

NO. 66695-9-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

ROBERTO DIAZ-LUONG
and
LAN THI NGUYEN, husband and wife, and the marital
community comprised thereof,

Appellants

vs.

LE & ASSOCIATES, P.S., a professional services corporation,

Respondent.

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Andrea Darvis, Judge

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Respondents (“the Les”) have utilized the contempt power to turn a case that was worth a few thousand dollars into a multi-million dollar bonanza of sanctions. The essence of the Les argument in this appeal is that Diaz and Nguyen, having once committed completed contempt, should be endlessly sanctioned for ongoing contempt. The problem with this contention is that they failed to prove any ongoing contempt. Furthermore, the massive and crippling sanctions imposed by the trial court bear no reasonable resemblance to the harms being redressed, nor to the financial resources of the contemnors. This Court should reverse.

II. ONLY ONGOING CONTEMPT IS AT ISSUE IN THIS APPEAL

There are crucial distinctions between punitive and coercive contempt sanctions. Punitive sanctions are imposed to punish past, completed contempt, for the purpose of upholding the authority of the court. *In re Silva*, 166 Wn.2d 133, 141-42, 206 P.3d 1240 (2009). Coercive sanctions are imposed to coerce obedience of a court’s lawful orders, when the contempt consists of the omission or refusal to perform an act that is within the person’s power to perform. *Id.*

The distinction between punitive and coercive contempt is vital, because to impose punitive sanctions—which are criminal in nature—the contemnor must be afforded numerous, significant, due process rights, such as trial by jury and proof beyond a reasonable doubt. *Id.*; *State v. Jordan*, 146 Wn. App. 395, 402, 190 P.3d 515 (2008). Remedial

sanctions, on the other hand, are civil in nature, and require fewer procedural safeguards. *In re Silva*, 166 Wn.2d at 141-42. There is no dispute that the only sanctions the court could impose in the proceedings below are remedial sanctions.

Consequently, the only specifications of contempt at issue here are allegations of ongoing contempt. For a remedial sanction to be valid, the contemnor must have the present ability to comply with the underlying order, i.e., to purge his or her contempt. *Britannia Holdings Ltd. v Greer*, 127 Wn. App. 926, 933-34, 113 P.3d 1041 (2005). It is not possible to purge completed contempt. *State v. John*, 69 Wn. App. 615, 618-19, 849 P.2d 1268 (1993).

In the first contempt order, entered June 13, 2008 (Contempt I), the only ongoing contempt found by the court was Diaz's and Nguyen's failure to disclose all computers that contained or once contained Le firm data. (CP 514-15, 518) Subsequently, Diaz and Nguyen filed declarations identifying every piece of computer equipment they'd used since they downloaded the Le firm files (CP 757-71; 773-79; 781-85). They also turned over all of the computers and thumb drives in their possession to the Le's computer forensics expert, Michael Andrews. (CP 628)

In the second contempt order, at issue in this appeal (Contempt II), only Specifications 1, 4, 5, 8 and 9 arguably address ongoing contempt. (CP 2524-36) Each of these will be discussed *infra*.

The Les place much emphasis upon completed acts of contempt, many of which occurred before, and were the subject of, Contempt I. As

egregious as some of the completed contempt was, it has little bearing on the instant appeal. Beyond seeking to take advantage of its tendency to cause the Court look upon Diaz and Nguyen with disfavor, the Les primarily cite past contempt in support of their argument that having once committed improprieties, Diaz and Nguyen should be deemed to be continuing to do so. BR at 18, 20-21, 22, 31. It is a well-established tenet of Washington law, however, that past acts cannot be utilized as proof of subsequent action in conformity therewith. *See, e.g.*, ER 404(b); *State v. Everybodytalksabout*, 145 Wn.2d 456, 466-68, 39 P.3d 294 (2002).

III. THE SANCTIONS IMPOSED IN CONTEMPT II CANNOT BE RECONCILED WITH THE HARM THEY PURPORT TO REDRESS

In the seminal case of *United States v. United Mine Workers of America*, the United States Supreme Court held that when imposing coercive contempt sanctions, the trial court “must . . . consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.” 330 U.S. 258, 304, 67 S. Ct. 677, 701 (1947) (emphasis added). Numerous subsequent cases have upheld this requirement. *See, e.g.*, *King v. DSHS*, 110 Wn.2d 793, 805, 756 P.2d 1303 (1988) (In deciding whether a coercive sanction should continue, the trial court should consider the significance of the ends to be achieved and balance the magnitude of the sanction against the significance of the desired end); *Dole Fresh Fruit Co. v. United Banana Co., Inc.*, 821 F.2d

