

No. 70063-4-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION I

FORTUNE OIL COMPANY, INC, THE FORTUNE COMPANY, INC., ALBERT D.
ROSELLINI, JR., VICKI ROSELLINI, husband and wife,

Appellants,

v.

JOON KIM, an individual, P.D.Q. INCORPORATED, dba P.D.Q. Deli Mart,
Respondents.

RESPONDENTS' BRIEF

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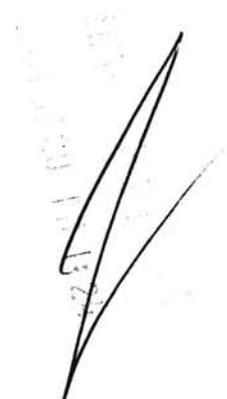
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I. INTRODUCTION

Respondents Joon Kim (hereafter "Kim") and his company P.D.Q. Incorporated ("PDQ.") are the assignee of the gasoline supply contract entered by and between Fortune Oil Company, Inc. ("Fortune Oil") and Sung Bok No and Joon Deuk No ("No"). The gasoline supply contract required Kim and PDQ to purchase gasoline exclusively from Shell, and Fortune Oil acted as the intermediary dealer ("jobber") that receives a portion of the gasoline sales as commission or fee from PDQ from its retail credit card sales to gasoline purchasers.

All credit card transactions of PDQ were required to be processed by Shell, and Shell would then credit the balance to Fortune Oil after deducting the transaction fees. The balance of the funds received from Shell by Fortune Oil was kept at a separate trust account for the benefit of retail gas station owners including Kim and PDQ. The gasoline supply contract required Fortune Oil to pay any residue amount left after the deductions to Kim and PDQ.

On October 7, 2006, the gasoline supply contract expired, and by the end of October 9, 2006, Fortune Oil owed \$32,076.20 to Kim and PDQ for the credit card transactions that Fortune Oil had received from Shell. Despite the obligation, Fortune Oil failed to

pay the amount, claiming that it was defunct and without assets.

When Fortune Oil failed to pay the amount, Kim and PDQ brought a lawsuit against Fortune Oil for breach of contract, breach of fiduciary duty, fraud, unjust enrichment, conversion, and consumer protection.

On January 31, 2006, Fortune Oil confessed to judgment in the amount of \$51,672.78, in favor of Kim and PDQ for Fortune Oil's failure to pay the credit card sale amount, along with interest, attorney's fees, and costs, based on the complaint made by Kim and PDQ. As with Kim and PDQ, Fortune Oil owed money to several other retail owners in Washington, for its failure to pay the credit card sales, which resulted in several judgments against Fortune Oil.

During the subsequent supplemental proceedings against Fortune Oil, Kim and PDQ discovered that Appellants Albert Rosellini, Jr. ("Rosellini") and his wife, Vicki Rosellini, the principal owners of Fortune Oil, manifestly abused the corporate formalities and independency of Fortune Oil by: 1) improperly shifting and transferring significant funds, assets, and trust account of Fortune Oil to themselves and the related companies, and without explanation, record, and payback; 2) granting significant credit terms to a related company without appropriate corporate requirements and recourses, which ultimately caused collapse of Fortune Oil; 3)

failing to pay back the loans from Fortune Oil to themselves and to their related companies; 4) failing to account for the sale proceeds of valuable gasoline supply contracts that Fortune Oil had with other gas station owners, whose contracts were sold to third party jobbers for significant sums; 5) failing to keep and maintain corporate and financial records needed to determine the extent of obligations the Rosellinis and their related companies had with Fortune Oil; and 6) improperly using corporate form to commingle the personal revenues with Fortune Oil's revenues to receive tax benefits.

The bench trial was held on December 27, 30, 2012, and the only person testified for the trial was Kim. The trial court found that Kim and PDQ were entitled to pierce the corporate veil of Fortune Oil, and that Rosellini and Vicki Rosellini are personally liable for the judgment of Fortune Oil to Kim and PDQ, together with attorney's fees and costs, based on the consumer protection statutes.

Kim and PDQ are seeking affirmation of the lower court rulings and attorney's fees and costs on appeal.

II. STATEMENT OF THE CASE

A. Kim and PDQ's Ownership of PDQ Deli, a Gas Station and Convenient Store

Kim is the principal owner of PDQ, dba PDQ Deli, a

convenient store located in Tacoma, Washington. Verbatim Report of Proceeding (“RP”), pgs. 43-5; Trial Exhibit (“Ex.”) 1. PDQ Deli is a convenient store which also sells gasoline to retail customers. RP 43-5; Ex. 3. Kim and PDQ purchased PDQ Deli from the No in July 2001. RP 43, LL 9-12; Ex. 2.

At the time of purchase of PDQ Deli, the No had a gasoline supply contract with Fortune Oil. Ex.1; RP 43-4. The gasoline supply contract was subsequently assigned by No to Kim and PDQ at the closing of the sale of PDQ Deli to Kim on July 3, 2001. RP 44-5; Ex. 2. Fortune Oil then continued the fuel supply contract by providing gasoline to Kim and PDQ. Ex. 3, 5, 6.

B. Rosellini’s Ownership of Fortune Oil Co., Inc., and Its Business of Supplying Gasoline to Retail Gas Stations

Fortune Oil was incorporated in 1995, and the purpose of Fortune Oil was to provide and distribute petroleum products to retail gasoline stations. Ex. 7, p. 1, LL 27-9. At the height of its business, Fortune Oil had over 40 gas station accounts. CP 63, LL 13-30; CP 145, LL 4-5.

Rosellini and Vicki Rosellini (the “Rosellinis”) are the sole shareholders and owners of Fortune Oil. CP 60, LL 13-23. Rosellini is also listed as the President, Secretary, Treasurer and the

Chairman of the Board of Directors of Fortune Oil. Ex. 12, 17, and 26. Vicki Rosellini is wife of Rosellini. CP 61, LL 1-2. Vicki Rosellini is listed as the Vice President of Fortune Oil. Ex. 12.

Fortune Oil used one employee and an independent contractor to market its jobber business to public. CP 79-80. Fortune Oil used the independent contractor, Bailey Cho, to market its products and services to Korean-American community. CP 80, LL 9-24. Bailey Cho was allowed to advertise for Fortune Oil. CP 91, LL 5-6.

Fortune Oil's credit terms to its gas station owners required that payment was due at the delivery of gasoline, but in practice, a gas station owner is required to pay for the gasoline within two to three days after the delivery. CP 64-5, LL 17-7. After the delivery, Fortune Oil would automatically withdraw the amount from the gas station owner's bank account. CP 65, LL 8-19.

Fortune Oil maintained two bank accounts - the general account and the gas account ("Gas Account"), and the Gas Account was used exclusively for the fuel transactions and solely for the benefit of the gas station owners:

Q (*by Kim's attorney*). The money you kept for these retailers, were they put into certain accounts, separate accounts? How was it managed?

A (by Rosellini). Separate account. We had two accounts. We had an operating account where we'd pay monthly bills out of, and then we had -- we called it the gas account, which was only for fuel transactions. And it was all electronic; no checks.

Q. Okay. So you have two accounts for the Fortune Oil. One's the operating account where it would pay out general expenses like wages or rents or whatnot. Then you have gas account, where you would have account with individual owners of these gas station to run up the amount of gas that owner may have purchased and these credit card transaction that may have been generated by these owners and which would be credit towards their account.

A. Yes.

CP 66-7 (underline added).

C. Rosellini's Ownership of Fortune Company, Inc., a Real Estate Brokerage Company

Rosellini is the president of Fortune Company, Inc.

("Fortune Co."), a real estate brokerage firm started by Rosellini in 1983, which is still in existence. CP 54, LL 11-12. Rosellini is a real estate broker since 1983. CP 54-5, LL 23-7. Fortune Co. is 100% owned by Rosellini. CP 55, LL 8-17. There is no director for Fortune Co. CP 55, LL 18-19.

D. Rosellini's Ownership of Ferndale Truck Stop, LLC

Ferndale Truck Stop, LLC, dba Ferndale Truck Stop, formed on November 2, 2004, was owned and managed by Rosellini. Ex. 25; CP 116, LL 11-18. Rosellini purchased Ferndale Truck Stop, the

business, in November 2005 for \$1.7 million and sold it in September 2006 for \$1.7 million. CP 119-20, LL 9-6. Rosellini made a down payment of \$300,000 for the purchase of Ferndale Truck Stop and got the same amount back when he sold it. Id. Ferndale Truck Stop, LLC, has no asset currently. CP 120, LL 11-13.

