

NO. 66595-2-I

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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NOSWORTHY TELECOMMUNICATION DISTRIBUTOR, INC., a  
Washington corporation, and AMIR BASHIR, a married man,

Appellants,

v.

SAMSUNG TELECOMMUNICATION AMERICA, L.L.C., a Delaware  
limited liability corporation, and SAMSUNG TELECOMMUNICATION  
AMERICA, L.P.,

Respondents.

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OPENING BRIEF OF APPELLANTS

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## TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	iii-v
I. INTRODUCTION	1
II. ASSIGNMENT OF ERROR	2
III. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR	2
IV. STATEMENT OF THE CASE	3
1. The origins of NTD's Complaint against Samsung	3
2. The proceedings in Snohomish County Superior Court	7
V. SUMMARY OF THE ARGUMENT	9
VI. ARGUMENT	10
1. The standard of review	10
2. Basic principles governing sanctions under CR 11	11
3. Remand is required because the trial court and Samsung failed to create an adequate record for review	14
4. NTD's Complaint is not frivolous	17
5. The inclusion of Mr. Bashir's name in the caption of the Complaints does not warrant the imposition of sanctions	25

6. Samsung gave NTD no opportunity to mitigate the sanctions, nor did the trial court consider any less severe sanctions	27
7. Even if some sanctions were warranted, the trial court abused its discretion by imposing them on NTD and Mr. Bashir rather than on Mr. Osemene	29
8. The trial court also abused its discretion by refusing to consider the affidavits of Mr. Bashir and Mr. Sutter, and by allowing Mr. Osemene to continue as counsel without inquiring about a conflict waiver	35
VII. CONCLUSION	37

## TABLE OF AUTHORITIES

### Washington Cases

<i>Alejandro v. Bull</i> , 159 Wn.2d 674, 153 P.3d 864 (2007).....	23
<i>Amy v. Kmart of Washington LLC</i> , 153 Wn. App. 846, 223 P.3d 1247 (2009).....	11
<i>Biggs v. Vail</i> , 124 Wn.2d 193, 876 P.2d 448 (1994) ( <i>Biggs II</i> ).....	passim
<i>Bryant v. Joseph Tree, Inc.</i> , 119 Wn.2d 210, 829 P.2d 1099 (1992).....	12, 13, 34
<i>Carlile v. Harbour Homes, Inc.</i> , 147 Wn. App. 193, 194 P.3d 280 (2008).....	23
<i>Colmex, Inc. v. Harris</i> , 2008 WL 2487991 (Div. 1, 2008).....	35
<i>Cox v. O'Brien</i> , 150 Wn. App. 24, 206 P.3d 682 (2009).....	25
<i>Eller v. East Sprague Motors &amp; R.V.'s, Inc.</i> , 159 Wn. App. 180, 244 P.3d 447 (2010).....	28
<i>Fid. &amp; Deposit Co. of Md. v. Dally</i> , 148 Wn. App. 739, 201 P.3d 1040 (2009).....	18
<i>In re Cooke</i> , 93 Wn. App. 526, 969 P.2d 127 (1999).....	14, 31
<i>Johnson v. Jones</i> , 91 Wn. App. 127, 955 P.2d 826 (1998).....	16
<i>Just Dirt, Inc. v. Knight Excavating, Inc.</i> , 138 Wn. App. 409, 157 P.3d 431 (2007).....	10, 14, 17
<i>MacDonald v. Korum Ford</i> , 80 Wn. App. 877, 912 P.2d 1052 (1996).....	passim
<i>Mahler v. Szucs</i> , 135 Wn.2d 398, 957 P.2d 652 (1998) .....	14
<i>Miller v. Badgley</i> , 51 Wn. App. 285, 753 P.2d 530 (1988).....	32

<i>Pacific Northwest Group A v. Pizza Blends, Inc.</i> , 90 Wn. App. 273, 951 P.2d 826 (1998).....	20
<i>Poulsbo Group, LLC v. Talon Development, LLC</i> , 155 Wn. App. 339, 229 P.3d 906 (2010).....	23, 24
<i>Rinke v. Johns-Manville Corp.</i> , 47 Wn. App. 222, 734 P.2d 533 (1987).....	26
<i>Skimming v. Boxer</i> , 119 Wn. App. 748, 82 P.3d 707 (2004).....	13, 20
<i>Splash Design, Inc. v. Lee</i> , 104 Wn. App. 38, 14 P.3d 879 (2001) .....	32
<i>State v. Knutson</i> , 81 Wash. 47, 142 P. 444 (1914) .....	26
<i>Washington State Physicians Ins. Exchange &amp; Ass'n. v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	10, 32

#### **Federal Cases**

<i>Calloway v. The Marvel Entertainment Group</i> , 854 F.2d 1452, (2 <sup>nd</sup> Cir. 1988) .....	33, 36
<i>Kirk Capital Corp. v. Bailey</i> , 16 F.3d 1485, (8 <sup>th</sup> Cir. 1994) .....	passim
<i>Marlin v. Moody National Bank, N.A.</i> , 533 F.3d 374, (5 <sup>th</sup> Cir. 2008) .....	34
<i>Pavelic &amp; LeFlore v. Marvel Entertainment Group</i> , 493 U.S. 120, 110 S.Ct. 456 (1989).....	33
<i>Simon DeBartolo Group, L.P. v. The Richard E. Jacobs Group, Inc.</i> , 186 F.3d 157, 177 (2 <sup>nd</sup> Cir. 1999).....	22