106, 110 (2nd Cir. 1987) (“the court must before imposing [coercive sanctions explicitly consider (1) the character and magnitude of the harm threatened by the continued contumacy; (2) the probable effectiveness of any suggested sanction in bringing about compliance; and (3) the contemnor’s financial resources and the consequent seriousness of the burden of the sanction upon him.”). *General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1380 (9th Cir. 1986); *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510 517-18 (9th Cir. 1992); *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1148 (9th Cir. 1983); *EEOC v. Local 638*, 81 F.3d 1162, 1177 (2nd Cir. 1996); *O’Connor v. Midwest Pipe Fabrications, Inc.*, 972 F.2d 1204, 1211 (10th Cir. 1992).¹

In the instant case, the original harm the Les alleged was caused by Diaz and Nguyen’s possession of Le firm data was (1) that it was being used to attempt to pilfer Le firm clients; (2) that Diaz and Nguyen were using the files to interfere with the settlement of Le firm cases; and (3) that Diaz and Nguyen were using the information to defame the Le firm. (CP 10-14; 171-72) The Preliminary Injunction was entered, in part, to prevent these alleged harms from occurring. (CP 364-65)

It was effective. Since the preliminary injunction was entered in February of 2008, the Les have not established that Diaz or Nguyen have

¹ The Les correctly point out (BR at 39) that only punitive sanctions are strictly confined to the amount of the aggrieved party’s loss. *See, e.g., United Mine Workers*, 330 U.S. at 304. Appellants’ use of the word “coercive” rather than the intended word “punitive” in the sentence beginning on the bottom of page 40 of Brief of Appellants was a mistype.

engaged in any of these prohibited behaviors, nor caused any of the above-listed harms. In its Contempt I order, the trial court specifically found that no such ongoing activities or harm were proven. (CP 523-24) Since the Contempt I hearing, the Les have not introduced any evidence that Diaz and Nguyen are causing the Le firm or anyone else harm by their alleged possession of that data. (CP 2522-35)² The Contempt II order does not contain a single finding that such harm has occurred or is occurring.

Applying the *United Mine Workers* criteria, balancing the magnitude of the sanction that has been imposed (nearly two million dollars, increasing by \$2,000 per day) against the significance of the issue being redressed (no demonstrated harm for several years) results in a radically unbalanced equation. Since entry of the preliminary injunction, the litigation has become so focused upon inscrutable and evolving theories regarding metadata, the question of whether there is actually any remaining harm remaining to be addressed has been completely lost. This, according to the Supreme Court, is improper. *United Mine Workers*, 330 U.S. at 304. There is no rational or legal basis to impose ruinous sanctions upon Diaz and Nguyen when the Les cannot demonstrate any harm.³

² The Les correctly point out that the Le firm data contained confidential client information. However, again, the Le firm has introduced no evidence, since its original motion for preliminary injunction, indicating Diaz or Nguyen are misusing or failing to maintain the confidentiality of any such information. It is permissible for a lawyer to retain copies of files he or she has worked when he or she leaves a firm, even if the client doesn't retain that lawyer. (CP 225-26) The fact that such files necessarily contain client secrets does not, alone, make it unethical for the departing lawyer to retain copies. *Id.*

³ An analogy would be if a plaintiff was ordered, pursuant to a motion by the defense, to submit to a CR 35 Independent Medical Examination to determine if

**IV. THE TRIAL COURT FAILED TO TAKE THE
CONTEMNOR'S RESOURCES INTO ACCOUNT IN IMPOSING
THE CONTEMPT II SANCTIONS.**

The sanctions imposed in the Contempt II order also fail to meet the requirement that they take into account the resources of Diaz and Nguyen. Respondent's only response to this reality is to point out that the order (they drafted) contains a requirement that the sanctions be paid within 10 days, or that Diaz and Nguyen file declarations stating why they cannot do so. (CP 2537) Diaz and Nguyen admittedly did not file *additional* declarations explaining why they could not come up with nearly two million dollars in 10 days. However, they had already filed several declarations stating they could not afford these expenses (CP 532, 770-71), and Diaz testified as to the financial impact of the litigation at the hearing. (6/17 RP 238-39)

It is absurd for The Les to suggest sanctions of this magnitude are reasonably related to the resources of two young attorneys only a few years out of law school, who are struggling to start their own practice. At their previous employment at Le & Associates, Nguyen was paid a salary of \$60,000, and Diaz was paid on straight commission. (CP 6-7) For the last several years, they have been engaged in protracted, uncommonly aggressive, and expensive litigation with the Les. (6/17 RP 238-39)

symptoms in his elbow were related to an auto accident. If the plaintiff subsequently stipulated that he would not pursue any damages related to the elbow symptoms, there would be no rational basis for the trial court to impose per diem sanctions to force the plaintiff to submit to the IME. This would be true even if the plaintiff had previously sought damages for the injury.