E. Fortune Oil Processed PDQ's Credit Card Transactions and Maintained the Gas Account for Benefit of Kim and PDQ

Fortune Oil supplied gasoline to Kim and PDQ after Kim's purchase of PDQ in 2001 to September 2006. RP 46, LL 3-8; Ex. 3. All credit card purchases of gasoline by customers at PDQ were handled by Shell, and the credit card purchase amounts are then credited to Fortune Oil on behalf of Kim and other gas station owners. RP 47-8; CP 65-6. Fortune Oil would then credit the credit card sales amounts (less handling fees) to Kim. Id. The credit card sales generated by Kim are then deducted from the amount owed by Kim to Fortune Oil for any gasoline it had previously delivered to PDQ, together with Fortune Oil's fees and commissions. Id. Any amount in excess of the invoice for the gasoline delivered to PDQ is then required to be paid by Fortune Oil to Kim, based on the gasoline supply contract. Ex. 1, Para. 8. The funds in the Gas Account belonged to Kim and other gas station owners, and the Gas

Account was segregated from other general funds of Fortune Oil, as Fortune Oil was temporarily holding the funds for the benefit of PDQ and the other gas station owners. CP 66-7, LL 11-27; CP 68, LL 1-4. Rosellini admits positively to the deposition question that the funds in the Gas Account belong to the gas stations owners : “[T]hese credit card transaction we talk about, your company was holding that for the benefit of these individual owners; isn't that true?” CP 68, LL 1-4.

F. Fortune Oil Failed to Pay the Balance of Credit Card Sales to Kim and PDQ in October 2006

On October 6, 2006, the gasoline supply agreement between Fortune Oil and Kim and PDQ became contractually expired. Ex. 1, Para. 3.1. By October 9, 2006, Kim and PDQ had a positive balance of \$32,076.20 with Fortune Oil arising from the credit card sales. Ex. 4; RP 88-90. Fortune Oil's last delivery of gasoline to PDQ was on September 25, 2006, but it continued to keep the credit card sale proceeds until October 9, 2006. RP 88, LL 7-17; Ex. 3. Fortune Oil thereafter ceased its gasoline wholesale and jobber business in December 2006. CP 73, LL 19-20. Despite numerous demands from Kim, Fortune Oil failed to pay the credit card sales balance to Kim. RP 89-90; Ex. 6, Para. 4.2. Fortune Oil

similarly refused to pay other gas station owners for their credit card sales, resulting in judgments against Fortune Oil. Ex. 21, 22; CP 79, LL 11-5; CP 134-6.

G. Kim and PDQ's Lawsuit In King County District Court Resulted in a Confession of Judgment by Fortune Oil

As a result of Fortune Oil's failure to pay the amount, Kim brought a lawsuit against Fortune Oil and Rosellini in King County District Court, in February 2010. Ex. 5. The complaint alleges that Fortune Oil and Rosellini breached the gasoline supply contract, breached fiduciary duty, committed fraud, committed conversion, was unjustly enriched, and breached the consumer protection statutes. Ex. 5. Fortune Oil and Rosellini admit to not paying the credit card sales and breach of the agreement. Ex 5, Para. 4.2; Ex. 6, Para. 4.2. As a result of the lawsuit, Kim and PDQ received a confession of judgment from Fortune Oil in King County District Court in the amount of \$51,672.78, on January 31, 2011. Ex. 8, 9. Fortune Oil, authorized attorney's fees and costs to Kim. Ex. 8, 9.

Kim and PDQ filed the judgment from King County District Court with King County Superior Court on February 22, 2011. CP 455-7. Supplemental proceedings followed. CP 458-75. Fortune Oil, according Rosellini, has no asset to satisfy Kim's judgment. CP

93, LL 15-8. The documents received from Fortune Oil and testimonies by Rosellini during the supplemental proceedings resulted in the present lawsuit against the Rosellinis personally.

H. Ownership and Management of Fortune Oil's Assets and the Rosellinis' Commingling of the Gas Account, Fortune Oil's, Fortune Co.'s, and Ferndale Truck Stop's Assets

From the beginning, Rosellini considered Fortune Oil, Fortune Co. and Ferndale Truck Stop, LLC, as his personal companies and failed to keep records of the financial transactions between himself and his companies. Albert Rosellini made numerous draws and deposits from the Gas Account, and other accounts of Fortune Oil, Fortune Co., and Ferndale Truck Stop from 2002 to 2008, in the amounts in excess of \$1,000,000. Ex. 23. Counting significant transactions only, over \$955,806 in transfers, payments, or debits were made from the Gas Account of Fortune Oil to the Rosellinis, Fortune Oil's general accounts, Fortune Co., Ferndale Truck Stop, and Fortune Oil's line of credit.¹ Appendix 1. The payments to the Rosellinis alone exceed \$307,000. Id. The

¹ Fortune Oil and Rosellini did not provide the bank and accounting statements for Fortune Oil's general accounts in Wells Fargo, or Fortune Oil's accounts in Bank of America during discovery. See CP 205-216, in which Fortune and Rosellini failed to disclose the financial documents. The only document provided to Kim and PDQ was the computerized Gas Account ledger from Quick Book, which is Ex. 23. PDQ's account with Fortune Oil did not appear at all on the Quick Book ledger of Wells Fargo Gas Account.

payments to the Wells Fargo credit line exceed over \$464,000. *Id.* Rosellini admits that Fortune Oil owed about \$350,000 to the Wells Fargo line of credit. CP 75, LL 7-9.

To be fair, there are also numerous deposits and transfers made to the Gas Account by Rosellini from his personal funds, the line of credit, Fortune Co., and from the general accounts. Ex. 23. It is impossible to discern the exact amount owed by the Rosellinis to the Gas Account from the Quick Books ledger provided by Rosellini. Ex. 23.

Although Rosellini claims that there was no money to pay PDQ and Kim at the end of 2006, significant sums from the Gas Account were transferred to various accounts belonging to Fortune Oil and Fortune Co., and funds in the Gas Account were used to pay for the line of credit belonging to Fortune Oil. *Id.*

Despite these and other financial transactions that occurred inside and outside of the Gas Account, there was no record of any kind, whether for the corporations or for his own, of the numerous draws and deposits. The Rosellinis freely commingled their bank accounts with Fortune Oil and Fortune Co.'s bank accounts to the degree that moneys were deposited and withdrawn from the company accounts (including from the Gas Account) and the

personal accounts without any record whatsoever:

Q(by Kim's attorney). There were, like, numerous transactions, again going back what we discussed, between the Fortune Oil, the Fortune Real Estate, and you personally; isn't that true?

A(by Rosellini). Yes.

Q. Was there any recordkeeping for those financial transactions?

A. No.

Q. Who would decide -- for example, when you were drawing this money from Fortune Oil, who would decide to draw that money?

A. I would.

Q. And you would draw and you would prepare the check and sign on to you; is that correct?

A. Yes.

CP 83-84, LL 14-2 (underlines added). Once Rosellini receives these checks from Fortune Oil, he would use them for personal benefits:

Q. Were those used for your personal expenses? Once those checks were written to you, let's just say, from Fortune Oil, let's say \$20,000 made out to Mr. Albert Rosellini, Jr., what would you do with that money?

A. Yes. I'd deposit it in our account, personal account.

...

Q. What would it be used for?

A. Paying mortgage payment, paying food and groceries, paying tuition, basic expenses.

CP 84, LL 3-12.

On the 2005 federal tax returns for Fortune Oil and on the Gas Account ledger, the transfers from Fortune Oil to the Rosellinis are listed as "Shareholder loans" and "Advance". Ex. 16, p. 4, L 7;

Ex. 23: p. 7, 13, 25, 27, and 29.

The federal tax returns of Fortune Oil show that in the beginning of 2005 the Rosellinis owed \$552,000 to Fortune Oil in the form as the loans to shareholders, and by the end of the year, the amount decreased to zero. Ex. 16, p. 4 (Schedule L), L 7. When asked if he had actually paid back the loans, Rosellini did not know, but claims that a draw from Fortune Oil is not a loan. Rosellini does not know whether the draws of \$552,000 were reported as his personal income:

Q. In the beginning of year 2005, Line No. 7 said there was loans to shareholders in the amount of \$552,000. Do you see that?

