SUPREME COURT NO. 91712-4

Court of Appeals, Division I, No. 71103-2-I

THE SUPREME COURT
OF THE STATE OF WASHINGTON

FLIGHT SERVICES & SYSTEMS, INC.,

Defendant/Petitioner,

v.

AIR SERV CORPORATION,

Plaintiff/Respondent.

RESPONDENT AIR SERV'S RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

Air Serv Corporation ("Air Serv") provided cabin cleaning services to Flight Systems & Services, Inc. ("FSS") on 476 flights from May through September 2011 at Sea-Tac airport. FSS admitted that Air Serv complied with regulations in the industry and successfully performed these services. The parties discussed the amount that FSS should pay Air Serv and FSS informed Air Serv that it would pay the amount requested by Air Serv of $175 per flight. Air Serv relied upon FSS's representations. However, when Air Serv's services were no longer needed, FSS refused to pay the amount discussed.[1] This led to Air Serv filing suit.

As no written agreement was ever executed, the trial court summarily found FSS liable under theories of unjust enrichment and quantum meruit. This liability went previously unchallenged by FSS on appeal. Indeed, FSS conceded it was liable under the theory of unjust enrichment. *See* Appellant's Brief at 3. Yet FSS now improperly argues to this Court that it was not unjustly enriched. *Cf.* Petition at 12-13 (arguing that the money it received due to Air Serv's services "cannot be considered unjustified enrichment"). FSS's argument that it should not be made to pay any amount for valuable services it was provided, and that "the Court of Appeals erred by failing to dismiss" Air Serv's claims, finds no support in logic or law.

[1] FSS made no objection to any invoice it received from Air Serv until after it no longer needed the services. FSS still has not paid any amount for Air Serv's services to date.

Moreover, the Court of Appeals made no error in enunciating the remedy allowed under Washington law for unjust enrichment. Washington law has long allowed for disgorgement of the benefit received unjustly by a defendant. The Court of Appeals merely explained – as numerous courts applying Washington law have before – that the benefit received by FSS can be calculated as the amount by which it profited from the services Air Serv provided. The Court of Appeals opinion does not conflict with any Washington appellate decision.

Finally, FSS's belated argument that the Court should expressly adopt portions of the Restatement (Third) of Restitution and Unjust Enrichment (2011) also provides no reason for this Court to accept review. The trial court determined that FSS was not an innocent recipient of the services provided. *See* CP 2184 at ¶9 ("FSS deliberately misled Air Serv to believe it would be paid its reduced price of $175 per flight"). So even if this Court were to expressly adopt the "conscious wrongdoer" standard as FSS proposes, the result would still allow for disgorgement of FSS's profits. Moreover, the Complaint in this matter was filed in 2012 after the Restatement was published. But, although FSS concedes Air Serv argued for disgorgement of FSS's profits at trial, *see* Petition at 4, FSS failed to raise any argument to the trial court or to the court of appeals that any "conscious wrongdoer" standard should be applied. This Court should not consider new arguments that could have been made by FSS long ago. There is absolutely no reason for Supreme Court consideration of this case. FSS's Petition should be denied.

STATEMENT OF THE CASE

A. FSS'S INABILITY TO PERFORM ITS CONTRACT WITH DELTA

In January of 2011, FSS entered into a bid process with Delta in an effort to be awarded a three-year contract to provide cabin cleaning services for Delta's domestic and international aircraft at Sea-Tac airport.[2] FSS presented its bid knowing that Delta expected each bidding company to be able to perform the contract. *See* FSS Dep. at 31:9-18. However, at the time of its bid, FSS did not have a compliance agreement under which it could service Delta's international flights. *See id.* at 32:7-16. FSS did not inform Delta that it lacked a compliance agreement when it submitted its bid. *See id.* at 33:8-15.