The cases contemplate an affirmative duty by the trial court to inquire into the resources of the defendant in order to craft an appropriate sanction. *See, e.g., King*, 110 Wn.2d at 805 (court must, “at regular intervals,” permit contemnor to present new evidence regarding his ability to comply with coercive sanctions); (*Dole Fresh Fruit Co.*, 821 F.2d at 110 (2nd Cir. 1987) (“the court must before imposing [coercive sanctions] explicitly consider . . . the contemnor's financial resources and the consequent seriousness of the burden of the sanction upon him.”) (emphasis added). Here, Diaz testified at the contempt hearing. Counsel for the Les or the court could have questioned Diaz regarding his and Nguyen’s financial resources. They could also have compelled Diaz to produce financial records if the testimony was considered insufficient. Instead, a sanction that would be crippling for almost any litigant was imposed without any inquiry into Diaz and Nguyen’s ability to pay it. The sanctions order should be reversed and remanded to permit the court to engage in the required inquiry.

V. THE INDIVIDUAL SPECIFICATIONS OF CONTEMPT CANNOT BE SUSTAINED

A. SPECIFICATION 4: UNDISCLOSED COMPUTER

The undisclosed computer allegation was the “mother of all specifications of contempt” in this case. (RP 6/18: 15) The only evidence that this specification was being violated was the highly technical opinion testimony of the Le’s hired expert, Michael Andrew. Mr. Andrew opined that metadata demonstrated that a computer existed which had not yet

been disclosed. *See*, BA at 21-30.

At the Contempt II hearing, Mr. Andrew provided two bases to support his opinion that there was an undisclosed computer: (1) several revision 1 documents he found on Diaz’s and Nguyen’s Dell and HP laptops⁴; and (2) certain documents he found on the Dell, HP and thumb drives, which, he opined, must have existed in an unbroken electronic path from the time they were downloaded from the Le firm. (6/16 RP 62-63) The “primary” basis was the revision 1 documents. *Id.*

1. The Les Had the Burden to Demonstrate Non-Compliance.

The Les contend the ability to comply with an order is an affirmative defense. BR at 37. “In other words,” they state, “Lan and Roberto had to prove that they cannot comply with the court’s order to identify the yet-undisclosed computer.” *Id.* What this assertion fails to acknowledge is that before one need consider that question, it must first be established that a “yet-undisclosed computer” exists at all. There could be no violation of the order unless there is a “yet-undisclosed computer.”

Contempt of court is, *inter alia*, “intentional . . . disobedience of any lawful . . . order . . . of the court.” RCW 7.21.010. *In re Dependency of A.K.*, 162 Wn.2d 632, 644, 174 P.3d 11 (2007). Disobedience of an order is an element of the offense. *Id.* It was the Les’ burden, therefore, to

⁴ This was the only theory discussed by Andrew in his first direct examination. (6/15 RP 23-80)

establish that a violation of the order is occurring; i.e., that a computer exists that has not yet been disclosed.

2. Andrew's Opinions Cannot Provide the Basis for a Contempt Finding if They Are Not Supported by Adequate Foundation.

The viability of Andrew's testimony is foundational to whether this specification of contempt is supported by substantial evidence. "[T]he closer the tie between an opinion and an ultimate issue of fact, the stronger the supporting factual basis must be." *State v. Farr-Lenzini*, 93 Wn. App. 453, 460, 970 P.2d 313 (1999). A careful reading of Andrew's testimony reveals that it has no supporting basis whatsoever.

While the Les place great reliance upon Andrew's conclusory statements that an undisclosed computer exists, (BR at 26) an "'opinion has a significance proportioned to the sources that sustain it.' An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process." *Mid-State Fertilizer Co. v. Exchange Nat'l Bank of Chicago*, 877 F.2d 1333, 1339 (7th Cir. 1989) (quoting *Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank*, 253 N.Y. 23, 25, 170 N.E. 479, 483 (1930) (Cardozo, J.)). "[W]hile ER 703 is intended to broaden the bases for expert opinion, there is no value in an opinion that is wholly lacking some factual basis." *Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 102-03, 882 P.2d 793 (1994). "It is well established that conclusory or speculative expert opinions lacking an adequate foundation" are not competent evidence. *Miller v. Likens*, 109

Wn. App. 140, 148, 34 P.3d 835 (2001). In providing a basis for an opinion, “Presumptions may not be pyramided upon presumptions, nor inference upon inference.” *Davidson v. Municipality of Metropolitan Seattle*, 43 Wn. App. 569, 575, 719 P.2d 569 (1986) (quoting *Prentice Packing & Storage Co. v. United Pac. Ins. Co.*, 5 Wn.2d 144, 164, 106 P.2d 314 (1940)).