A. I do.

Q. And the end of the tax year it went to zero or it was not even filled in. Do you know what that's about?

A. No.

Q. Okay. So do you know how this \$552,000 came about?

A. No.

Q. Okay. Could it be possible that these things that you mention as draw, those were added as loan to shareholders?

A. It's possible.

Q. So wasn't that, in fact, loan to you by the company?

A. No.

Q. Again, and your theory is that draw is not a loan. Is that fair statement?

A. That's not a theory.

Q. Okay. So what's your theory?

A. A draw is not a loan.

Q. Draw is just owner taking the money out?

A. Yeah.

...
Q. But you have no record to support that, right, other than you writing yourself a check?

A. I don't need any other record.

...
Q. Did you file this amount, the draw -- did you ever report that as your income, personal tax return?

A. I don't know. I don't. I don't know --

CP 100-01, LL 8-22 (underlines added); Ex. 16, p. 4 (Schedule L), L 7. For 2005, Fortune Oil had \$622,278 in intercompany receivables, increasing to \$655,305 at the end. Ex. 16, p. 4 (Schedule L), L 6; p. 16, Statement to Schedule L.

The sources of deposits to Fortune Oil, including to the Gas Accounts came from the Rosellinis and Fortune Co. Through that process, Rosellini intentionally intermingled his personal and Fortune Co.'s assets with that of Fortune Oil:

Q. Was there occasion that you personally put your own money back to the accounts of Fortune Oil?

A. Many times.

Q. Why was that?

A. Fortune Oil needed the cash to operate.

...
Q. Where would you get these moneys from?

A. Over the 10-year period, sometimes Fortune Company made money and could give to Fortune Oil Company, sometimes Fortune Oil made money and could give to Fortune Company.

Q. So it goes back and forth between Fortune Oil and

The Fortune Company and your personal account?

A. Yes.

CP 72-3, LL 10-6 (underlines added).

In 2006, Fortune Oil's intercompany receivable went from \$655,305 in the beginning to \$1,142,208 at the end.² Ex. 17, p. 4 (Schedule L), L 6. On the other hand, the loan from shareholders started as zero and went up to \$190,230. Ex. 17, p. 4 (Schedule L), L 19. When asked to explain this loan, Rosellini did not know, but claims that he was just depositing his personal funds to pay for creditors of Fortune Oil as his own personal creditors as Fortune Oil was winding down:

Q. Okay. If you look at the same exhibit, Exhibit 1{Ex. 17}, go to the fourth page, beginning of the year, the Line 19 says "Loans from shareholders." There were no loans. Suddenly at the end of the year 2006, there's loan in the amount of \$190,230. Can you explain what that is?

A. I don't know.

Q. Was there loan by you to Fortune Oil?

...

A. And the question is did I loan that amount to the company. Possibly.

Q. Do you --

A. I told you in December of 2006 I put money in to pay all this stuff. He may have booked something as a loan. But all I knew is, I'm paying off these debts.

Q. So you considered the company as part of you; isn't

² Even though the tax returns refer to "Line 6 Stat" for explanation, the documents provided by Fortune Oil did not contain the Line 6 Statement or explanation. However, because Line 6 in the 2005 returns refers the amount as the intercompany receivables, it is only logical to assume that Line 6 in the 2006 returns refers to Fortune Oil's intercompany receivables.

that true? Whatever the company owed, you would have paid out of your own pocket, and whatever the company make, it would be yours. Is that fair statement?

A. I really don't understand that one.

Q. Well, the company -- you said you drew money out from the company.

A. Yeah.

Q. It's like, you know, your account, so your company owned by you and your wife, no other shareholders.

A. Right.

Q. So whenever there's a need for your house -- you know, household expenses, you would draw it out. You didn't have to ask anybody. You would draw it out. And you would book it as draw or you claim as draw. And if there's a need for the company, you would just put your money in there, into Fortune Oil -- is that fair statement -- out of your own pocket?

MR. BARNARD: I object to the form of the question; compound. You can answer if you can.

A. Yes.

Q. (By Mr. Park) Okay. Thank you. And there's no record showing that you were formally loaning money to your company, the Fortune Oil, Inc.; isn't that true?

A. No.

Ex. 17, p. 4, L19; CP 96-8(underlines and cross-reference to Ex. 17 added).

In 2007, the intercompany receivable of Fortune Oil went from \$1,142,208 from the beginning to zero at the end. Ex. 18, p. 4 (Schedule L), L 6. Even though Rosellini acknowledges that Fortune Co. owed money to Fortune Oil, when asked how this occurred or whether the debts were paid off by Fortune Co., Rosellini and Fortune Oil have no explanation or record:

Q. Okay. And then look at -- go down there. It says, "Other current assets." There's intercompany receivable of 1,142,208. And then -- that's the beginning of tax year, and then end of tax year went to zero. Do you know what that's about?

A. No.

Q. When you say intercompany receivable, how many companies were involved? I mean, looks like there's Fortune Oil. And then again my understanding is there's The Fortune Company, real estate company.

A. Right.

...

Q. Any other company that could have been involved?

A. No.

Q. So it would be between -- when you say intercompany, it would be between Fortune Oil Company and The Fortune Company, which is real estate arm.

A. Yes.

Q. Is that true?

A. Yes.

Q. So do you know, how did it went from 1.14 million to zero?

A. I do not.

Q. Did Fortune, the real estate company, pay up to the Fortune Oil Company?

A. Not that I know of.

...

Q. (By Mr. Park) Did Fortune Company, the real Estate company, owe any money to the Fortune Oil Company?

A. Yes, I think so.

Q. And was this paid in year 2007?

A. Not that I know of.

Q. Can you explain why that it went from 1.1 million, approximately 1.1 million, to 1.4 million to zero in that year?

A. No.

Q. Do you have any records of these transfers or payoff?

A. No.

Q. Is there any memos or minutes of the corporation that would reflect these kind of payoff?

A. No.

CP 105-07 (underlines added).

Neither Rosellini nor Fortune Oil kept any record of disbursements from the Gas Account to Rosellini, Fortune Co., or Ferndale Truck Stop:

Q(by Kim's attorney). Let's look at another one down there. February 11, 2002, Al Rosellini, advance. There was, it appeared this time, payment to you, 80 -- \$8,250.

A (by Rosellini). Right.

...

Q. So again there's no record reflecting -- corporate record reflecting this payment from the company to you?

A. Right.

...

Q. And if I were to look at the other records, I mean, I only showed you one page, but there were similar transactions throughout.

A. Right.

Q. So those were all done without any corporate records or any corporate authorization, formal authorization?

A. Right.

Q. What about between Fortune Oil and Fortune Company? Were they same story?

A. Yes.

Q. So if I were to again look at the continuation of this Exhibit 6 {Ex. 23}, which will go, run through 2006, all these withdrawals or deposit between The Fortune Company and the Fortune Oil there's no record, corporate record, to reflect that, but because you are the owner of both companies, you were transferring money from one company to another. Is that --

A. Right.

CP 128-29; Ex. 23, pgs. 79-81(underlines and cross-reference to

Ex. 23 added).

According to the bylaws of Fortune Oil, the Treasurer is required to keep all financial records:

Section 6. Treasurer. The Treasurer shall have the care and custody and be responsible for all funds and securities of the corporation and shall keep regular books of account in accordance with standard accounting practices...

Ex. 26, Article IV, Section 6 (underline added). Rosellini is the Treasurer for Fortune Oil. Ex. 12. Despite its bylaws, neither Fortune Oil nor Rosellini kept any financial transaction record for the numerous loans (or draws as Rosellini calls them), deposits, intercompany loans.

The bylaws also require that the salary of Rosellini as the president be fixed:

Section 9. Salaries. The salaries of all officers and agents of the corporation and all other forms of compensation and benefits to such officers and agents shall be fixed and determined by the Board of Director.

Ex. 26, Article 4, Section 9. Despite the rules, Rosellini's salary at Fortune Oil was not fixed, but determined solely at the whim of Rosellini and was disguised as "draws":

Q. You were the president of Fortune Oil. What was your salary?

A. I didn't have one.

Q. So there wasn't any record with respect to you

getting regular wage from Fortune Oil. Is that fair statement?

A. Yes.

CP 71, LL 4-9.

Fortune Oil in 2005 had the net ordinary income of \$141,535.31, and the net income of \$50,355.09, according to its own profit and loss statement. Ex. 13. Moreover, even though Rosellini claims that Fortune Oil had no assets to satisfy the debt to Kim and PDQ, Fortune Oil had the net ordinary income of \$148,260.75, and the net income of \$42,967.07, for January through September of 2006. Ex. 14.