On April 14, 2011, FSS then proceeded to contract with Delta to provide cabin cleaning services at Sea-Tac airport for Delta's domestic and international flights. *See* Ex 2 at 11. This contract would serve to provide FSS monthly revenues in excess of $130,000.[3] FSS's services for Delta were to begin on May 17, 2011. Ex 2 at 1. FSS was unable to procure a federal compliance agreement by the date the contract began, *see* FSS Dep. at 76:13-22, yet nevertheless still serviced Delta's aircrafts starting May 17, 2011 in violation of federal law, *see id.* at 90:19-25 & Ex 3.

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[2] *See* CP 2389 (Plaintiff's Amended Deposition Designations); RP at 102:24-103:20 (admitting designations); FSS Dep. at 27:13-18; 29:14-33:15 (*see* CP 2341-2388). As the deposition designations are in condensed form, "FSS Dep." is used for clarity.

[3] Exs. 3-10. The invoices from FSS to Delta show that FSS charged over $400,000 to Delta during the timeframe Air Serv made it possible for FSS to perform its contract with Delta.

On May 28, 2011, FSS was notified by Customs and Border Protection ("CBP") that it would not be allowed to board any inbound international flight without first obtaining a compliance agreement from the United States Department of Agriculture. *See* Ex 65 at 3; *see also* CP 1-2 (Complaint) at ¶¶5-6 and CP 8 (Answer) at ¶¶5-6. Delta was informed that FSS did not have the proper compliance agreement on the same date and also was informed that Air Serv did have a proper compliance agreement. *See* Ex 65 at 3. Specifically the CBP explained:

> Please be advised, FSS does not have USDA approval to clean inbound international flights for Delta. FSS is only allowed to clean domestic aircraft. FSS is currently in violation of 7CFR330.400 (Regulation of Certain Garbage). FSS will not be allowed to board inbound international flights for Delta without first obtaining a compliance agreement with the USDA.

Id. After being notified that FSS would not be allowed to board its international flights, Delta contacted Air Serv and the CBP to determine what steps were necessary to enable "FSS [to] sub-contract with a compliant company to clean DL aircraft." *Id.* at 2. Of course, without Air Serv's supervision, FSS would have been unable to provide cleaning services to any of Delta's international flights at Sea-Tac airport. *See* FSS Dep. at 37:15-38:11. Moreover, immediate action was necessary as Delta's incoming international flights needed to be cleaned that following day. *See* FSS Dep. at 89:14-19.

Due to Air Serv's efforts, FSS was able to provide cleaning services to 476 international Delta flights from May 28, 2011 through September 2, 2011. *See* Ex 17 at 4. However, FSS never paid Air Serv

for any of its services. CP 4 & CP 10 at ¶ 27. This is true even though FSS has long admitted that Air Serv effectively supervised and ensured that FSS's employees complied with the necessary regulations for 476 flights. CP 3 & CP 9 at ¶16 (FSS admitting "Air Serv effectively supervised and ensured that FSS's employees complied with the necessary regulations"); *see also* Ex 17 at 4; RP at 392:11-13.

B. AIR SERV'S POTENTIAL LIABILITY FOR PROVIDING SERVICES TO FSS

In order to provide cabin cleaning services for international flights, a company must work under a federal compliance agreement. *See* Ex 65 at 3. A compliance agreement is applicable to a specific airport and must be renewed yearly. *See* FSS Dep. at 39:13-40:15. The compliance agreement provides that:

> Additionally, any person violating the PPA [Plant Protection Act] and/or the AHPA [Animal Health Protection Act] may be assessed civil penalties of up to $250,000 per violation or twice the gross gain or gross loss of any violation that results in the person deriving pecuniary gain or causing pecuniary loss to another, whichever is greater.

Ex 1 at 2. The agreement further explains:

> By signing this agreement, the signer certifies that his/her facility has met or will meet the requirements of all applicable environmental authorities prior to handling [regulated] garbage ... [and that] the company, its employees and **subcontractors**, and procedures covered by this compliance agreement are subject to unannounced inspections by CBP or APHIS personnel.