#### **Washington Statutes**

RCW 4.84.185 .....	11, 32
--------------------	--------

**Washington Rules**

CR 11 ..... passim  
CR 17 ..... 26  
CR 9 ..... 24  
RPC 1.1 ..... 35

**Federal Rules**

Fed. R. Civ. P. 11 ..... 32, 34

## I. INTRODUCTION

In the spring of 2009, Respondent Samsung Telecommunications America, LLC (“Samsung”) breached a distributorship agreement with Appellant Nosworthy Telecommunication Distributor, Inc. (“NTD”). Unfortunately for NTD, it engaged attorney Justin Osemene to represent it in the ensuing litigation with Samsung. Mr. Osemene signed and filed a Complaint and Amended Complaint against Samsung that added tort, unjust enrichment, and CPA causes of action to the core breach of contract claim. He added co-Appellant Amir Bashir, owner and CEO of NTD, to the caption of the complaints as a plaintiff, although Mr. Bashir had no claims against Samsung in his individual capacity.<sup>1</sup> Finally, Mr. Osemene also failed to submit a timely response to Samsung’s Motion for Summary Judgment, offering the trial court no valid excuse for his failure. As a consequence, the trial court granted the effectively unopposed motion, and dismissed all of NTD’s claims.

NTD and Mr. Bashir do not appeal the dismissal of NTD’s claims, as they understand that their remedy on that issue, if any, will be against Mr. Osemene. However, NTD and Mr. Bashir do appeal that part of the Order Granting Summary Judgment that imposed CR 11 sanctions on them. The award of \$51,164.89 in sanctions, representing Samsung’s total fees and costs for the litigation, was an abuse of the trial court’s discretion. The trial court, and Samsung’s counsel, failed to create a

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<sup>1</sup>In the remainder of this Brief, all claims advanced in the trial court on behalf of both NTD and Mr. Bashir will be referred to as “NTD’s claims.”

proper record for review, as there are no findings and conclusions supporting the sanction award. Moreover, the claims NTD advanced in the trial court were factually well grounded, and if some may have lacked proper legal support, this was Mr. Osemene's responsibility, not that of his clients. For these and other reasons spelled out below, the trial court abused its discretion by awarding CR 11 sanctions and imposing them on NTD and Mr. Bashir. This Court should reverse and remand for further proceedings.

## **II. ASSIGNMENT OF ERROR**

The trial court erred by ordering Appellants NTD and Mr. Bashir to pay Respondent Samsung \$51,164.89 in CR 11 sanctions.

## **III. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR**

1. Did the trial court abuse its discretion by awarding CR 11 sanctions without entering written findings to support its award?
2. Did the trial court abuse its discretion by awarding CR 11 sanctions equal in amount to Samsung's total<sup>2</sup> attorney's fees and costs when not all of NTD's claims were frivolous?
3. Did the trial court abuse its discretion, and improperly turn CR 11 into a fee shifting mechanism, by imposing \$51,164.89 in CR 11 sanctions when there is no evidence in the record that Samsung ever alerted NTD and Mr. Bashir that it intended to seek sanctions for a frivolous or improper Complaint prior to filing its motion for summary judgment?

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<sup>2</sup> With the exception of \$4,500 in separately awarded discovery sanctions which are not in dispute in this appeal. CP 9.

4. Did the trial court abuse its discretion, and improperly turn CR 11 into a fee shifting mechanism, by imposing \$51,164.89 in CR 11 sanctions when there is no evidence it considered the propriety of a lesser sanction?
5. Did the trial court abuse its discretion by imposing CR 11 sanctions on Mr. Bashir and NTD when the CR 11 violations, if any, were the responsibility of their trial counsel, Mr. Osemene?
6. Did the trial court abuse its discretion by making its decisions regarding the quantity of sanctions and on whom to impose them without considering the previously filed affidavits of Mr. Bashir and Mr. Robert Sutter?
7. Did the trial court abuse its discretion by imposing CR 11 sanctions on Mr. Bashir and NTD without alerting them that Mr. Osemene had a conflict of interest on the question of who should be liable for any sanctions, or providing them an opportunity to secure new counsel?

#### **IV. STATEMENT OF THE CASE**

Mr. Bashir and NTD are not appealing the dismissal of NTD's claims. However, to decide whether those claims were ungrounded in fact, unwarranted by law, or interposed for an improper purpose, and thus properly subject to sanctions under CR 11, it is necessary to understand the factual background that gave rise to this case.

1. The origins of NTD's Complaint against Samsung

NTD is a telecommunications products distributorship that has been doing business in Washington State for more than forty years. CP 43. Mr. Bashir purchased NTD from its prior owners in December, 2008.

CP 43. Samsung, whose headquarters are in Texas, is an affiliate of a well-known Korean industrial group. CP 58, ¶ 5. Samsung researches, develops, and markets personal and business communication products in North America. It relies on independent distributors to sell its product to end users. CP 298, ¶ 3. NTD and Samsung entered into negotiations in early 2009 concerning the possibility that NTD could act as a Samsung distributor in the Pacific Northwest. CP 58-59. Mr. Bashir, as president and owner of NTD, led the negotiations on behalf of his firm. CP 58. Samsung was represented in the negotiations by Terrence Bloom, Bart Kohnhorst, and Darrin Roberts. CP 58-59.

These negotiations covered a broad range of topics, including the extent of the financial help Samsung would make available to NTD under certain circumstances to reimburse expenses incurred in promoting Samsung products. In particular, Samsung provided NTD with a document bearing the heading “Distributor Marketing Development Funds: Guidelines” (henceforth “MDF Guidelines”). CP 299, ¶ 7, CP 337-341. This document stated in pertinent part as follows:

. . . initial stocking orders of \$100,000 or more will accrue \$5,000 into the MDF account. Distributors will begin accruing *additional* MDF monies on their first stocking order purchase and will be able to use their MDF dollars upon payment of their initial stocking order invoice.

CP 337 (italicized emphasis added).