I. The Demise of Fortune Oil was Caused by Rosellini Providing Unsecured and Excessive Credit of Over \$500,000 to His Own Company, Ferndale Truck Stop, LLC, to the Detriment of Kim, PDQ, and Other Creditors

Despite the credit terms (gasoline payments due in three days after delivery) imposed on the other gas station owners, Fortune Oil, through Rosellini, granted extraordinary credit to Ferndale Truck Stop in the form of gasoline deliveries in amount excess of \$500,000, which resulted in demise of Fortune Oil:

Q. You mentioned something about this -- I mean, my understanding from your prior testimony, you stated that the business just wasn't doing good. That's why you closed it down. According to this statement, there was some events that triggered this downfall of Fortune Oil.

A. Yeah. The statement that it just wasn't making money, that was Vicki's statement.

Q. Okay. So what are we talking about when there's two customers that did not make payments?

A. Oh, like there was one truck stop that, you know, ran up several hundred thousand, 500,000, in invoices, which never got paid to Fortune Oil Company.

Q. Okay. Which company was that?

...

A. Ferndale Truck Stop.

Q. Truck stop? And they run 500, half million dollar in invoices?

A. Yes.

Q. I thought your policy was to draw the money out within three to four days from automatic -- from accounts.

A. Yeah.

Q. How come that didn't happen to this company?

A. Well, it was a company that I was a part of.

...

Q. You were owner?

A. Yes.

...

Q. What's the name of the LLC?

A. Ferndale Truck Stop, LLC.

Q. And what was your percentage of ownership for this LLC?

...

A. But it was substantial. It was over half.

Q. Over 50 percent?

A. It might have been all of it. I don't remember.

...

Q. So it was your own business that basically was flopping?

A. Yes.

CP 114-117 (underlines added). Rosellini admits that his company, Ferndale Truck Stop, "ran up a large bill quickly and then didn't pay." Appellants' Opening Brief, p. 18. Once again, Rosellini kept no record of corporate authorization or transaction between

Fortune Oil and Ferndale Truck Stop. Furthermore, Fortune Oil never tried to collect from Ferndale Truck Stop:

Q. Okay. We'll get to that. Let's just concentrate on Ferndale Truck Stop. How much did it owe to Fortune Oil?

A. 500.

Q. \$500,000?

A. Roughly.

Q. Roughly. And that was never paid back?

A. Right

Q. Did you keep any record for Ferndale Truck Stop, LLC?

A. Whatever records I had at the time.

Q. Was there any minutes or meetings --

A. No.

Q. -- record?

A. No.

Q. Again, you operated the Ferndale Truck Stop, LLC, Just like you have operated the Fortune Oil and Fortune Company --

A. Yes.

...

CP 117-118 (underlines added); see also CP 70-1.

Although Fortune Oil lost over \$500,000 for the gasoline it provided to Ferndale Truck Stop, Rosellini personally got all of his investment of \$300,000 that he had put into Ferndale Truck Stop when he sold it in 2006, at the expense of Fortune Oil:

Q. (By Mr. Park) And when did this happen, the \$500,000 approximately?

A. I bought Ferndale Truck Stop in roughly November of 2005, and I sold it in September of 2006.

...

Q. How much did you sell it for?

A. Basically the same thing I bought it for.

- Q. Which was?
A. 1.7 approximately.
Q. Was there any loan involved?
A. Yes.
Q. Okay. How much was the loan?
. . . .
A. I'm guessing. About 1.4.
Q. So you got at least what you put as downpayment, approximately \$300,000, when you --
A. Yes.
Q. -- sold it?
A. Yes.

CP 119-120 (underlines added). Rosellini did not bother to collect the \$500,000 gasoline bill from the sale of Fortune Oil from Ferndale Truck Stop because he owned both companies..

Again, no record of any kind was kept either by Fortune Oil or Rosellini with respect to the self-serving favorable credit terms given to Ferndale Truck Stop:

- Q. Again, I think I have ask you already. Was there any record reflecting these supply to Ferndale Truck, LLC, by Fortune Oil Company?
A. Reflecting what?
Q. Decision to grant this \$500,000 in gasoline.
A. No.

CP 120, LL 14-19 (underlines added).

J. Fortune Oil Sold Its Major Assets, the Gasoline Supply Contracts with the Other Owners, to WSCO and Other Jobber Companies for Significant Sums, but Rosellini Cannot Account for the Money Received from the Sales

In 2006 and 2007, the Rosellinis sold the remaining assets

of Fortune Oil, about 22 of the gasoline supply contracts with various gas stations, to numerous jobber companies, including WSCO Petroleum Corp (“WSCO”). Ex. 15; CP 77-78. The sale to WSCO alone was valued \$286,500. Ex. 15, para. 4. Again, the Rosellinis could not account for the money they received from WSCO, not to mention the other sales. CP 77-78, LL 19-16.

Rosellini claims that all amounts due to Fortune Oil from the sales of the contracts were retained by the purchasers (e.g., WSCO) and applied to the outstanding balances owed to the purchasers by Fortune Oil, and Fortune Oil never received the sale proceeds. Appellants Opening Brief, p. 6.

However, when asked to produce documents related to the sale, Rosellini and Fortune Oil objected and refused. CP 211-12. As such, there is no evidence to support Rosellini’s theory that the sale amounts were washed against the alleged account balances owed by Fortune Oil to the buyers of the gasoline supply contracts.

K. The Rosellinis Commingled Their Personal Incomes by Booking Vicki Rosellini’s Personal Incomes in 2007 and 2008 as that of Fortune Oil, Resulting in the I.R.S. Audit

According to Rosellini, by December 2006, Fortune Oil ceased to do business and did not generate any revenue after that point. CP 92, LL 1-5. Vicki Rosellini, wife of Rosellini, has her

separate consulting business, and has never worked for Fortune Oil or Fortune Co., and received no salary:

- Q. How much was your wife making at that time, 2006?
A. 2006, approximately, I would say, between 150 and 200.
Q. \$200,000?
A. Mm-hm.
Q. And none of that came from Fortune Oil, The Fortune Company, or the Fortune Bank; it was totally her Own business?
A. Yes.
Q. Was she ever paid by Fortune Oil, your wife?
A. No.
Q. Was she ever paid by The Fortune Company?
A. No.

CP 88, LL 1-14(underlines added); see also CP 92-3.

Despite business inactivity after December 2006, the Rosellinis booked Vicki Rosellini's revenues from her consulting work as the revenues of Fortune Oil in 2007 and 2008, in the amounts of \$362,301 and \$250,305 (Ex. 18, 19), respectively, to offset the prior tax loss credit of Fortune Oil, even though Vicki Rosellini did not do any work for Fortune Oil and received no compensation from Fortune Oil at all:

- Q. No. So can you explain? I think you were mentioning something about your CPA mucking up some tax returns or something, that it appears that there was 250,305 generated in 2008. Can you explain what that amount is about?
A. As far as I know, it was all Vicki's income. There – as far as I know, there was no other income in Fortune Oil

Company in 2008 besides Vicki's income.

Q. So in other word, even though she was running her own independent business, not under Fortune Oil Company, as a consultant, basically the Fortune Oil booked her income as its own income, Fortune Oil's income. Is that fair statement?

A. Evidently.

Q. Was there a reason for this?

...

A. I think my accountant thought that by putting her income in Fortune Oil Company -- there was a big tax loss in Fortune Oil Company. And so that loss could offset the income and help our personal financial -- or personal tax return.

Q. So even though Fortune Oil Company, Inc., is totally separate entity from Vicki Rosellini, based on your CPA's advice, you filed these tax return for the income that was generated by your wife, Vicki Rosellini, as if it was income generated by Fortune Oil, Inc.

A. Yes.

Q. Is that fair statement?

A. Yes.

CP 92-3 (underlines added). This again shows that the Rosellinis willingly commingled their assets and revenues as Fortune Oil's and vice versa, whenever there was advantage in doing so.

The I.R.S. audited the Rosellinis' tax returns for 2006-2008 and assessed taxes in the amount of \$280,000 for the incomes earned by Vicki Rosellini and disallowed tax credits of Fortune Oil to be applied to the personal incomes. Ex. 24; CP 95-96.

Kim and PDQ are seeking affirmation of the trial court's judgments, together with attorney's fees and costs incurred in this

appeal.