3. The Trial Court’s Findings Should Be Subjected to Heightened Scrutiny.

The Les correctly cite the substantial deference given to trial courts in deciding factual matters. *Simpson v. Thorslund*, 151 Wn. App. 276, 287, 211 P.3d 469 (2009). Trial courts also are entitled to deference in their evaluation of expert opinions. *Davidson*, 43 Wn. App. at 575. That deference is not unlimited, however. *Id.*

The Le firm emphasizes that the trial court’s findings “are incredibly careful and detailed.” BR at 37. What the Le firm fails to acknowledge is that those detailed findings were written not by Judge Darvis, but by the Le firm’s attorneys. On August 9, 2010, nearly two months after the contempt hearing was held, the Le firm presented 17 pages of findings of fact and conclusions of law. (CP 2478-96) A month later, on September 13, 2010, Judge Darvis signed off on the Les’ proposed findings and conclusions virtually verbatim, changing only some of the paragraph numbering. (CP 2522-2539) Findings that are adopted verbatim “are not the same as findings independently made by the trial judge after impartially and judiciously sifting through the conflicts and

nuances of the trial testimony and exhibits” and are “subjected to heightened scrutiny” by the appellate court. *In re Estate of Grubbs*, 753 So.2d 1043, 1046 (Miss. 2000) (quoting *Rice Researchers, Inc. v. Hiter*, 512 So.2d 1259, 1265 (Miss. 1987)).

In *F.J. Hanshaw Enterprises, Inc. v. Emerald River Dev., Inc.*, the Ninth Circuit noted that a “troublesome aspect” of the contempt power “is that the trial court may act as accuser, fact finder and sentencing judge,” not subject to the normal procedural restrictions of even a civil proceeding. 244 F.3d 1128, 1137 (9th Cir. 2001). Here, the trial court relied upon the Le firm to act as accuser; relied upon the opinions of an expert hired by, and paid by, the Le firm to determine if contempt had occurred; and relied upon the Le firm to draft all of the court’s factual and legal findings. To make matters more difficult, the court had before it a contemnor who had already admitted to past transgressions. While this process was not intrinsically improper, it displays all of the “troublesome” attributes of contempt described by the 9th Circuit.

The case below, moreover, presented unique challenges. Andrew’s testimony was highly technical. BR at 29. It was also exceedingly confusing. *See, e.g.*, 6/15 RP 69-76, 79-80; 6/16 RP 4-5, 60-66. Andrew often resorted to circular reasoning. *See, e.g.*, 6/15 RP 73, 76; 6/16 RP 75-76, 77-78; 90-91. He went through no less than nine iterations of theory in his various attempts to explain away the glaring inconsistencies in the data underlying his theory. BA at 21-28. Here was simply an expert who, having advanced a theory, could not—would not—back down. The fact

that he was willing to make unequivocal assertions despite his inability to explain irreconcilable problems with his theory does not turn his bald assertions into substantial evidence.

The trial judge could only do her best to follow Andrew's confusing and evolving narrative from the bench. She did not have the benefit of a transcript. This Court is in a better position than the trial court to closely examine Andrew's testimony to determine whether it was supported by an adequate foundation. *See, Davidson, supra* (Appellate Court examined in detail the factual bases for two experts opinions, and reversed on the basis that one of them lacked adequate foundation).⁵

4. The Revision 1 Theory Lacked any Competent Foundation.

The entire foundation for Andrew's opinion regarding Revision 1 documents is that the metadata values upon which he relies are reliable and act consistently. (6/16 RP 62-63) But Allison Goodman, Diaz and Nguyen's computer expert, identified two values that could not, absent some explanation, be reconciled with the revision 1 value of the documents Andrew identified: the "modified date anomaly" and the "face date anomaly." *See* BA at 21-28. Appellants have meticulously documented how Andrew advanced, in succession, six different theories to

⁵ Diaz and Nguyen wish to emphasize that they recognize the difficulty Judge Darvis faced in deciding the Les' Contempt II motion. By stating "the trial court became caught up in plaintiffs' vengeful zeal," Appellants meant to convey that the Les' vengeful zeal created a wave that ultimately carried the case to an extreme outcome, which cannot be sustained under the law or the facts.

attempt to explain away the anomalies identified by Goodman; and how each of these theories fell apart under scrutiny. *Id.* Appellants respectfully urge this Court to review Andrew’s testimony with an equally critical eye.