On or about March 24, 2009, NTD and Samsung entered into a written distributor agreement (“the Agreement”). CP 226. The Agreement contains an integration clause, and a provision that any

“alteration, amendment, waiver, cancellation or any other change in any term or condition of this Agreement shall be . . . set forth in writing.” CP 230, ¶ 21.8 (integration clause); CP 230, ¶ 21.5 (no oral modifications). However, the Agreement makes no reference to the MDF Guidelines. Other key features of the Agreement include a provision for a restocking charge to apply to returned merchandise, and a termination provision ensuring the distributor 30 days notice and a chance to correct specified forms of alleged default. CP 229, ¶ 7.3 and CP 230, ¶ 15.

Subsequent to the execution of the Agreement, on or about March 30, 2009, Samsung agreed in writing to modify the parties’ contract by granting NTD “the option to return any **unopened** equipment from your opening order *without restocking charges.*” CP 237 (bold and underlined emphasis in original, italicized emphasis added). Mr. Bashir acknowledged this change on behalf of NTD, and in response placed an initial order for \$150,000 of Samsung equipment. CP 236.

Despite its best efforts, NTD was unable to sell any Samsung equipment in the two months following the execution of the agreement. CP 133. When it sought to take advantage of the modified contractual provision allowing it to return unsold equipment with no restocking charge, Samsung protested. CP 63, ¶ 18. This dispute led to extensive discussions between the parties about their obligations under the Agreement, as modified. CP 63. Samsung concluded that these discussions had led to a “mutual agreement to terminate the Distribution Agreement.” CP 248. To support this conclusion, Samsung would later

cite to the following paragraph from a memorandum written by Robert Sutter, NTD's Vice President of Operations:

There followed several days of email exchanges between Mr. Bashir, Mr. Bloom [of Samsung], and Mr. Kohnhorst [of Samsung] about what the distributor agreement actually said. On June 10 there was a conference call in the late afternoon, comprised of the three men and also Mr. Sutter. During the course of the call it became apparent that there were irreconcilable differences between the positions occupied by Samsung and by NTD. It was therefore decided by Mr. Kohnhorst that the best resolution for all parties was to end the distributorship, and have NTD return all of the Samsung items it had purchased. He said that Terry Bloom would work with Mr. Sutter in the collection of the data needed to create a Return Authorization. Mr. Kohnhorst would have a Letter of Termination Agreement drawn up and sent to Mr. Bashir for his signature. The conference call ended with the verbal agreement of all four parties to these terms.

CP 222. On June 15, 2009, Samsung sent NTD a termination letter, ostensibly to memorialize the claimed verbal agreement. CP 248. NTD returned all of the Samsung equipment it had ordered, but neither Mr. Bashir nor anyone else at NTD ever signed the termination agreement. CP 222, 248.

Concerned that Samsung had improperly terminated the Agreement and damaged NTD, Mr. Bashir eventually consulted with Mr. Osemene. On October 5, 2009, Mr. Osemene sent a demand letter to Samsung, apparently requesting \$100,000 to settle NTD's claims. CP 250-252. Samsung's corporate counsel rejected Mr. Osemene's demand, asserting that there was "no basis for NTD to recover its expenses from Samsung." CP 254. However, there is no evidence in the record that anyone from Samsung ever informed NTD that it would seek sanctions if

NTD pursued its claims, until Samsung sought such sanctions in its Motion for Summary Judgment.

2. The proceedings in Snohomish County Superior Court

Represented by Mr. Osemene, NTD and Mr. Bashir filed suit against Samsung on May 3, 2010, alleging breach of contract, intentional misrepresentation, unjust enrichment, and conversion. CP 389-418. On May 11, 2010 Mr. Osemene filed an Amended Complaint, adding claims for breach of the covenant of good faith and fair dealing, loss of business opportunities, and violation of the Washington State Consumer Protection Act. CP 371-384. Both the original Complaint and the Amended Complaint were signed by Mr. Osemene; neither was signed by Mr. Bashir. CP 384, 401. Samsung answered the Amended Complaint on May 28, 2010.<sup>3</sup> Samsung's Answer makes no mention of the possibility that it might seek sanctions, nor does its Prayer for Relief request attorneys' fees.

The parties proceeded to conduct written discovery, but no depositions were held.<sup>4</sup> On October 27, 2010, Samsung moved for

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<sup>3</sup> Samsung's Answer was not included in Appellants' first Designation of Clerks' Papers. Pursuant to RAP 9.6(a), it is designated in Appellants' Supplemental Designation of Clerks' Papers, filed on April 18, 2011 with the Snohomish County Superior Court, a copy of which is attached to this Brief as Appendix A. A copy of the Answer is attached to this Brief as Appendix B.

<sup>4</sup> NTD sent improper deposition subpoenas to Samsung employees which resulted in sanctions against Mr. Bashir and NTD. Those sanctions are reflected in a separate line for \$4,500 in the Judgment (CP 9), and are not at issue in this appeal.

summary judgment, seeking dismissal of all of Appellants' claims. CP 350-370. For the first time, Samsung also requested CR 11 sanctions, alleging that Appellants' claims had "absolutely no basis in law or fact." CP 370, line 4. Mr. Osemene wrote to counsel for Samsung on November 9, 2010, asking Samsung to stay its motion to permit additional discovery. CP 118. Samsung's counsel refused. CP 120. Although he was aware of this refusal, Mr. Osemene nonetheless failed to submit a timely response on behalf of NTD and Mr. Bashir. Instead, on November 19, four days late, Mr. Osemene submitted an "Emergency Response" which failed to raise any issues of material fact regarding the underlying claims, did not properly ask for a CR 56(f) continuance, and did not offer a valid excuse for its tardiness. CP 702-205. The Court granted Samsung's motion for summary judgment, and awarded Samsung "its reasonable attorneys' fees and expenses because of the filing of plaintiffs' claims pursuant to CR 11." CP 180.