III. PROCEDURAL HISTORY

The Rosellinis assigned errors to Amended Findings of Fact Nos. 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 24.³ Appellants' Opening Brief, p. 1, Para. 1.1(4);CP 399-407. The Rosellinis did not claim errors to Amended Findings of Fact Nos. 1, 2, 5, and 6, and as such, no controversy exists on those findings. Appendix 2.

IV. LEGAL ANALYSIS AND ARGUMENT

A. Standard of Review on Appeal

Review of a bench trial is a two-step process: 1) findings of fact is reviewed to determine whether they are supported by substantial evidence and, if so; 2) whether the findings support the conclusion of law. Hegwine v. Longview Fibre Co., 132 Wn.App. 546, 555, 132 P.3d 789 (2006). Substantial evidence is the quantum of evidence sufficient to persuade a rational, fair-minded person a finding is true. *Id.* at 555-56. The unchallenged findings of fact are verities on appeal. Robel v. Roundup Corp., 148 Wn.2d 35, 42, 59 P.3d 611 (2002).

The appellate review uses a deferential standard, which

³ In the Finding of Fact (CP 273-81) and the Amended Findings of Fact (CP 393-8), the documents incorrectly identify Ferndale Truck Stop as Ferndale Gas.

views reasonable inferences in the light most favorable to the prevailing party. Sunderland Family Treatment Servs. v. City of Pasco, 127 Wn.2d 782, 788, 903 P.2d 986 (1995). The appellate court also defers to the trial court on issues of conflicting evidence, witness credibility, and evidence persuasiveness. City of University Place v. McGuire, 144 Wn.2d 640, 652, 30 P.3d 453 (2001). The party challenging a finding of fact bears the burden of showing that it is not supported by the record. Panorama Vill. Homeowners Ass'n v. Golden Rule Roofing, Inc., 102 Wn.App. 422, 425, 10 P.3d 417 (2000), review denied, 142 Wn.2d 1018 (2001).

Appellate court reviews a conclusion of law erroneously labeled as a finding of fact as a conclusion of law and review a finding of fact erroneously labeled as a conclusion of law as a finding of fact. Willener v. Sweeting, 107 Wn.2d 388, 394, 730 P.2d 45 (1986). The factual components of a mixed finding and conclusion are reviewed under the substantial evidence standard and the conclusions of law de novo. Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003); In re Estate of Haviland, 162 Wn.App. 548, 561, 255 P.3d 854 (2011).

An award of attorney's fees is a matter within discretion of the trial court. Simpson v. Thorslund, 151 Wn.App. 276, 289, 211

P.3d 469 (2009), citing Guntle v. Barnett, 73 Wn.App. 825, 826-37, 871 P.2d 627 (1994).

B. The Lower Court Correctly Ruled that Corporate Disregard is Required Against Fortune Oil.

The lower court correctly ruled that the corporate form must be pierced to reach the Rosellinis. Findings of Fact Nos. 6-24; Conclusions of Law Nos. 1-4; CP 406; CP 401-06. There was no error in reaching the findings or the conclusions.

The doctrine of corporate disregard was set out in Morgan v. Burks, 93 Wn.2d 580, 585, 611 P.2d 751 (1980); see Thomas H. Harris, Washington's Doctrine of Corporate Disregard, 56 Wash. L. Rev. 253 (1981). "The corporate entity is disregarded and liability is assessed against shareholders in the corporation when the corporation has intentionally used violate or evade a duty owed to another." *Id.* The court's statement of the doctrine identifies two essential factors: (1) the corporate form must be intentionally used to violate or evade a duty and (2) disregard must be "necessary and required to prevent unjustified loss to the injured party." Meisel v. M&N Hydraulic Press Co., 97 Wn.2d 403, 410, 645 P.2d 689 (1982)(quoting Morgan, at 587).

"With regard to the first element, the court must find an

abuse of the corporate form.” Meisel, at 410. The court in Truckweld Equip. Co. v. Olson, 26 Wn.App. 638, 644-45, 618 P.2d 1017 (1980), stated that such an abuse generally involves “fraud, misrepresentation, or some form of manipulation of the corporation to the stockholder’s benefit and creditors’ detriment.” With respect to the second element, “wrongful corporate activities must actually harm the party seeking relief so that disregard is necessary. Intentional misconduct must be the cause of the harm that is avoided by disregard.” Meisel, at 410.

In reviewing the reasons for disregarding corporate form, the court in J.I. Case Credit Corp. v. Stark, 64 Wn.2d 470, 475, 392 P.2d 215 (1964) stated that the thrust of analysis should not be whether “the element of sameness” predominate, but whether there is “such a commingling of the property rights or interest as to render it apparent that they are intended to function as one, and, further, to regard them as separate would aid the consummation of a fraud or wrong upon others.” For the court to treat multiple corporate entities as one, “it must appear that one so dominates the other as to make the other a mere tool and that their funds and property interests are commingled.” Western Washington Laborers-Employers Health & Security Trust Fund v. Harold Jordan Co., Inc., 52 Wn.App. 387,

393, 760 P.2d 382 (1988 Div. 1), citing McCurdy v. Spokane Western Power & Traction Co., 174 Wash. 470, 24 P.2d 1075 (1933). Additionally, the misuse of corporate form must be the proximate cause of the plaintiffs' loss. Hiller Corp. v. Port of Port Angeles, 96 Wn.App. 918, 926, 982 P.2d 131 (1999).

Rosellini claims that he kept the transactions for Fortune Oil through its use of Quick Books accounting program. Appellants' Opening Brief, p. 10. Unlike claim by Rosellini that Quick Books ledger (Ex. 23) is the complete financial transaction record of Fortune Oil, Rosellini could not tell how much he owed to Fortune Oil, even looking at Fortune Oil's federal tax returns. Ex. 16; CP 100, LL 8 - 14. The computer printout of the Gas Account does not constitute the adequate financial and corporate record of Fortune Oil, when Rosellini cannot tell how much he or his other companies owe to Fortune Oil. It alone also does not qualify as the "regular books of account in accordance with standard accounting practices", as required by the Fortune Oil's bylaws.

There are also ample evidence that the Rosellinis' personal assets were commingled willingly and freely with that of Fortune Oil, Fortune Co., and Ferndale Truck Stop, thus disregarding the corporate formality and independency requirements. The Rosellinis

numerously raided into the Gas Accounts and the general accounts whenever there were personal needs. The Rosellinis also freely shifted Fortune Oil's assets to Fortune Co. and Ferndale Gas without regard for corporate forms or independency. Moreover, the funds in the Gas Account, which actually belonged to the gas station owners, were used by the Rosellinis as their personal funds, and no record, except for the rudimentary computerized ledgers, existed to show the actual obligations and debts of the Rosellinis, Fortune Co., and Ferndale Truck Stop. For fiscal 2006 alone, the Rosellinis' failed to explain what happened to over \$1.4 million dollars of the shareholder's loans and the loans to Fortune Co. and Ferndale Truck Stop, made by Fortune Oil, through the actions of Rosellini. Even the tax returns, which were filed under penalty of perjury, could not tell the Rosellinis how much they owed to Fortune Oil. As such, the first element required to pierce the veil, namely that the Rosellinis manifestly abused the corporation formalities of Fortune Oil, Fortune Co., and Ferndale Truck Stop, by freely shifting assets without regard for corporate requirements, and also by commingling the corporations' assets and their personal assets, has been met. Fortune Oil, and thus the Rosellinis, under the cover of corporate shield and pretext, abrogated its fiduciary duty to pay the

credit card sale money received from Shell to Kim and other gas station owners.

Rosellini cites Norhawk Investment v. Subway Sandwich Shops, 61 Wn.App. 395, 811 P.2d 221 (1991), as the case that where two corporations' property and interest are commingled, without evidence that the corporations intended to function as one or that separating them would consummate any fraud upon others. Here, Rosellini exactly intended to have all of his corporations behave as one entity, where Rosellini would readily shift assets and revenues from one to another, whenever and wherever Rosellini felt that there was a need or benefit to be had. Unlike Norhawk, where there was no claim of financial mismanagement by the controlling entity, Rosellini was one and Fortune Oil together, unable to separate or distinguish one from the other in finance.