While the Les bemoan the fact that Appellants “carry on” about these anomalies (BR at 29), Andrew himself admitted the data identified by he and Goodman “contradict each other. . . [W]e have to reconcile those somehow, they cannot both be absolutely true.” (6/16 RP 94) (emphasis added) A perhaps even more telling indication of the significance of the anomalies is Andrew’s tortuous, nine-iteration, six-theory attempt to explain them away.⁶

Attempting to rehabilitate Andrew’s opinions, The Les first assert that Goodman did not provide any forensic evidence that the process of writing Revision 1 metadata was failing on Diaz and Nguyen’s computers. BR at 28. Goodman, however, identified major inconsistencies in the values Andrew was relying upon. It is unclear why the Les do not consider this “forensic evidence.” In any event, it was the Le Firm’s burden to demonstrate the existence of the undisclosed computer, not the other way around. *See discussion supra* § IV.A.1.

a. The Modified Date Anomaly.

The Le firm first latches onto one of the several abandoned theories Andrew advanced to explain the modified date anomaly: that the

⁶ *See* Shakespeare, Hamlet, Act 3, scene 2, lines 222-30.

documents were converted into a PDF format, which purportedly changed the last modified date, but not the revision number. BR 29-30. The firm's attempt to cherry pick what it perceives to be the most palatable of Andrew's many explanations is unavailing. Although Andrew, in keeping with his behavior throughout the litigation, was unwilling to simply admit that this opinion was not true, he did admit it would not occur on his own computer (6/15 RP 122); and that "in most circumstances" it would not hold true. *Id.* at 123 (emphasis added).

More importantly, however, Andrews himself abandoned this theory. He instead attempted to advance a series of alternate theories in succession: First, that copying the file to a new location changes the modified date but doesn't change the revision number (CP 888-89; RP 6/15: 126-27) (He later did admit this simply wasn't true) (RP 126-27). Second, that the "modular design" of .docx documents permits the modified date to be changed without changing the revision 1 value (RP 6/15: 45-49) (This doesn't work for .doc documents; one of the revision 1 documents he identifies is a .doc document) (RP 6/15: 62-63) (BA at 24-25). Third, there is a "symbolic relationship" between certain files that causes the modified date of one of them to change without affecting the revision 1 value (RP 6/15: 69-80) (He immediately abandoned this theory) (RP 6/15: 69-71, 74-76). Fourth, he stated the modified date anomaly is simply a "mystery" (RP 6/16: 74-76) (He quickly recanted this statement, after a break in the hearing) (RP 6/16: 88). And finally, Andrews returned to his modular design theory (RP 6/16: 88) (Again, it doesn't work).

b. The Face Date Anomaly.

A close reading of the transcript strongly suggests Andrew was not even aware of the face date anomaly until he was cross examined on his first day of testimony. (6/15 RP 135-49) When first confronted with it, he agreed “a hundred percent” that it was “contrary to the revision one statements [he] made.” *Id.* at 138. Andrew admitted at that moment that he “really [had] no explanation as to how this happened, [he] really cannot say how it happened”. *Id.* at 143. Although he claims it was “of great interest” to him, he does not mention it in any of the numerous, detailed pre-hearing reports discussing his theories. (6/15 RP 149)

Andrew did attempt to recover. On the second day of testimony, on redirect, he asserted “The only real possibility” to explain the face date anomaly is that Roberto deliberately set back the clock on his computer when he transferred the documents containing the face date anomaly. (RP 6/16: 57-59) (emphasis added) Only when faced with the facial absurdity of this explanation (each document had a greatly different time gap) did Andrew, on the last day of testimony, come up with the dying battery theory. (RP 6/17: 199-204, 208, 211-13)

The only legitimate response to the Les and Andrew’s attempt to rely upon the dying battery theory is that it simply does not, under any stretch of the law, meet the minimum standards for opinion evidence. Andrew came up with this “anecdotal information” by running a “very quick Google search” while listening to Goodman’s testimony. (RP 6/17: 212-13) He based the theory on the first paragraph of one of the web sites

he found. *Id.* He didn't actually read the articles that came up in the search. *Id.* This, like his preceding explanations, was a new theory, never previously discussed in any report, deposition or testimony. *Id.* He admitted it didn't even apply to one of the four revision 1 documents at issue (6/17 RP 208) Finally, Andrew's dying battery theory was thoroughly discredited by an expert declaration submitted in support of Diaz and Nguyen's motion for reconsideration. (CP 3348 - 3353)