Pursuant to the trial court's Order Granting Summary Judgment, Samsung filed its Motion to Set Amount of CR 11 Sanctions on December 3, 2010, noting it for hearing on December 15, 2010. CP 52-56. On the same day that Samsung filed its motion, Mr. Osemene filed a Motion for Reconsideration on behalf of NTD and Mr. Bashir, attempting to note it for hearing on December 17, 2010. CP 161-178. The Motion for Reconsideration was accompanied by lengthy declarations from Mr. Osemene, Mr. Sutter, and Mr. Bashir. CP 110-128, 129-160, and 57-109. Finally, on December 8, 2010, Mr. Osemene filed Plaintiffs' Response and

Objection to Motion for Monetary Sanction. CP 34-39. This response explicitly referred to the “sworn affidavits” that accompanied the previously filed Motion for Reconsideration. CP 35.

The trial court held the hearing on Samsung’s Motion to Set Amount of CR 11 Sanctions on December 15, 2010. It expressly noted that it was making its decision without considering the previously submitted affidavits of Mr. Bashir and Mr. Sutter. RP (12/15/10) at 21:19-21. The trial court asserted that “the lawsuit is totally frivolous and without merit,” but did not distinguish between factually baseless and legally unwarranted claims, or otherwise offer any justification for imposing sanctions on Mr. Bashir and NTD rather than Mr. Osemene. RP (12/15/10) at 21:21; 22:8-11. The trial court entered a corresponding judgment that same day, and denied the Motion for Reconsideration on December 29, 2010. CP 9-11, CP 7-8. Mr. Osemene filed a timely Notice of Appeal on January 24, 2011, and then filed a Notice of Withdrawal and Substitution on February 28, 2011.<sup>5</sup> Current counsel for NTD and Mr. Bashir appeared on March 28, 2011.

## **V. SUMMARY OF THE ARGUMENT**

While Mr. Osemene’s failure to submit a timely response to Samsung’s Motion for Summary Judgment provided a proper procedural basis for the trial court’s dismissal of Appellants’ claims, there was no

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<sup>5</sup>A copy of Mr. Osemene’s Notice of Withdrawal and Substitution is attached hereto as Appendix C. The attorney Mr. Osemene identified as the substituting attorney, Mr. Charlie Shane, had not in fact been engaged by NTD or Mr. Bashir, and did not appear on their behalf.

justification for its imposition of \$51,164.89 in attorneys' fees as CR 11 sanctions *on Mr. Bashir and NTD*. The trial court and Samsung's counsel failed to create a proper record for review of the award of sanctions in general, and specifically for the imposition of sanctions on Mr. Bashir and NTD, as opposed to Mr. Osemene. There is absolutely no basis to believe that NTD's claims were interposed for an improper purpose, and if some of the claims may not have been warranted by law, this was Mr. Osemene's responsibility. For these and other reasons spelled out in detail below, the trial court abused its discretion by imposing \$51,164.89 in CR 11 sanctions on Mr. Bashir and NTD, and this Court should reverse and remand for further proceedings.

## VI. ARGUMENT

### 1. The standard of review

A trial court's decision to award CR 11 sanctions is reviewed for abuse of discretion.<sup>6</sup> Although this is a deferential standard, "trial courts must exercise their discretion on articulable grounds, making an adequate record so that the appellate court can review [the] fee award."<sup>7</sup> A court abuses its discretion if its decision is "manifestly unreasonable or based on untenable grounds. A court necessarily abuses its discretion if it bases its

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<sup>6</sup> *Washington State Physicians Ins. Exchange & Ass'n. v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993)

<sup>7</sup> *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn. App. 409, 415, 157 P.3d 431 (2007).

ruling on an erroneous view of the law.”<sup>8</sup> Moreover, abuse-of-discretion review of CR 11 sanctions is subject to the special qualification that “[i]f the sanctions imposed are substantial in amount, type, or effect, appellate review of such awards will be inherently more rigorous.”<sup>9</sup> The justification in the record for a Rule 11 award “must correspond to the amount, type, and effect of the sanction applied.”<sup>10</sup> Because the trial court here imposed the very substantial sanction of \$51,164.89, review should be according to this heightened abuse of discretion standard.

2. Basic principles governing sanctions under CR 11

CR 11 is the only purported basis for the \$51,164.89 in fees and costs awarded in this case.<sup>11</sup> That rule provides in pertinent part as follows:

(a) Every pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by at least one attorney of record in the attorney’s individual name . . . . A party who is not represented by an attorney shall sign and date the party’s pleading, motion, or legal memorandum . . . . The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party’s or attorney’s knowledge, information, and belief, formed after

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<sup>8</sup> *Amy v. Kmart of Washington LLC*, 153 Wn. App. 846, 856, 223 P.3d 1247 (2009).

<sup>9</sup> *MacDonald v. Korum Ford*, 80 Wn. App. 877, 892, 912 P.2d 1052 (1996)

<sup>10</sup> *Id.*

<sup>11</sup> In particular, Samsung did not plead entitlement to fees under RCW 4.84.185, which requires a party to pay fees if its claims or defenses are “frivolous and advanced without reasonable cause.” See CP 369-370 (seeking fees under CR 11 only); CP 186 (awarding fees under CR 11 only).

an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . . If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.<sup>12</sup>

The purpose behind the rule is to deter “baseless filings, not filings which may have merit.”<sup>13</sup>

As interpreted by the Washington State Supreme Court, CR 11 distinguishes between two types of “baseless” filings: those which are not both well-grounded in fact and warranted by law, and those “interposed for any improper purpose.”<sup>14</sup> Samsung never alleged that NTD or Mr. Bashir made any filing for an improper purpose, so if sanctions were warranted here, it must have been because a filing was not well grounded in fact, or was unwarranted by law, or both.<sup>15</sup> However, even if a pleading “lacks a factual or legal basis, the court cannot impose CR 11 sanctions unless it also finds that the attorney [or party] who signed and filed the [pleading] failed to conduct a *reasonable inquiry* into the factual and legal

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<sup>12</sup> CR 11.