As to the second requirement, but for the Rosellinis' commingling and free dipping of Fortune Oil's Gas Account, there would have been sufficient funds to pay for the amount owed by Fortune Oil to Kim. Over \$1.9 million of Fortune Oil's assets, comprising of the loans to shareholders (\$552,000), the intercompany receivables (\$1,142,208), and the proceeds from the sale of the gasoline supply contracts (\$286,500, excluding other

undisclosed sales), are unaccounted for, and the Rosellinis cannot explain what happened to the loans from Fortune Oil to themselves and to their other companies. Had there not be such commingling and self-serving extension of credit to Ferndale Truck Stop by Rosellini, Fortune Oil would have had sufficient funds to pay Kim and PDQ and other gas station owners for the credit card sales. Therefore, the abuse of corporate forms by Rosellini was the proximate cause of Kim and PDQ and other gas station owners' losses.

Based on the gasoline supply contract and the prior dealings, Fortune Oil has a duty to pay the credit card sales amount collected on behalf of Kim and PDQ. Fortune Oil also had a duty to keep all the financial records as required its bylaws. By unlawfully usurping and raiding the Gas Account, Fortune Oil and the Rosellinis, whether in the form of "draw", loans, or credit to Ferndale Truck Stop, Fortune Oil, were evading their fiduciary duty to pay the retail gas station owners, including Kim and PDQ.

Based on these reasons, the corporate niceties of Fortune Oil must be disregarded, and this Court must find that the Rosellinis are one and the same Fortune Oil, Fortune Co., and Ferndale Truck Stop, and the corporate veils must be pierced.

C. The Lower Court Correctly Ruled that Fortune Oil Co., Inc., and thus Albert Rosellini, Breached Its Fiduciary Duty Owed to Kim and Other Similar Gas Station Owners by Failing to Segregate and Maintain the Gas Account

The lower court properly ruled that “Fortune Oil had a fiduciary relation with Plaintiffs and had a duty to make the funds available to Plaintiffs, as Fortune Oil did not own the funds and was only temporarily holding the funds for the benefit of Kim and similar accounts.” Findings of Fact No. 3, CP 400.

Fiduciary relationship is found in circumstances where an individual relaxes his guard and reposes his trust in another. Liebergesell v. Evans, 93 Wn.2d 881, 889-90, 613 P.2d 1170 (1980), citing Moon v. Phipps, 67 Wn.2d 948, 954, 411 P.2d 157 (1966). The Restatement of Contracts describes such a fiduciary relationship as one in which one party “occupies such a relation to the other party as to justify the latter in expecting his interest will be cared for...” Liebergesell, at 889-90, citing Restatement of Contracts § 472(1)(c) (1932). A “fiduciary duty” can also arise out of certain business relationships:

A fiduciary relationship arises as a matter of law in certain contexts such as attorney and client, doctor and patient, trustee and beneficiary, principal and agent, and partner and partner. But a fiduciary relationship can arise in fact regardless of the relationship in law between the parties. . . . For example, acting as an advisor may contribute to the

establishment of a fiduciary relationship.

Micro Enhancement Intern., Inc., v. Coopers & Lybrand, 110 Wn. App. 412, 433-34, 40 P.3d 1206 (2002).

Here, evidence is ample and clear that such relationship existed. First, the gasoline supply contract required Fortune Oil to handle and collect credit card transactions of PDQ, and Kim had no choice but agree to this arrangement. Second, Fortune Oil had set up a separate and exclusive account at Wells Fargo Bank, the Gas Account, to handle the credit card transactions for its gas station owners, including Kim. The account was titled "Gas-Wells Fargo", and Rosellini admits that it was "only for fuel transactions."

Rosellini also admits that the Gas Account was set up strictly for the benefit of the gas station owners: "[T]hese credit card transaction we talk about, your company was holding that for the benefit of these individual owners; isn't that true?" Rosellini replied, "[Y]es."

Third, Kim testified during trial that he expected Fortune Oil to pay for any gasoline purchase orders out the credit card transactions and if there is any credit left over, that Fortune Oil would pay him. Such expectation by Kim was not unreasonable as Fortune Oil was handling and receiving its fees from the transactions. Fourth, Fortune Oil continued to pay or credited the

other customers for the credit card transactions even after October of 2006, until the accounts were later sold to third parties in December 2006, while Kim's account remains unpaid as of October 2006. This shows that while the gasoline delivery to PDQ ended in October 2006, Fortune Oil continued to fulfill its fiduciary duty to other gas station owners, which would be sold later. Rosellini selectively honored Fortune Oil's fiduciary obligations to the gas stations owners, as there were benefits to be had to himself.

Kim had no choice or option but expected that Fortune Oil would take care of his customers' credit card transactions based on the contract. Moreover, Kim had no choice but to rely on Fortune Oil's accounting and financial management for temporary holding of the funds from the credit card transactions, as this was required under the contract. Therefore, Kim's expectation that his account would be segregated and available was not unreasonable under the circumstances. The lopsided bargaining power created by the Fortune Oil's fuel supply contract necessary requires Fortune Oil to be held in a fiduciary position when it comes to handling Kim's credit card transactions. As such, based on the evidence presented, the lower court correctly ruled that fiduciary relationship existed between Fortune Oil and Kim, and that Fortune Oil breached such

relationship by failing to pay the funds in October 2006.

D. The Lower Court Correctly Determined that Rosellini Personally Violated the Consumer Protection Laws and Is Liable for Kim's Attorney's Fees and Costs; In the Alternative, Kim is Entitled to Attorney's Fees and Costs Based on the Contract and Caselaw

The lower court determined that Rosellini is personally liable for a violation of the Consumer Protection Laws, based on the confession of judgment of Fortune Oil, arising out of the consumer protection claims by Kim in the complaint. Conclusions of Law, No. 4, CP 406-07. The lower court ruled that, "[T]herefore, he (Rosellini) participated and directed the acts of the corporation and is personally liable for the violation of the Consumer Protection Act which the corporation confessed to having committed. Under RCW 19.86 et seq. Plaintiff is awarded attorney's fees and costs." Id.

Grayson v. Nordic Construction Co., 92 Wash. 2d 548, 599 P.2d 1271 (1979) is the standard for imposing personal liability against a corporate officer who participates in wrong conduct, in addition to the corporation. The court there held that a deceptive act in violation of the Consumer Protection Act was the type of wrongful conduct which justified in imposing personal liability on a participating corporate officer. Grayson, at 553-54, citing State v. Ralph Williams North West Chrysler Plymouth, Inc., 87 Wn.2d 298,

553 P.2d 423 (1976) (the perpetrator of a deceptive advertising is personally liable).

Here, the wrongful conducts in question are: 1) Rosellini's personal use and unlawful transfer of the funds belonging to PDQ, which was held in trust for PDQ by Fortune Oil through the contract and agreement; 2) Rosellini's failure to repay back the money belonging to Fortune Oil upon sale of Ferndale Truck Stop for the gasoline supplied to Ferndale Truck Stop, which caused the demise of Fortune Oil; and 3) the self-serving acts with respect to Ferndale Truck Stop. As testified by Rosellini, the funds in the Gas Accounts were for the sole benefit of the gas station owners, and neither Fortune Oil nor Rosellini had any right to transfer the funds to the Rosellinis, Fortune Co., Fortune Oil's general accounts, to make payments to Fortune Oil's Wells Fargo Bank for the line of credit, or pay gasoline orders that were unpaid by Ferndale Truck Stop.

Rosellini willfully violated such trust and fiduciary duty by personally transferring the funds belonging to Kim and other gas station owners to his personal accounts, the account of Fortune Co., and providing practically unlimited gasoline supply terms to Ferndale Truck Stop.

Rosellini fully knew that, in principle, the \$500,000 in gasoline delivered from Fortune Oil to Ferndale Truck Stop was required to be paid upon the sale of Ferndale Truck Stop in September 2006, as this was required for all other credit terms given to the customers. Despite the requirement, Rosellini's preferential treatment personally benefited himself by not paying back the gasoline delivered to Ferndale Truck Stop, when he sold it and recouped his original investment of \$300,000 at the expense of Fortune Oil, and ultimately at the expense of Kim and other gas station owners. Such conducts are deceptive and unfair and the lower court correctly held that as the perpetuator of the scheme, Rosellini is personally liable.

Once Kim is able to pierce the corporate veil against the Rosellinis, he is entitled to attorney fees and costs, as the contract between Kim and PDQ and Fortune Oil is now applied to the Rosellinis. DGHI Enterprises v. Pacific Cities Inc., 91 Wn.App. 109, 117, 956 P.2d 324 (1998 Div. 1). Here, the gasoline supply contract between Fortune Oil and Kim contains the attorney's fees and costs provision. Because Kim received attorney's fees and costs in the King County District Court case, Fortune Oil is collaterally stopped from arguing that the provision does not apply

in the present case against the Rosellinis once the corporation is disregarded.