The Les also attempt to prop up Andrew's abandoned hypothesis that Diaz deliberately set back the clock on his computer when he uploaded the face-date-anomaly revision 1 documents. BR at 31. Unwilling to pass on a cheap shot, the Les assert the substantial differences in the time gaps between each document's creation date and face dates "simply proves that Lan and Roberto were ignorant of the easiest way to falsify data." *Id.* The Les, however, are unable to supply even a rational nefarious motive for Diaz to have done this. Assuming for the sake of argument the absurd proposition that Diaz intuited the possibility that a computer forensics expert might someday identify the revision 1 metadata in these documents and use that information to suggest Diaz was secreting an undisclosed computer, neither the Les nor Andrew ever attempted to explain how randomly and inconsistently backdating the date setting on his computer each time he downloaded one of the documents could possibly throw the forensics expert off the trail. Simply exclaiming "he did it before!" supplies nothing to the analysis but a thinly veiled attempt to bait this Court into damning Diaz out of passion.

In any event, it is disingenuous for The Les to attempt to rely upon this particular iteration of Andrew's ever-evolving theories when Andrew himself abandoned it. Less than 24 hours after testifying backdating was "the only real possibility" for explaining the face date anomaly (6/16 RP 57-59), Andrew testified, on the last day of the hearing, that it was "a likelihood" that his dying battery theory "is what is occurring based on all the evidence." (6/17 RP 200) If the Les are to invoke the power of contempt to impose millions of dollars in sanctions upon Diaz and Nguyen, it seems reasonable to require that they choose a rational theory to justify those sanctions and stick with it.

5. Andrew Admitted on Cross Examination the "Unbroken Electronic Path" Documents He Identified in His October 23, 2009 Report Did Not Demonstrate the Existence of an Undisclosed Computer.

The Les also attempt to rehabilitate Andrew by discussing opinions he gave in a written report drafted eight months before the contempt hearing occurred. BR 23-25. In that report, Andrew identified several documents on Diaz and Nguyen's computers which, he claimed, existed in an "unbroken electronic path" from the time they were originally downloaded from the Le firm's database. These opinions were not mentioned in the detailed findings of fact and conclusions of law of the Contempt II order. (2528-30) This is most likely because Andrew was forced to admit at the hearing that he could not state on a more probable than not basis that any of the documents he identified in his report actually demonstrated the existence of an undisclosed computer:

- The Ha Vo Folder (CP 634)

Q. I'm simply asking you whether or not you can state, on a more probable than not basis, that the Havo (sic) document is evidence of an undisclosed computer.

A. No, I can't.

(RP 6/15: 171); *See also* (6/16 RP 21-23)

- The Norris Wong List of Primary Witnesses (CP 634)

Andrew admitted he could not tell on a more probable than not basis whether this document had been saved in an unbroken electronic path, or whether it was retrieved from Diaz's email and re-opened. (RP 6/15 177)

- The Spreadsheet XLS (CP 634)

Q. . . . you cannot opine, on a more probable than not basis, that that document is evidence of an undisclosed laptop, desktop, server, or thumb drive, can you?

A. No, I cannot.

(RP 6/15 178)

- The November 29, 2007 PDF (CP 637)

Q. . . . Are you able to tell Judge Darvas, under penalty of perjury, that the November 29, 2007 document, on a more probable than not basis, is evidence of an undisclosed computer?

A. I cannot say that on a more probable than not basis.

(6/16 RP 15-16)

- The Three Additional Documents Listed in Andrew's Report (CP 637)

Q. So you really cannot, you can't testify to Judge Darvas, under penalty of perjury, that those documents are evidence on a more probable than not basis of an undisclosed

computer . . . ?

A. At this point in time, no, I cannot.

(6/16 RP 16)

- The Ty Banh Fee Agreement (CP 636)

Q. So now I'm going to ask you again. Because you do not know when the PDF was printed out, and it could have been done at any time, you cannot tell Judge Darvis, under penalty of perjury, on a more probable than not basis, that the fee agreement Ty Bohn document is evidence of an unbroken electronic path from October 23 to the date it was placed on the Dell laptop, can you?

A. No, I cannot.

(6/16 RP 20)

B. SPECIFICATION 5: CONTINUED POSSESSION OF E-FILES

The Les' true motivation for their relentless pursuit of contempt sanctions against Diaz and Nguyen begins to come into focus in their discussion of Specification 5. The Les state that Specification 5 holds Diaz and Nguyen in contempt for continuing to possess Le firm files on the computers and thumb drives they turned over to Andrew for analysis. BR at 32-33. What the Les do not explain is why Andrew did not destroy those files. The Preliminary Injunction provides that "The IT professional selected by the [Le firm] shall destroy the Le Firm client database on any and all such computers of [Diaz and Nguyen], permanently removing any trace of such computer files" (CP 362) (emphasis added)

Rather than destroy the allegedly offensive files as they were entitled (commanded) to do, the Les turned the computers back over to

Diaz and Nguyen. The Les then brought contempt charges against Diaz and Nguyen for continuing to possess files the Les had a right to delete.