<sup>13</sup> *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992).

<sup>14</sup> *Id.* at 217.

<sup>15</sup> That one can infer this conclusion from Samsung’s pleadings should not relieve the trial court of its obligation to make an adequate record for review, as is argued in the next section below.

basis of the claim.”<sup>16</sup>

Because Washington’s civil rules endorse notice pleading, “[a] court should . . . be reluctant to impose sanctions for factual errors or deficiencies in a complaint before there has been an opportunity for discovery.”<sup>17</sup> As for the required degree of overall merit, both factual and legal, the threshold necessary to avoid sanctions is quite low. A trial court “should impose sanctions only when it is *patently clear* that a claim has *absolutely no chance of success*.”<sup>18</sup>

Once a court determines that a filing is sanctionable, it must determine both the appropriate sanction and on whom to levy it. Factors relevant to the proper quantity of the sanction include whether the party seeking sanctions gave the other party an opportunity to mitigate the harm done, and whether the proposed sanction amount is the minimal necessary to achieve the deterrent purpose of CR 11.<sup>19</sup> CR 11 is not intended to function as a fee shifting mechanism.<sup>20</sup> And although the rule gives the trial court “broad discretion in determining who should be sanctioned,” a court would abuse that discretion if it imposed the sanction on a person or

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<sup>16</sup> *Id.* at 220 (italicized emphasis in original).

<sup>17</sup> *Id.* at 222. In this case, the parties had propounded and answered written discovery, but there had been no depositions.

<sup>18</sup> *Skimming v. Boxer*, 119 Wn. App. 748, 755, 82 P.3d 707 (2004) (emphasis added).

<sup>19</sup> See *MacDonald*, 80 Wn. App. at 891 (discussing requirement of early notice to offending party to allow it to mitigate harm); and *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994) (*Biggs II*) (noting that “[i]n deciding upon a sanction, the trial court should impose the least sever sanction necessary to carry out the purpose of the rule”).

<sup>20</sup> *Biggs II*, 124 Wn.2d at 197.

entity that was not responsible for the frivolous filing.<sup>21</sup>

3. Remand is required because the trial court and Samsung failed to create and adequate record for review

Under established Washington law, the absence of an adequate record upon which to review any award of attorneys' fees "will result in a remand of the award to the trial court to develop such a record."<sup>22</sup>

Moreover, "findings of fact and conclusions of law are *required* to establish such a record."<sup>23</sup> With regard to decisions imposing attorneys' fees as CR 11 sanctions, the required findings are quite specific:

in imposing CR 11 sanctions, it is incumbent upon the court to specify the sanctionable conduct in its order. The court *must* make a finding that either the claim is not grounded in fact or law *and* the attorney or party failed to make a reasonable inquiry into the law or facts, or the paper was filed for an improper purpose.<sup>24</sup>

Washington courts have frequently applied these principles to reverse and remand judgments awarding CR 11 sanctions when the trial court and the party seeking sanctions have not created an adequate record for review.<sup>25</sup>

Here, that part of the trial court's Order Granting Summary Judgment dealing with sanctions states in its entirety as follows:

. . . it is further ORDERED, ADJUDGED AND DECREED that the defendant is awarded its reasonable attorneys' fees and expenses because of the filing of

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<sup>21</sup> *In re Cooke*, 93 Wn. App. 526, 529, 969 P.2d 127 (1999).

<sup>22</sup> *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 652 (1998).

<sup>23</sup> *Id.* (emphasis added).

<sup>24</sup> *Biggs II*, 124 Wn.2d at 201 (emphasis added).

<sup>25</sup> See, e.g., *Just Dirt*, 138 Wn. App. at 435-36, and *MacDonald*, 80 Wn. App. at 893 (holding that "[o]n remand, the trial court should identify the specific filings that violate CR 11").

plaintiffs' claims pursuant to CR 11. Defendant is directed to submit a declaration describing those fees and expenses within ten (10) days from the date of the entry of this Order.

CP 186. This does not adequately explain the basis for the Court's award. Although the phrase "because of the filing of plaintiffs' claims" can be read as specifying the Complaint (or the Amended Complaint) as the offending document, the Order does not state whether that pleading offends the rule because it was not grounded in fact, was unwarranted by law, or was interposed for an improper purpose.<sup>26</sup> It is completely silent on the subject of "reasonable inquiry" by either Mr. Osemene or NTD and Mr. Bashir.<sup>27</sup> Moreover, there is absolutely no indication in the record as to why sanctions were imposed on Mr. Bashir and NTD as opposed to on Mr. Osemene.

Nothing in the trial court's subsequent written rulings regarding sanctions cures the defects of the Order Granting Summary Judgment. In particular, although the Order Setting Amount of CR 11 Sanctions specifies for the first time that it is Mr. Bashir and NTD who shall pay the sanctions, it provides no findings or conclusions as to the basis for the sanctions in general, or why they are imposed on Mr. Bashir and NTD.<sup>28</sup>

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<sup>26</sup> CR 11(a). That Samsung had not requested sanctions for any filing allegedly submitted for an improper purpose does not relieve the trial court of its obligation to specify the basis for its award of sanctions.

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<sup>28</sup> The Order Setting Amount of CR 11 Sanctions was not included in Appellants' first Designation of Clerks' Papers. It is designated in Appellants' Supplemental Designation of Clerks' Papers, a copy of which is attached to this Brief as Appendix A. A copy of the Order Setting Amount of CR 11 Sanctions is attached to this Brief as Appendix D.

The trial court's Order Denying Motion for Reconsideration and to Set Aside Summary Judgment Order similarly offers no findings and conclusions that support the award of sanctions. CP 7-8.

