expenses paid for by the Companies, but remand to the court to direct that judgment be entered against Thompson on that count for all charges which are not identified on the corporate records as being made by or for another party;

(3) Reverse the judgment of the trial court with respect to preferences, and remand with direction that judgment on those counts be entered in favor of Shareholders.

(4) Reverse the trial court's judgment with respect to attorney fees, directing the court that neither party is entitled to attorney fees on remand for matters occurring after entry of summary judgment.

DATED this 23rd day of September, 2010.

SEYMOUR LAW OFFICE, P.S.

Thomas J. Seymour, WSBA # 39629
Attorney for Shareholders

CERTIFICATE OF SERVICE

Today I delivered by electronic mail and United States Mail a true and correct copy of the Appellants' Brief in Thompson v. Datamarine, et. al., Consolidated Case No. 65001-7 in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

	9/23/10
Name	**Date**

Done in Seattle, Washington