The Les' position on Specification 5 clearly demonstrates one thing: they are not genuinely interested in finding and deleting Le firm e-files in Diaz and Nguyen's possession. They are interested, rather, in pursuing Diaz and Nguyen for contempt sanctions.

C. SPECIFICATION 1: FAILURE TO IDENTIFY COMPUTERS USED TO MAKE USB2.

The Les contend Specification 1 was supported by "forensic evidence." BR at 20, 22. However, the only "forensic evidence" the Les identify is the unsupported assertion that the Dell drive Diaz claimed he used to create USB2 was not big enough to accomplish the transfer. BR 21. The Les' professed reliance on this "forensic evidence" is sophistry.

Diaz testified that he used the Dell laptop he purchased in April 2007 to create USB 2. (RP 6/17 226-27) (CP 3177-79) (Deposition of Roberto Diaz, at 36:23-25, 37:5-7, 15-25, 38:1-12, 24-25, 39:1-20, 41:15-18). He also testified he destroyed the hard drive in that Dell ("Dell Drive 1") and replaced it with the hard drive he eventually turned over to Andrews for analysis ("Dell Drive 2"). (CP 3179-80) (Diaz Deposition at 42:7-14, 44:25, 45:1-8) This occurred in April 2008. *Id.* It is true the Dell hard drive Andrews examined (Dell Drive 2)—which was 80 gigabytes—would not have been large enough to transfer the entire Le firm database, which was 86 gigabytes. (CP 3344) However, no one ever suggested, at the hearing or anywhere else, that Dell Drive 2 was used to create USB2.

The Dell's original hard drive (Dell Drive 1) was 160 gigabytes: more than large enough to accommodate any transfer of the Le firm data. (CP 3429) Quite simply, there is not now, and never has been, any "forensic evidence" that the Dell Drive 1 was too small to be used to create USB2. Worse, the Les were aware at the time they inserted this unsupported finding into their proposed findings that it was not true. (CP 2911, 3429)

The Les' also contend Diaz's "inconsistent" testimony regarding Dell Drive 1 proves he has not identified the drive used to create USB2. BR at 20-21. But Diaz acknowledged as early as June 11, 2008 that the Dell Drive 1 may have contained "ghost" copies of Le firm files after he used it to effect the transfer of files from USB1 to USB2. (CP 766-67)

The Les next argue the negative evidentiary presumption created by Diaz's spoliation of Drive 1 is sufficient proof that he failed to disclose the device used to create USB2. BR at 21. But "[p]resumptions are the 'bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts.' The sole purpose of a presumption is to establish which party has the burden of going forward with evidence on an issue.'" *Taufen v. Estate of Kirpes*, 155 Wn. App. 598, 604, 230 P.3d 199 (2010) (quoting *In re Indian Trail Trunk Sewer*, 35 Wn. App. 840, 843, 670 P.2d 675 (1983)). "[T]he presumption arising from the fact of spoliation of evidence does not relieve the other party from introducing evidence tending affirmatively to prove his case so far as he has the burden." *Walker v. Herke*, 20 Wn.2d 239, 250, 147 P.2d 255 (1944) (quoting *F.R. Patch Mfg. Co. v. Protection Lodge*, 60 A. 74, 84 (1903)). When a presumption is met with contrary

evidence, it ceases to exist and cannot be further considered by the court. *Taufen*, 155 Wn. App. at 602. Here, Diaz testified under oath he used his Dell laptop, which at the time contained Dell Drive 1, to create USB2. (RP 6/17 226-27) The Les produced no competent evidence that the Dell Drive 1 was not the drive Diaz used to create USB2. They cannot rely upon the spoliation presumption alone to establish contempt. *Id.*

Finally, the Les incorrectly assert Diaz and Nguyen “never explained what happened to files that they transferred off of USB2. They had to go somewhere.” BR at 21.⁷ This is simply inaccurate. Diaz explained that he used his Dell laptop, with Dell Drive 1, to create USB2 and then later destroyed Dell Drive 1. Even if files were transferred off of USB2 and not returned to it, they would have been on Dell Drive 1.