Although a court's oral decisions can sometimes make up for a lack of written findings, that is not the case here.<sup>29</sup> There is no transcript of the hearing of Samsung's Motion for Summary Judgment.<sup>30</sup> The transcript of the December 15, 2010 hearing on Samsung's motion to quantify the sanctions does include a passage where the trial judge states that sanctions are "based upon filing a totally frivolous lawsuit." RP (12/15/10) 11:4-5. It includes another passage where the trial judge asserts that "[t]he basis for the sanctions is that the Court found and continues to find today, before reviewing any of the materials on motion to reconsider, that the lawsuit is totally frivolous and without merit." RP

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<sup>29</sup> Cf. *Johnson v. Jones*, 91 Wn. App. 127, 136, 955 P.2d 826 (1998) (rejecting argument that written findings supporting sanctions were inadequate, and noting that "[t]he trial judge intended her oral decision to be the findings and conclusions on the sanctions issue and considered them as such when she *specifically incorporated them in the final judgment and order* following trial. The *oral decision was comprehensive and detailed the court's reasons for concluding that sanctions were warranted*) (italicized emphasis added). By contrast, in this case the trial court did not specifically incorporate any oral findings in its orders, its oral rulings were not "comprehensive," and they did not "detail" reasons for concluding that sanctions were warranted.

<sup>30</sup> See the Statement of Arrangements filed by Mr. Osemene on February 23, 2011. Appellants' current counsel confirmed with Ms. Karen Avery, the responsible court reporter, that there is no transcript available for the November 24, 2010 summary judgment hearing. A copy of Ms. Avery's email confirming this point is attached to this Brief as Exhibit 1 to Appendix E.

(12/15/10) 21:18-21. However, the trial court did not specify whether it regarded the Complaint as ungrounded in fact, or unwarranted by law, or both.<sup>31</sup> It continued its complete silence on the subject of reasonable inquiry. It did not address the issue of mitigation or justify the sanctions as the “least severe . . . necessary to carry out the purpose of the rule.”<sup>32</sup> And it said nothing to explain its decision to impose sanctions on Mr. Bashir and NTD as opposed to on Mr. Osemene. This record is inadequate to support meaningful appellate review, and accordingly, reversal and remand are required.

4. NTD’s Complaint is not frivolous

Even if this Court disagrees with the preceding argument, and concludes that the record is adequate to support review, it should reverse and remand.<sup>33</sup> The first reason this is so is because NTD’s claims were not frivolous, or at the very least, not all of them were frivolous. Since at least some of NTD’s claims were not frivolous, reversal and remand is necessary to recalibrate the sanctions to limit them to the amounts reasonably expended in responding to the frivolous claims.<sup>34</sup>

a. NTD’s breach of contract claim was not frivolous.

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<sup>31</sup> “Totally frivolous” *could* mean both ungrounded in fact and unwarranted by law, but it need not mean this.

<sup>32</sup> *Biggs II*, 124 Wn.2d at 197.

<sup>33</sup> Conversely, if the Court agrees that the record is inadequate for review, it may nonetheless proceed to consider the arguments that follow below in order to ensure that any fee award on remand is “based on proper grounds.” *Just Dirt*, 138 Wn. App. at 416.

<sup>34</sup> *See, e.g., Biggs II*, 124 Wn.2d at 201-202

To prevail on a breach of contract claim, a plaintiff has to show the existence of a contract, breach of a contractual obligation by the defendant, and damages.<sup>35</sup> NTD and Samsung were clearly bound together by contractual obligations spelled out in the Agreement. CP 226-234. Moreover, after the Agreement was executed, Samsung agreed in writing to modify an important provision: it waived the 20% restocking charge for items returned unopened from the initial order. CP 237. When NTD sought to take advantage of the modified provision and return its entire initial order at no charge, there is clear evidence that Samsung refused. CP 133-134; 62-66.<sup>36</sup> That refusal, and the ensuing termination of the distributorship arrangement, at least arguably caused harm to NTD. Even if NTD might not ultimately have prevailed on its breach of contract claim, it was not frivolous.

Samsung will surely reply that after it refused to honor the no-restocking-charge provision, the parties rescinded the Agreement, making it as though it had never been formed. CP 354-355. This is one *possible* reading of the evidence, but it is not a *necessary* one. Recall Mr. Sutter's memorandum, in which he stated as follows:

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<sup>35</sup> *Fid. & Deposit Co. of Md. v. Dally*, 148 Wn. App. 739, 745, 201 P.3d 1040 (2009).

<sup>36</sup> This evidence was not before the trial court when it granted Samsung's Motion for Summary Judgment. However, it was filed with the court before it quantified the magnitude of the sanctions. The court deliberately decided to ignore it. RP (12/15/10) at 21:20-21. In Section 8 below, Appellants argue that this was an abuse of discretion.

There followed several days of email exchanges between Mr. Bashir, Mr. Bloom [of Samsung], and Mr. Kohnhorst [of Samsung] about what the distributor agreement actually said. On June 10 there was a conference call in the late afternoon, comprised of the three men and also Mr. Sutter. During the course of the call it became apparent that there were irreconcilable differences between the positions occupied by Samsung and by NTD. *It was therefore decided by Mr. Kohnhorst* that the best resolution for all parties was to end the distributorship, and have NTD return all of the Samsung items it had purchased. He said that Terry Bloom would work with Mr. Sutter in the collection of the data needed to create a Return Authorization. *Mr. Kohnhorst would have a Letter of Termination Agreement drawn up and sent to Mr. Bashir for his signature. The conference call ended with the verbal agreement of all four parties to these terms.*

CP 221-222 (emphasis added). Simply put, the reference of “these terms” is unclear. Did Mr. Sutter believe that NTD had agreed to rescind the Agreement, as the term is used at law, and thereby waive all claims for past breaches? Or did he instead understand that the Agreement was terminated going forward, but NTD retained the right to make claims for the prior breach? Mr. Sutter does not say.