Without looking at the confession of judgment, Kim is also entitled to attorney's fees and costs based on the fact that Fortune Oil and the Rosellinis violated the consumer protection statutes.

The Consumer Protection Act ("Act") declares unlawful "unfair or deceptive acts or practices in the conduct of any trade or commerce". RCW 19.86.020. A private plaintiff must prove five elements:(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation. Hangman Ridge Training Stables v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

The Act does not define the term "deceptive", but implicit in that term is "the understanding that the actor misrepresented something of material importance." Hiner v. Bridgestone/Firestone, Inc., 91 Wn.App. 722, 792-30, 959 P.2d 1158 (1998), rev'd on other grounds, 138 Wn.2d 248 (1999). To prove that a practice is deceptive, neither intent to deceive nor actual deception is required. The question is whether the conduct has the capacity to deceive a substantial portion of the public. Id., citing Hangman Ridge, 105

Wn.2d at 785-86. Whether particular actions are deceptive is reviewable as a question of law. Leingang v. Pierce County Medical Bureau, 131 Wn.2d 133, 150, 930 P.2d 288 (1997).

Here the deceptive act was Rosellini using the trust funds belonging to Kim. Fortune Oil and the Rosellinis actively sought gas station owners as their customers. Fortune Oil hired a salesperson and used an employee to actively solicit local gas station owners to become Fortune Oil's customers, resulting in more than 40 clients. Rosellini also authorized advertising to public through its agent Bailey Cho. As such, Fortune Oil and the Rosellinis have the real capacity to deceive a substantial portion of the public.

The wrongful conduct of the Rosellinis must have occurred "in the conduct of any trade or commerce". Trade and commerce "shall include the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington." RCW 19.86.010(2). The Legislature intended these terms to be construed broadly. Hangman Ridge, 105 Wn.2d at 785. In the present case, Kim's claims came about as a result of Fortune Oil's failure to pay credit card sales made at Kim's business. As such, the trade or commerce requirement has been met.

Even a private plaintiff must "show that the acts complained

of affect the public interest." This element fulfills the legislative statement of purpose, that the Act "shall not be construed to prohibit acts or practices which . . . are not injurious to the public interest". Hangman Ridge, 105 Wn.2d at 788; RCW 19.86.920.

This is not a case where the public interest element is satisfied per se by a showing of conduct in violation of a statute containing a specific legislative declaration of public interest impact. Whether the public has an interest is therefore an issue to be determined by the trier of fact. The factors to be considered will depend upon the context in which the alleged acts were committed. Hangman Ridge, 105 Wn.2d at 789-90. For example, where the acts complained of involve "essentially a consumer transaction" such as the sale of goods, the following five factors are relevant:(1) Were the alleged acts committed in the course of defendant's business? (2) Are the acts part of a pattern or generalized course of conduct? (3) Were repeated acts committed prior to the act involving plaintiff? (4) Is there a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff? (5) If the act complained of involved a single transaction, were many consumers affected or likely to be affected by it? *Id.*

Here, the act of converting Kim's credit card funds held the

trust account occurred in the regular course of Fortune Oil's business. Fortune Oil collected fees from the credit card sales and the whole process was an intricate part of Fortune Oil's business. Finally, the Rosellinis have a real chance of repeating the similar pattern of skimming the monies from other clients, should the Rosellinis ever re-enter the gasoline distribution business in future.

As shown by other cases and the findings of fact and evidence reviewed by the lower court, other gas station owners were denied of the monies due from Fortune Oil, and there is a pattern of dishonest and breach of fiduciary duty by Fortune Oil and the Rosellinis to the public. The Kim's complaint in this case is a mere symptomatic pattern of abuse perpetuated by the Rosellinis to Washington consumers and business owners.

The Act requires for the plaintiff to prove that he/she has been "injured in his or her business or property" by the deceptive act. RCW 19.86.090. Here, Kim and PDQ were injured by Fortune Oil's failure to pay the amounts collected on behalf of Kim, which has been already established in the district court case.

Rosellini argues that Kim and PDQ failed to segregate the fees related to the CPA claims based on Smith v. Behr, 113 Wn.App. 306, 54 P.3d 665 (2002). Appellants' Opening Brief, p. 26. Unlike

Smith v. Behr, where there were product warranty and defect claims by the plaintiffs in addition to the CPA claims, the CPA claims, breach of fiduciary duty, and the corporate disregard in here are very interlocked and would be impossible to parse out the single theory from the another. As such, Kim and PDQ are not required to segregate the attorney's fees and costs. In the alternate, Kim and PDQ are entitled to attorney's fees and costs based on the gasoline supply contract, which mandates that the prevailing party is entitled to attorney's fees and costs. Ex. 1, Para. 22.

E. Rosellini is also Personally Liable Based on Fraudulent Transfer of Fortune Oil's Assets and Conversion

Rosellini is also personally liable for Fortune Oil's debt to Kim based on his fraudulent transfer of Fortune Oil's assets without consideration. RCW 19.40.051 defines a fraudulent transfer as:

- (a) A transfer made or obligation incurred by a debtor is fraudulent as to the a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer of obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligations.

A creditor is entitled to recover against the transferee based on

RCW 19.40.081:

- (b) Except as otherwise provided in this section, to the extent

a transfer is voidable in an action by a creditor under RCW 19.40.071(a)(1), the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (c) of this section, or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

(1) The first transferee of the asset or the person for whose benefit the transfer was made; or ...

A fraudulent transfer under UFTA (Uniform Fraudulent Transfer Act) is (1) any transfer made by a debtor with actual intent to hinder, delay, or defraud a creditor; or (2) a transfer made without adequate consideration leaving the debtor with unreasonably small assets, insolvent, or intending to incur more debts than he or she can pay (constructive fraud). Associates Housing Finance L.L.C. v. Stredwick, 120 Wn.App. 52, 57, 83 P.3d 1032 (2004), citing: (1) RCW 19.40.041(a)(1); and (2); Clearwater v. Skyline Constr. Co., 67 Wn. App. 305, 322, 835 P.2d 257 (1992).

Here, the Rosellinis fraudulently transferred the assets of Fortune Oil to gorge themselves, Fortune Co., and Ferndale Truck Stop, in excess of \$1.98 million, and Rosellini has no explanation as to what happened to the shareholder loans and the intercompany transfers. These fraudulent transfers were disguised as inter-company loans, draws, line of credits, and sale of gasoline contracts to third parties. Fortune Oil and Rosellini provided

basically unlimited supply of gasoline to Ferndale Truck Stop, even while knowing that Fortune Oil's creditors would not be paid.

Based on these violations, the Rosellinis, who are the transferees of the fraudulent transfers, are individually responsible for the damages suffered by Kim and PDQ.

F. Rosellini is Liable Based on Unlawful Distribution of Fortune Oil's Assets in Breach of RCW 23B.06.400

In the alternative, RCW 23B.06.400 prohibits lining of shareholders' pockets, by way of distribution of corporate assets, at the expense of creditors of a corporation:

- (1) A board of directors may approve and the corporation may make distributions to its shareholders subject to restriction by the articles of incorporation and the limitation in subsection (2) of this section.
- (2) No distribution may be made if, after giving it effect:
 - (a) The corporation would not be able to pay its liabilities as they become due in the usual course of business; or
 - (b) The corporation's total assets would be less than the sum of its total liabilities plus, unless the articles of incorporation permit otherwise, the amount that would be needed, if the corporation were to be dissolved at the time of the distribution, to satisfy the preferential rights upon dissolution of shareholders whose preferential rights are superior to those receiving the distribution.

In general, under Washington law, a corporation has broad power to encumber or distribute its assets, so long as creditors of the corporation are not prejudiced thereby. Zimmerman v. Kyte, 53

Wn.App. 11, 17, 765 P.2d 905 (1988 Div. 1). Unless there is evidence of fraud, dishonesty, or incompetence (i.e., failure to exercise proper care, skill, and diligence), courts generally refuse to substitute their judgment for that of the directors. Seafirst Corp. v. Jenkins, 644 F.Supp. 1152, 1159 (W.D. Wash. 1986); Shinn v. Thrust IV, Inc., 56 Wash. App. 827, 834-35, 786 P.2d 285, review denied, 114 Wash. 2d 1023, 792 P.2d 535 (1990). Directors and officers stand in a fiduciary relation to the corporation they serve and are not permitted to retain any personal profit or advantage gleaned "on the side". Leppaluto v. Eggleston, 57 Wn.2d 393, 402, 357 P.2d 725 (1960).