Id. The compliance agreement must be renewed yearly at each airport a company services. *See id.*; RP at 79:9-12. Accordingly, among other

things, by allowing FSS to work as a **subcontractor** under its compliance agreement, Air Serv faced up to $250,000 per violation for work performed by FSS employees and faced losing its ability to service other international aircraft at Sea-Tac. *See* Ex 1 at 2. During trial, Toan Nguyen, Air Serv's vice president of finance, specifically explained that:

> violation of the compliance agreement subjects Air Serv, or anyone that has a compliance agreement, of a fine up to $250,000 per occurrence. So it is [] a substantial financial liability, as well as from an operational business perspective. Depending on the seriousness of the violation, Air Serv or whoever holds the compliance agreement, could face having their compliance agreement revoked, in which case the $250,000 fine [] can actually be much greater financially because we would then lose our license to operate that contract [] for the particular line. And actually for us it would have been for other clients as well.[4]

Indeed, as explained by Air Serv's then general manager at Sea-Tac, Gilbert Green, Air Serv held a teleconference with company executives to discuss the potential consequences if Air Serv were to allow FSS to subcontract under its compliance agreement. Moreover, Mr. Nguyen explained that Air Serv's concerns were magnified given FSS's willingness to service Delta's flights illegally. *See* RP at 82:5-15.

C. AIR SERV AGREED TO PROVIDE SERVICES

After a discussion with its senior management, Air Serv agreed that it would provide services to FSS. *See* RP at 276:20-277:14. As

[4] RP at 80:4-20. During trial both FSS and Air Serv provided examples of violations of the compliance agreement at other airports which led to fines. RP at 360:19-361:25 (FSS being fined in Milwaukee); 162:1-163:2 (Air Serv being fined in Atlanta and Washington D.C.); *see also* RP at 160:20-25 (fines occur multiple times per year).

Delta's flights needed to be serviced the following day, Mr. Green informed CBP that it had agreed to supervise FSS for Delta's international flights. *See* RP at 277:18-278:21. CBP followed up with Mr. Green and requested that he come to CBP's offices to sign an amended compliance agreement. RP at 278:22-279:21. At that time, CBP specifically informed Mr. Green that Air Serv would be responsible for FSS's activities and Air Serv would be at risk of being fined if FSS did not follow the prescribed procedures. RP at 280:1-11. Mr. Green then signed the addendum to Air Serv's compliance agreement, allowing FSS to act as a subcontractor. Ex 29 at 2-10.

D. AIR SERV EFFECTIVELY PERFORMED ITS SERVICES

FSS has long admitted that Air Serv effectively supervised and ensured that FSS's employees complied with the necessary regulations. CP 3 (Complaint) at ¶16 & CP 9 (Answer) at ¶16. Moreover, FSS admitted that "during the time period [in which Air Serv provided supervisory services] there were no notices by USDA of violations of Compliance Agreement processes." Ex 17 at 3. Additionally, although FSS was expected to clean the flights, its inaction led Air Serv to provide cleaning services as well. *See* Ex 53.

E. FSS PROFITED FROM THE SERVICES AIR SERV PROVIDED

Without Air Serv's services, FSS would have been unable to clean 476 flights at Sea-Tac airport. The evidence submitted at trial demonstrated that FSS profited directly from Air Serv's services in an amount between $77,730.50 and $159,345.59. *See* Slip Op. at 6 &

Petition at 4. The evidence at trial also showed that FSS profited by more than $400,000 in total for performing its contract with Delta during the time Air Serv provided its services – a contract FSS would have breached if it could not have cleaned the international flights.