When the trial court saw Mr. Sutter’s statement for the first time, Mr. Osemene failed to produce any evidence or argument to counter Samsung’s interpretation. CP 202-205. However, such countervailing evidence exists in the form of Mr. Bashir’s declaration, submitted to the trial court prior to its decision quantifying sanctions. CP 57-71. Mr. Bashir flatly denies that he agreed to “terminate” the Agreement in a manner that would deprive NTD of the right to press claims against Samsung. CP 63-66, at ¶¶ 19-22. The fact that Mr. Sutter may plausibly be interpreted as saying the Agreement was rescinded would of course

create a credibility problem for Mr. Bashir before a trier of fact, but this is not the standard for determining the frivolity of a claim.<sup>37</sup> The trier of fact might possibly have believed Mr. Bashir, and that is enough to render the breach of contract claim non-frivolous.<sup>38</sup>

Moreover, no one at NTD ever signed the Termination Letter sent by Mr. Kohnhorst. CP 248. Yet the Agreement contains a clause requiring all alterations and amendments to be signed. CP 230, ¶ 21.5. Precisely, the clause states that Samsung will not be bound by any alteration unless a responsible Samsung officer signs off on it. But NTD would at least have a good faith argument for an extension of law to require this clause to be interpreted reciprocally. The question would then become whether the parties' actions evidenced an intent to waive this clause.<sup>39</sup> The very fact that Samsung sent a written confirmation of the purported termination suggests that it did not intend to waive the clause prohibiting oral modifications. NTD might lose this factual argument, but it is not "patently clear" that it would lose. NTD's failure to sign the

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<sup>37</sup> Appellants' current counsel is aware of no authority stating that one corporate officer may not be heard to contradict another. Recall that Mr. Sutter's statement was not made while he was serving as a CR 30(b)(6) designee for NTD. CP 222.

<sup>38</sup> Recall that "[a] trial court "should impose sanctions only when it is *patently clear* that a claim has *absolutely no chance of success*." *Skimming*, 119 Wn. App. at 755 (emphasis added).

<sup>39</sup> Under Washington law, parties can agree to waive a no-oral modifications clause. *See, e.g., Pacific Northwest Group A v. Pizza Blends, Inc.*, 90 Wn. App. 273, 278-280, 951 P.2d 826 (1998). Whether parties agree to modify a no-oral modification clause is a question of fact. *Id.* at 280.

termination letter is thus an independent reason why its contract claim is not frivolous.

Finally, there is another component to NTD's breach of contract claims: its claim to reimbursement for its training and marketing expenses. It is true that the MDF Guidelines contain language tending to deny any liability for such reimbursement in the circumstances of this case. CP 337-341. However, the Agreement *nowhere* references the MDF Guidelines. CP 226-234.<sup>40</sup> Therefore, in their dispute about the terms governing reimbursement of marketing expenses, NTD and Samsung were on the same footing: both were insisting on the validity of terms established outside of the Agreement itself. NTD was insisting on terms it claimed were established in verbal communications; Samsung was insisting on terms it claims were established by the parties' purported agreement to the MDF Guidelines, which are not incorporated into the Agreement. One cannot predict with certainty how a fact-finder would have resolved this dispute.

For all of these reasons, NTD's core breach of contract claim was not frivolous. Since Samsung never claimed, and the trial court certainly

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<sup>40</sup> Samsung's Motion for Summary Judgment asserts that "the parties specifically allocated responsibilities for payment of marketing and training expenses at the outset of their contractual relationship." CP 362. It then proceeds to cite to "Bloom Dec., Ex. 1:10" and "Graff Dec., Ex. E." CP 362-363. Exhibit 1:10 to the Bloom Declaration is the MDF Guidelines Document. There is no evidence that this document was ever signed or agreed to by NTD. Exhibit E to the Graff Declaration is the Agreement. There is no reference in the Agreement to the MDF Guidelines document.

never found, that NTD's claims were advanced for any improper purpose, it follows without more that the trial court's decision to award Samsung all of its attorneys' fees and costs as CR 11 sanctions was an abuse of discretion.<sup>41</sup>

b. NTD's other claims were vulnerable to attack on matters of law, but they were not frivolous

In addition to its breach of contract claim, NTD also alleged claims for intentional and fraudulent misrepresentation, unjust enrichment, conversion, breach of the covenant of good faith and fair dealing, loss of business and economic opportunities, and unfair or deceptive trade practices. That Mr. Osemene included these claims along with the stronger breach of contract cause of action suggests he was following the "commonplace but unfortunate practice" of propounding a "kitchen sink compliant."<sup>42</sup> Samsung's Motion for Summary Judgment effectively showed why these claims were vulnerable as a matter of law, but that does not mean that they were frivolous.

Consider first the claim for fraudulent misrepresentation. Samsung did not attack this claim on factual grounds, but rather because it was

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<sup>41</sup> This would still be true even if the trial court had imposed the sanctions on Mr. Osemene, rather than on his clients.

<sup>42</sup> *Simon DeBartolo Group, L.P. v. The Richard E. Jacobs Group, Inc.*, 186 F.3d 157, 177 (2<sup>nd</sup> Cir. 1999). The Court of Appeals for the Second Circuit went on to note that "[w]hile we hardly countenance the filing of bogus claims among valid ones, there may thus be a considerable difference for Rule 11 purposes between an entirely frivolous complaint and a complaint including both 'doubtful' counts and counts of 'reasonable merit'").

barred by the economic loss rule. Samsung properly noted that “Washington Courts have declined to grant an exception to the economic loss doctrine for claims of intentional or fraudulent representation.” CP 363. However, it is also true that there is no published Washington case where a court has imposed CR 11 sanctions on an attorney—let alone on a party—for failing to anticipate that the economic loss rule bars a recovery in tort.<sup>43</sup> Simply put, the economic loss rule “serves to limit parties to their contract remedies when a loss potentially implicates both tort and contract relief.”<sup>44</sup> It is not a rule that says any attorney (or party!) who advances a claim for tort recovery in a contract case will be sanctioned under CR 11.