Here, Rosellini, as the sole director of Fortune Oil, abused his duty, power, and discretion by: 1) failing to keep financial and corporate records; 2) distributing assets of Fortune Oil to himself and his companies without regard for creditors of Fortune Oil in breach of in breach of RCW 23B.08.300; 3) negligently performing his duties in providing over \$500,000 in gasoline to his company Ferndale Truck Stop and failing to collect the amount due to Fortune Oil; and 4) failing to exercise good faith and obligations to Fortune Oil by disregarding the best of interest of Fortune Oil.

Because Kim was damaged by Albert Rosellini's fraud and

negligence as the sole director of Fortune Oil, he is entitled to the damages against the Rosellinis personally.

G. Karl Park, Attorney for Kim and PDQ, is Entitled to Award of Attorney's Fees and Be Named as a Judgment Creditor

Rosellini claims that Kim and PDQ's attorney, Karl Park ("Park")⁴, is not entitled to be named as a judgment creditor, but did not cite any case or statute. Appellants' Opening Brief, Paras 1.2(6), 3.5. Because Kim and PDQ have contractually assigned their attorney's fees to Park, Park is entitled to be named as the judgment holder for the attorney's fees and costs incurred. This would be equivalent to having Kim and PDQ partially assign the attorney's fees portion of the judgment to Park. Furthermore, because the award of attorney's fees was not duplicative, there was no harm done against Rosellini in naming Park as a judgment creditor for the attorney's fees. Using a criminal case analogy, even if awarding attorney's fees directly to Park was an error, it was harmless nevertheless.

H. Kim and PDQ Are Entitled to Attorney's Fees and Costs on Appeal

If a statute authorizes attorney fees in the trial court, the appellate court has the inherent jurisdiction to make such an award

⁴ Karl Park, the attorney and agent for Kim and PDQ, entered into a contingency agreement with Kim and PDQ.

on appeal. Ur-Rahman v. Changchun Dev., 84 Wash.App. 569, 576, 928 P.2d 1149 (1997 Div. 1). Because the lower court's award of attorney's fees and costs was based on Rosellini's breach of RCW 19.86 et seq., which allows for attorney's fees and costs, Kim and PDQ are entitled to attorney's fees and costs on appeal.

V. CONCLUSION

Overwhelming facts point out that Rosellinis totally disregarded the corporate formalities at the expense of Kim. The Rosellinis freely commingled the Gas Account held for Kim and other gas station owners, its other bank accounts, assets, Ferndale Truck Stop's and Fortune Co.'s accounts as if the accounts were theirs personally, with total disregard for formality, which resulted in losses to Kim. Kim's losses are directly attributable to the Rosellinis' malicious behavior and the lower court correctly determined that the corporate veil of Fortune Oil must be pierced, and that the Rosellinis personally liable, to compensate Kim. As such, the Court must affirm the rulings by the lower court and award attorney's fees and costs of appeal to Kim and PDQ.

DATED this 18th day of November, 2013.

Karl Park

Karl Y. Park WSBA #27132
Attorney for Respondents

**APPENDIX 1: SUMMARY OF SOME OF THE TRANSFERS,
PAYMENTS, AND DEBITS MADE FROM THE GAS ACCOUNT
OF FORTUNE OIL**

DATE	PAYMENT/ DEBIT AMOUNT	NOTE
2/6/2002	(\$35,000)	Ex. 23, p. 6; payment to Rosellini
2/11/2002	(\$8,250)	Ex. 23, p. 7; payment to Rosellini
2/12/2002	(\$10,000)	Ex. 23, p. 7; payment to Rosellini
2/14/2002	(\$20,000)	Ex. 23, p. 7; payment to Vicki Rosellini
4/26/2002	(\$90,000)	Ex. 23, p. 13; payment to Rosellini
5/1/2002	(\$21,000)	Ex. 23, p. 13; payment to Rosellini
5/6/2002	(\$4,300)	Ex. 23, p. 13; payment to Fortune Co.
9/11/2002	(\$52,000)	Ex. 23, p. 25; payment to Rosellini
10/7/2002	(\$53,000)	Ex. 23, p. 27; payment to Rosellini
11/4/2002	(\$18,125)	Ex. 23, p. 29; payment to Rosellini
12/3/2002	(\$80,500)	Ex. 23, p. 32; payment to Fortune Co.
12/09/2005	(\$11,204.46)	Ex. 23, p. 140; returned check from Ferndale Truck Stop
5/12/2006	(\$3,000)	Ex. 23, p. 158; payment to Fortune Co.
5/31/2006	(\$15,000)	Ex. 23, p. 161; returned check from Ferndale Truck Stop
6/28/2006	(\$20,113.10)	Ex. 23, p. 165; returned check from Ferndale Truck Stop

9/12/2006	(\$100,000)	Ex. 23, p. 174; payment to Wells Fargo Line of Credit
9/18/2006	(\$100,000)	Ex. 23, p. 174; payment to Wells Fargo Line of Credit
9/26/2006	(\$26,213.31)	Ex. 23, p. 175; payment to Wells Fargo Line of Credit
10/3/2006	(\$80,767.84)	Ex. 23, p. 176; payment to Wells Fargo Line of Credit
10/10/2006	(\$23,360.51)	Ex. 23, p. 177; payment to Wells Fargo Line of Credit
10/25/2006	(\$12,942.19)	Ex. 23, p. 178; payment to Wells Fargo Line of Credit
11/3/2006	(\$24,793.74)	Ex. 23, p. 179; payment to Wells Fargo Line of Credit
11/13/2006	(\$8,528.58)	Ex. 23, p. 180; payment to Wells Fargo Line of Credit
11/15/2006	(\$47,582.84)	Ex. 23, p. 180; payment to Wells Fargo Line of Credit
12/7/2006	(\$40,133.20)	Ex. 23, p. 180; payment to Wells Fargo Line of Credit
12/12/2006	(\$20,000)	Ex. 23, p. 182; payment to Fortune Co.
1/11/2007	(\$6,818.99)	Ex. 23, p. 183; transfer to Fortune Oil's general account
1/18/2007	(\$19,708.25)	Ex. 23, p. 184; transfer to Fortune Oil's general account
1/22/2007	(\$804.46)	Ex. 23, p. 184; transfer to Fortune Oil's general account
1/23/2007	(\$2,661.13)	Ex. 23, p. 184; transfer to Fortune Oil's general account
TOTAL:	\$955,806.59	

APPENDIX 2: THE UNCONTROVERTED FINDINGS OF FACT

1) Plaintiff Joon Kim ("Kim") is the principal owner of PDQ Inc. dba P.D.Q. Deli Mart ("PDQ"). PDQ is a convenient store which also sells gasoline to retail customers. Joon Kim purchased PDQ in June 2001.

2) At the time of purchase of PDQ, the prior owner had a gas supply contract with Defendant Fortune Oil Company, inc. ("Fortune Oil"), called "Shell Branded Retailer Contract Between Fortune Oil Company and Sung Bok No and Joon Deuk No, Station No. 1009" ("Gasoline Contract"). The Gasoline Contract was subsequently assigned by the seller to Kim sometime in June 2001. Therefore, Fortune Oil and Kim are the parties of the Gasoline Contract. The contract provides that the prevailing party in any suit to enforce the contract shall be entitled to attorney's fees and costs incurred.

5) As a result of Fortune Oil's failure to pay the amount, Kim filed a complaint in King County District Court. The parties waived the arbitration requirement of the contract and the case was heard in King County District Court. Fortune Oil Co, through its President Albert Rosellini, Jr. confessed to judgment on January 31,

2011 in favor of Joon Bum Kim & P.D.Q. in the District Court (King County) Case No. 85-12616. The amount of judgment was \$51,672.78 (\$32,076.20 principal, \$15,396.58 interest and \$4,000 attorney fees and costs). The judgment did not contain any basis for the attorney's fees or any other amount given (i.e. whether it was based on breach of contract, violation of the Consumer Act, or other allegations claimed in the Complaint). The claims for personal liability against the Rosellinis was (sic) dismissed from District Court and brought before this court.

6) Albert Rosellini is the president of Fortune Company, Inc., a real estate brokerage firm started in 1984. Albert Rosellini has a master degree in social science in 1977 from University of Chicago, and he was involved with numerous businesses and corporations both as employee and owner.