These calculated profits are all based on FSS's revenues. FSS refused to provide Air Serv any information relating to its costs. Air Serv requested FSS's cost information in document requests, interrogatories, and as a designated topic in FSS's 30(b)(6) deposition. Air Serv also filed a motion to compel FSS to provide Air Serv its cost information, which was granted by the trial court. Still, FSS failed to comply with the trial court's order and failed to provide any information related to its costs. Contrary to FSS's argument to this Court, *see* Petition at 4, FSS admitted in its deposition that it was capable of determining the requested cost information, *see* FSS Dep. at 52:2-20, 185:9-25. FSS's failure to provide any evidence of its costs was solely its own fault.[5]

F. THERE WAS NO "MARKET RATE" FOR THESE SERVICES

Although FSS has argued throughout this matter that the an hourly low-ball price it concocted after all of the services were complete was a "market analysis" or "market rate," it did not provide any evidence in

[5] FSS now argues that Air Serv "knew Flight Services incurred significant costs for providing cleaning services" and that it was Air Serv's obligation to estimate FSS's costs. *See* Petition at 4. However, Air Serv never made any such admission, nor is it aware of any authority that requires it to make a guess as to an opposing party's cost information where the opposing party was ordered to and refused to provide such information in discovery.

support of such a contention.[6] Indeed, the appellate court affirmed the trial court's ruling, on Air Serv's motion in limine, to preclude FSS from offering any evidence of an industry standard or a market rate. *See* Slip Op. at 16. Moreover, FSS admitted when bidding on a contract for cabin cleaning services, the airline expects the cleaning company to have a compliance agreement, *see* FSS Dep. at 32:7-33:12, so it is extremely unusual for such a circumstance to exist, *see* CP 901 at 15-16 (FSS arguing that the "case is unique, one-of-a-kind private dispute"); CP 902 at 16-17 (referring to the relationship between the parties to be "atypical" and to be an "unusual situation"). Air Serv was never even aware that it could provide such services before this instance; nor was it aware of any market rate or price charged by a competitor.[7]

Finally, FSS argues that the disgorgement of its profits in this matter would provide for "an inflated award grossly out of the proportion

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[6] FSS failed to prove any market exists for the services. *See* RP at 266:15-270:2; Slip Op. at 16-17 (explaining FSS was unable to verify any industry standard or market rate during discovery). FSS did not convince either the trial court or the appellate court that the $7.00 price it offered, derived from an inapplicable contract provision between FSS and Delta, *see* Petition at 3, had anything to do with the value of the services Air Serv provided. Indeed, as pointed out by Judge Appelwick during oral argument on January 20, 2014, the contract provision FSS refers to relating to "out of scope services" is on its face inapplicable as the services at issue would have been considered to be "in the scope" of those required in the contract.

[7] *See* RP at 273:11-274:10 (Mr. Green explaining that in his 37-38 years of experience he had never heard of such a thing); 81:1-12 (Mr. Nguyen explaining he was shocked that a company would even bid on a contract without a compliance agreement); 190:23-191:22 (Ms. Tessie Ong explaining in her 13 years of billing for services she had never seen an hourly rate, all rates were by plane); *see also* Exs 3-10 & 62 (invoices from both FSS and Air Serv charging on a per plane basis). FSS and Air Serv had never provided similar services before. *See* RP at 81:1-12, 190:23-191:22, 273:11-274:10; FSS Dep. at 149:22-150:2.

to the small amount of services rendered in this instance," *see* Petition at 7, but provides no evidence that such a statement is true. The evidence at trial showed that the services provided by Air Serv were unique and subjected Air Serv to a great risk of fines and/or termination of its compliance agreement at Sea-Tac.

ARGUMENT

FSS presents no reason for this Court to accept review of this matter.

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). As the Court of Appeals opinion is in line with well-established Washington law, none of these circumstances exist and FSS's petition should be denied.