D. SPECIFICATION 8: CONTINUED POSSESSION OF HARD COPY FILES.

Prior to Contempt II, the last time the Les raised the issue of Diaz and Nguyen’s possession of hard copy (paper) files was the preliminary injunction, entered February 2008. The Les did not raise any concerns about paper files in their Contempt I motion, and the trial court made no

⁷ It is, once again, disingenuous of the Les to take this position here. Diaz and Nguyen have always denied there were 165 files transferred off of USB2 that were not returned to it. They attempted to make an offer of proof from their expert Goodman that would have challenged Andrew’s opinion that this occurred. (6/16 RP: 130-38) The Les convinced the trial court to exclude this evidence on the basis that the Contempt I order already contained a finding that the files had been moved. *Id.* at 133-34. In the course of arguing the evidence should be excluded, the Les’ counsel downplayed the significance of it, stating, “There has never been any allegation of contempt concerning those 165 files.” *Id.* (emphasis added) That they now rely upon the 165 files to prove contempt is yet another opportunistic change of face by the Les.

findings concerning them. (CP 513-28) Immediately following the Contempt I ruling, Diaz and Nguyen openly disclosed that they possessed paper files for their own clients who had formerly been Le firm clients. (CP 766, 769, 770) Nevertheless, the hard copy files were not mentioned in the trial court's January 27, 2009 order on the Les' contempt motion. (CP 726-32) Indeed, the Les did not raise the issue of Diaz and Nguyen's possession of paper files until they filed their second contempt motion on February 25, 2010—over two years after the preliminary injunction was entered. (CP 596)

The Les' position might be more compelling if Diaz and Nguyen's possession of the paper files was causing anyone harm. But it is not. After two years, the Les could not, and did not, demonstrate that they or anyone else have suffered any harm as a result of Diaz and Nguyen's possession of paper files. Without harm there is no legitimate basis for imposing the crippling sanctions handed down here. *See* discussion at § II *supra*.

In fact, the only harm that appears possible in this situation would be if any of Diaz and Nguyen's clients were to have their files taken away from their chosen counsel. Diaz and Nguyen requested that the trial court provide them guidance as to how to proceed with respect to the paper files. If the court determined there was some harm to be redressed by ordering disgorgement, it could have done so; along with a coercive fine that was more reasonable in light of the complete lack of demonstrated harm.

E. SPECIFICATION 9: FAILURE TO PAY IT BILLS

Finally, the Les contend Diaz and Nguyen should be fined millions for their failure to pay the \$26,000 invoice of Michael Andrew. Again, there is no harm possible under these facts that could justify sanctions of that magnitude. The Les forthrightly admit Andrew's bill has already been paid by a disbursement from the *Powers* registry. BR at 35. The *Powers* registry funds—attorney fees earned by Diaz and Nguyen when they won a large verdict for their client Powers at trial—were ordered held over by Judge Inveen “pending a determination of the total amount of [Diaz and Nguyen’s] financial obligations arising out of . . . their contempt of court.” (CP 528) While the Les may assert they have an attorneys lien against these funds (presumably based upon their purported repudiation of the Separation Agreement), there is no basis in the record to assume they will ultimately prevail on that claim. If they the Les do not prevail, the *Powers* registry funds will have been Diaz and Nguyen’s all along and will have already satisfied their obligation to pay Andrew’s invoice.

The Les suggest no rational basis for imposing massive fines on Diaz and Nguyen for failure to pay a bill that may well be determined to have already been satisfied. Costs such as expert fees are normally taxed at the end of a lawsuit. RCW 4.84.010. The only harm a delay in payment could cause would be the opportunity cost of the money. This could be remedied by imposing statutory interest, if the Les prevail on their lien claim. If the Les do not prevail, they will have lost nothing.

VI. CONCLUSION

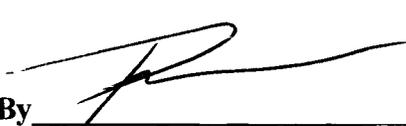
It would be easy to throw the book at Diaz and Nguyen in retribution for their actions preceding Contempt I. But to do so would be an abrogation of the lofty aspirations of a court of justice:

“Every precaution should be taken that [contempt] orders issue . . . , only after legal grounds are shown and only when it appears that obedience is within the power of the party being coerced by the order.” . . . No matter how reprehensible the conduct is it does not “warrant issuance of an order which creates a duty impossible of performance, so that punishment can follow.”

Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770, 781 (9th Cir. 1983) (quoting *Maggio v. Zeitz*, 333 U.S. 56, 69, 68 S.Ct. 401, 408, 92 L.Ed. 476 (1948)) (emphasis added). Appellants do not ask this Court to overlook or excuse their past behavior. They do respectfully seek a hearing not overly influenced by the passion the Les seek to arouse. No reasonable application of the law of contempt to these facts can justify the sanctions imposed below. Diaz and Nguyen respectfully request that this court reverse and remand.

DATED this 28th day of November, 2011

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