A. THE COURT OF APPEALS FOLLOWED WASHINGTON LAW

Washington law has long allowed for the disgorgement of any benefit, including profit, received by a defendant that is found liable for unjust enrichment. *See Body Recovery Clinic LLC v. Concentra, Inc.*, No. C13-1363RAJ, 2014 WL 651981 *3 (W.D. Wash. Feb. 19, 2014) (explaining that disgorgement of profit is a proper remedy for unjust enrichment); *National Products, Inc. v. Aqua Box Products*, No. C12-0605-RSM, 2013 WL 1399346 *3 (W.D. Wash. April 5, 2013) ("a court

may award damages based on defendant's profits on an unjust enrichment theory"); *Young v. Young*, 164 Wn.2d 477, 487-89, 191 P.3d 1258 (2008) (allowing for remedy beyond fair market value for services as determined by increase in value to the land – *i.e.*, the profit); *Foundation for the Handicapped v. Department of Soc. and Health Servs.*, 97 Wn.2d 691, 699, 648 P.2d 884 (1982) ("The doctrine of unjust enrichment is that one shall not be allowed to profit or enrich himself at the expense of another contrary to equity"); *Olwell v. Nye & Nissen Co.*, 26 Wn.2d 282, 287, 173 P.2d 652 (1947) (providing disgorgement of additional profit made by defendant due to use of plaintiff's machine). Contrary to FSS's assertion, the Court of Appeals in this matter was by no means the first court to allow disgorgement of profits under Washington law.[8]

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[8] Moreover, contrary to FSS bald assertion that "a disgorgement of profits restitution theory [] has no validity ... in the majority of other jurisdictions," *see* Petition at 7, such a remedy is commonly recognized by courts throughout the country, *see, e.g., InfoGroup, Inc. v. Database LLC*, No. 8:14-CV-49, 2015 WL 1499066 *20 (D. Neb. March 30, 2015) ("But there may also be cases in which the remedy for unjust enrichment gives the plaintiff something, such as the defendant's wrongful gain, that the plaintiff did not previously possess"); *Stavropoulos v. Hewlett-Packard Co.*, No. 13 C 5084, 2014 WL 7190809 *5 (N.D. Ill. Dec. 17, 2014) ("disgorgement of profits is an appropriate remedy for an unjust enrichment claim"); *Meister v. Mensinger*, 230 Cal.App.4th 381, 398 (2014) (explaining that disgorgement of a defendant's profits can sometimes be essential as a remedy for unjust enrichment); *SRS Arlington Offices, LLC v. Arlington Condominium Owners Ass'n*, 760 S.E.2d 330, 332 (N.C. App. 2014) ("A claim for unjust enrichment [] is a claim for restitution which seeks to force a party to disgorge its ill-gotten profits"); *Keurig, Inc. v. Sturm Foods, Inc.*, No. 10-841-SLR-MPT, 2013 WL 633574 *1 (D. Del. Feb. 19, 2013) (explaining disgorgement of defendant's profits is a remedy for unjust enrichment); *McIntosh v. Gilley*, 753 F.Supp.2d 46, 63 (D.D.C. 2010) ("Disgorgement of profits is a well-recognized remedy for unjust enrichment"). Additionally, FSS's reliance on *Kleinman v. Merck & Co.*, 417 N.J. Super. 166, 186, 8 A.3d 851 (2009) is misplaced. *See* Petition at 1 & 16. In *Kleinman,* in ruling on whether a class should be certified, the trial court held that unjust enrichment was not an available cause of action in that case. *Id.* at 166 (Holding 4). The loose language of the trial court which FSS relies upon, to claim that disgorgement of profits is punitive, is contrary to the law in New Jersey. The New Jersey Supreme Court has explained that disgorgement of a defendant's profits is an

The Court of Appeals specifically followed this Court's analysis in *Young*. FSS's claims that the law does not allow for disgorgement of the benefit conferred on the party that was unjustly enriched, *see, e.g.*, Petition at 6, and that the trial court should only be allowed to consider the "market price" for services, *id.* at 9, are contrary to this Court's decision in *Young*. In *Young,* the Court explained that a trial court has the option of fashioning an unjust enrichment remedy in two distinctly different ways.

> Washington law states the measure of recovery for unjust enrichment to a faultless claimant for the claimant's improvement to land is measured in one of two ways. It may be measured by the amount which the benefit conferred would have cost the defendant had it obtained the benefit from some other person in the plaintiff's position. **Alternatively, it may be measured by the extent to which the other party's property has been increased in value or his other interests advanced.**

164 Wn.2d at 487. Like FSS now, in *Young* the "[defendant's] argument [completely] overlook[ed] the focus of [the second way to fashion] an unjust enrichment calculation. The obligation to repay the debt or **disgorge the value of the received benefit focuses on the *receiver* of the benefit, not on the *provider* of the benefit**." *Id.* at 489 (emphasis added).

FSS's premise that the "received benefit" to be disgorged must be limited by a "fair market rate" is not supported by any authority. *See, e.g.*,

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appropriate remedy for unjust enrichment. *See County of Essex, v. First Union Nat'l Bank,* 186 N.J. 46, 56, 891 A.2d 600 (2006) ("Our case law has long recognized that in analogous circumstances, general principles of equity mandate that the wrongdoer be relieved of any profits"); *see also In re Cheerios Marketing and Sales Practices Litigation*, No. 09-cv-2413, 2012 WL 3952069 *13 (D. N.J. Sept. 10, 2012) (explaining that under New Jersey law "[i]n order to obtain disgorgement of profits, a plaintiff must demonstrate that a defendant was unjustly enriched").

Petition at 7-8. To the contrary, FSS has cited authority to the effect that courts often choose to require a defendant to pay the market price. *See* Petition at 9. But, there is no limitation on a trial court's election to fashion an alternative remedy where justice so requires or when the services are unique in nature and without an established market rate. Indeed, this Court explained that even when there is a market rate for services, the trial court still had "substantial discretion" to award the profit (*i.e.*, increase in value of the land) made by the defendant, even though that figure could be much greater than the "market value" for the services.

> Here, the value of the first measure is $760,382 while the value of the second measure is between $750,000 and $1,050,000. Therefore, under Washington law Jim and Shannon are entitled to an award between $750,000 and $1,050,000. Within this range the trial court, reviewing the complex factual matters involved in the case, has tremendous discretion to fashion a remedy to do substantial justice to the parties and put an end to the litigation.

Id. at 487-488 (citations and quotations omitted). If the law were in accord with FSS's arguments, *see* Petition at 11-13, this Court would not have allowed for any remedy above the "market value" of the services (*i.e.*, $760,382), in *Young*. Instead, the Court explained that the benefit conferred on the defendant, measured by the value added to the land, could be recovered by plaintiffs.

In *Young*, the land which was increased in value did not "belong to" plaintiffs. *Cf.* Petition at 12-13. However, as defendant realized an unjust gain in the value of the land (*i.e.*, profit) due to plaintiffs' work, the Court explained that the gain could be disgorged. Similarly here, although

the contract leading to FSS's profits did not "belong to" Air Serv, the profits from that contract were realized due to Air Serv's services. Without Air Serv's services, FSS would not have been able to perform on its contract with Delta because it would not have been able to service the international flights. Thus, awarding Air Serv the profits from those flights was well within an appropriate remedy.[9]

Furthermore, FSS's argument that disgorgement of profits is not a remedy under unjust enrichment is refuted by numerous authorities on which it relies.[10] At best, it seems that FSS is arguing that disgorgement of profits is not a preferable remedy in this instance. *See* Petition at 10 ("There is nothing extraordinary in this case that requires departure from the 'normal'"). However, this Court has explained that it is within a trial court's "tremendous discretion to fashion a remedy to do substantial

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[9] This result would not leave FSS worse off than it would have been otherwise. *Cf.* Petition at 16. Without Air Serv's services, FSS would not have received these profits because it would not have even been able to board the flights on which the services were performed. So without Air Serv's services FSS would have been in breach of its multimillion dollar contract with Delta, a position which is far worse than having to pay the profits for a portion, or even all, of the contract. FSS argues that the calculation of profits based solely on its revenues would be unfair. *See* Petition at 4. However, as FSS refused to provide its cost information, the trial court only has the revenue figures to analyze in the event it elects to disgorge FSS's profits. FSS refusal, including disregard of the trial court's order, to provide cost information is of its own doing.

[10] *See, e.g.*, Petition at 8, n. 6 (Restatement explaining that amount of profit wrongfully obtained is appropriate remedy for unjust enrichment); Petition at 9 (citing *Staff Builders v. Home Healthcare, Inc. v. Whitlock*, 108 Wn.App. 928, 930, 33 P.3d 424 (2001) which held, "***We hold that Staff Builders was entitled to recover their lost profits for damages and recoupment of unjust enrichment.***" (emphasis added)); Petition at 14 (Restatement recognizing disgorgement of profits is an appropriate remedy where defendant was a conscious wrongdoer); Petition at 15 (citing *Certified Fire Prot. v. Precision Constr.*, 283 P.3d 250, 257 (Nev. 2012) (court explaining that under unjust enrichment a trial court "***may strip a wrongdoer of all profits made in a transaction***") (emphasis added)).

justice to the parties and put an end to the litigation," *Young*, 164 Wn.2d at 488, therefore, FSS's preference for a specific remedy provides no reason to grant its petition.[11] The trial court, having a thorough knowledge of the specific facts of the dispute, was in the best position to determine which measure of recovery should be used for an unjust enrichment claim. *See id.*

Even if it were Air Serv's burden to prove this was not a "normal" case involving services, the evidence presented at trial would meet such a burden. The services provided by Air Serv were unique and required governmental approval. Throughout the underlying litigation, FSS was not able to provide a single concrete example of any company performing similar services. *See, e.g.*, Slip Op. at 5. Indeed, the overwhelming evidence at trial demonstrated that these services were not readily available in any market (or even offered to be provided by any other company to FSS). *See, e.g.*, Slip Op. at 5.

The Court of Appeals decision enunciating the remedies for FSS's liability under unjust enrichment provides no basis for this Court to accept review of this case. Rather, the Court of Appeals decision is in accord with long-established Washington law, including as most recently explained by this Court in *Young*.

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[11] There is absolutely no law that requires there to be a confidential or fiduciary relationship for disgorgement of profits to be a remedy for unjust enrichment. *Cf.* Petition at 10-11. FSS's citation to cases that have awarded disgorgement of profits based on other legal theories has absolutely nothing to do with a proper remedy for unjust enrichment.

B. FSS DOES NOT RAISE AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST

Contrary to FSS's assertion that the "consequences [of the Court of Appeals unpublished opinion] will be enormous," Petition at 7, the opinion does not alter the law in Washington, nor does it in anyway preclude a trial court from using market value for services in fashioning a remedy. Indeed, the Court of Appeals explained that the market value of services is one way of determining a remedy for unjust enrichment. *See* Slip Op. at 4 (explaining that "[w]hen services have been provided, the first measure is typically represented by the market value of the services rendered").

FSS's argument that a market value for services can be an appropriate remedy remains unchanged by the Court of Appeals opinion. Indeed, using market value as a remedy is reasonable in numerous instances where services are provided and there is a marketplace for such services. However, in this instance, where no such market was ever identified, the trial court should be allowed to disgorge the benefit that was conferred on FSS. If this Court were to accept FSS's misinterpretation of the law, any provider of a unique service would never be able to collect payment under unjust enrichment because a "market value" would be unprovable. *Cf.* Petition at 18-19. Of course, such an absurd result is not and should not be the law. The Court of Appeals unpublished opinion does not raise any substantial public interest that needs to be addressed by this Court.

C. THE COURT OF APPEALS DECISION DOES NOT VIOLATE PUBLIC POLICY

Although FSS advocates for this Court to expressly adopt disgorgement of profits under certain circumstances, *see* Petition at 14, it also argues that allowing such a remedy is punitive or would allow for a double recovery, *see id.* at 16-17. FSS's inconsistent position makes no sense. Moreover, FSS's contention that "no Washington court has ever adopted disgorgement of profits as a remedy in any unjust enrichment case," as discussed *supra*, is untrue.[12] Disgorgement of profits is the same as "the obligation to repay the debt or disgorge[ment] the value of the received benefit." *Young*, 164 Wn.2d at 489. FSS's argument that "disgorgement of profits" is unrelated to "disgorgement of the value of the received benefit" is nothing more than a semantical game. The profit *is* the value of the benefit received. Courts have long recognized that when a party is unjustly enriched, an appropriate remedy is to make sure the benefit/profit that was received unjustly is disgorged. There is nothing punitive about taking away an undeserved profit from a defendant. Indeed, this Court previously has rejected FSS contention, explaining that where a claimant is not at fault, it is important to disgorge the entire value

[12] FSS's argument seems to be based on a very specific search it conducted on Westlaw using a narrow choice of words. *See* Petition at 17, n.14. However, even if accurate, a Westlaw search is hardly persuasive authority. For example, more broad searches on Westlaw, such as "disgorg! /p profit /p "'unjust enrichment,'" prove that a number of Washington courts, both state and federal district courts, have explained disgorgement of profits to be an appropriate remedy under Washington law. *See supra* at 10-11. Notably, however, none of these cases hold that disgorgement of profits could ever be possibly be considered punitive or to be a double recovery.

of the benefit retained by the defendant, regardless of the gain to the claimant.

> [Defendant's] theory of recovery is based on preventing a supposedly unconscionable gain to the claimant. Yet, her theory of recovery permits a defendant to retain some benefit. Under circumstances where the claimant is at fault and/or the defendant did not consent to the benefit such a theory of recovery may be sound. But where the claimant is not at fault ... **fairness and justice dictate the defendant should be held to pay the entire amount as measured** by how much it would have cost the defendant to purchase the improvements or **by how much the improvement enhanced the value of the property.**

Young, 164 Wn.2d at 490-91. Accordingly, the Court of Appeals analysis that the benefit conferred on FSS due to Air Serv's services could be determined by the profit that FSS received from such services, is fully consistent with Washington law and public policy.

CONCLUSION

Without the services Air Serv provided to FSS, FSS would have been unable to perform its multi-million dollar contract with Delta. FSS was unjustly enriched and greatly profited from Air Serv's services. The Court of Appeals did not error in explaining that the benefit FSS unjustly received could be measured by the profit FSS received for the services. The Court of Appeals opinion does not conflict with any Washington appellate decision. Nor does the Court of Appeal's opinion create an issue of substantial public interest. FSS's Petition should be denied.

Dated this 3rd day of June 2015.

ROHDE & VAN KAMPEN

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that the following is true and correct:

On June 3, 2015, I arranged for service of the foregoing Respondents Brief, to the court and to the parties to this action as follows:

Supreme Court Clerk's Office Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	___ Facsimile ___ Hand Deliv. ___ U.S. Mail _X_ E-Mail ___ Messenger
Gregory McBroom Livengood Alskog, PLLC 121 Third Avenue P.O. Box 908 Kirkland, Washington 98033	___ Facsimile ___ Hand Deliv. _X_ U.S. Mail ___ E-Mail ___ Messenger

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

Executed at Seattle, Washington, on June 3, 2015.

E. Birch Frost

OFFICE RECEPTIONIST, CLERK

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Subject: RE: FSS v Air Serv - Supreme Court No. 91712-4 - Response to Petition

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To the Clerk of the Court:

Please find attached a copy of Respondent Air Serv's Response to Petition for Review. This matter is Flight Services, Inc. v. Air Serv Corporation, Supreme Court No. 91712-4. The attorney filing this response is David Crowe, WSBA No. 43529, telephone number 206-436-8339, and email address dcrowe@rvk-law.com.

Thank you,

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