To judge whether NTD’s intentional misrepresentation claim was frivolous at the time it was pled, one should consider not the applicability of the economic loss rule but rather whether there was an apparent factual and legal basis for each of the necessary elements of the claim. Those elements are: (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker’s knowledge of its falsity; (5) intent of the speaker that it should be acted on by the plaintiff; (6) plaintiff’s ignorance of its

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<sup>43</sup> This is not because attorneys do not continue to misunderstand the application of the economic loss rule. Representative recent cases where Washington courts have held that the economic loss rule bars recovery but have not applied (or apparently even considered) sanctions include *Poulsbo Group, LLC v. Talon Development, LLC*, 155 Wn. App. 339, 229 P.3d 906 (2010), *Cox v. O’Brien*, 150 Wn. App. 24, 206 P.3d 682 (2009), and *Carlile v. Harbour Homes, Inc.*, 147 Wn. App. 193, 194 P.3d 280 (2008).

<sup>44</sup> *Alejandro v. Bull*, 159 Wn.2d 674, 681, 153 P.3d 864 (2007).

falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon the representation; and (9) damages suffered by plaintiff.<sup>45</sup>

There is strong evidence that Samsung said it would waive the restocking charge for NTD's opening order (CP 237), and some evidence that Samsung agreed it would reimburse marketing and training expenses on conditions different from those in the MDF guidelines. CP 59, ¶ 8. Those are at least arguably representations of "existing fact." They were clearly material to inducing NTD to enter the contract. The first representation was also plainly false: although Samsung ultimately waived the restocking fee, it only did so after extracting additional concessions from NTD. CP 300, ¶ 9. If Samsung represented that it would pay certain marketing expenses with no strings attached (or under less restrictive conditions than set forth in the MDF Guidelines), then those representations were also at least arguably false. Whether Samsung knew that these representations were false, and intended that they should be acted upon, would have been a proper subject for ongoing discovery.<sup>46</sup> NTD clearly did not know the representations were false, plausibly alleges that it relied on them (CP 59-63), and was damaged by making substantial investments in a relationship that was prematurely and wrongly

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<sup>45</sup> *Poulsbo Group*, 155 Wn. App. at 345-46.

<sup>46</sup> CR 9(b), which requires averments of fraud to be "stated with particularity," allows "intent, knowledge, and other condition of mind of a person" to be averred generally. This is presumably because discovery is often required to establish the condition of mind of the opposing party.

terminated. CP 64. Even though NTD's intentional misrepresentation claim was probably barred by the economic loss rule, it was not baseless or frivolous.

As for NTD's unjust enrichment, conversion, and CPA claims, Samsung is probably correct to argue that they suffer from various fatal legal infirmities. CP 363-369. However, as with tort claims and the economic loss rule, the existence of valid defenses does not in itself warrant the imposition of sanctions.<sup>47</sup> Since the trial court completely failed to consider the reasonableness of Mr. Osemene's inquiry into the legal warrant for the claims he advanced, Mr. Osemene is arguably entitled to a chance on remand to show that these claims were supported by a "good faith argument for the extension, modification, or reversal of existing law."<sup>48</sup> Even if they were not so supported, this would not justify the imposition of sanctions *on NTD and Mr. Bashir*, as is shown in Section 7 below.

5. The inclusion of Mr. Bashir's name in the caption of the Complaints does not warrant the imposition of sanctions

Mr. Bashir is listed as an individual plaintiff in the caption of both the original Complaint and the Amended Complaint. CP 371, 389. Samsung appears to believe that since Mr. Bashir is not a proper plaintiff, then any claims asserted in his name must be frivolous, and sanctionable.

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<sup>47</sup> If the existence of a valid defense sufficed to impose sanctions, all successful motions to dismiss and for summary judgment would be combined with awards of sanctions.

<sup>48</sup> CR 11.

CP 370. This is too facile. The very first paragraph of each complaint makes it clear that NTD and Mr. Bashir were being considered collectively “(hereinafter collectively, ‘Plaintiff’ on ‘NTD’).” CP 371-372, 389. It is thus obvious from the face of each complaint that Mr. Bashir was making no separate claims in his individual capacity, and hence there is no claim that can be deemed frivolous for the sole reason that it was advanced only by Mr. Bashir. As an old but still valid Washington Supreme Court case states, “[t]here is no magic in the caption to an action, especially where the body of the complaint itself shows who the parties are and the capacity in which the action is prosecuted or defended.”<sup>49</sup>

Moreover, as CR 17(a) states, “[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest.” CR 17 “is not intended as a method by which the trial court may sanction dilatory plaintiffs; rather, it is meant to insure that the real party in interest will be made a party to the suit at a time when the interests of the defendants will be protected.”<sup>50</sup> Here, the real party in interest (NTD) was present from the start, and there was no prejudice to Samsung. The technical error of including Mr. Bashir in the captions of

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<sup>49</sup>*State v. Knutson*, 81 Wash. 47, 49, 142 P. 444 (1914).

<sup>50</sup>*Rinke v. Johns-Manville Corp.*, 47 Wn. App. 222, 226, 734 P.2d 533 (1987).

the complaints does not support an award of sanctions—certainly not an award of sanctions of \$51,164.89 against Mr. Bashir.<sup>51</sup>

6. Samsung gave NTD no opportunity to mitigate the sanctions, nor did the trial court consider any less severe sanctions

Samsung first asserted that the Complaint was frivolous in its Motion for Summary Judgment. CP 350.<sup>52</sup> That motion was filed October 27, 2010, almost six months after the first Complaint was filed, and more than a year after Mr. Osemene sent his demand letter to Samsung’s corporate counsel. CP 250-252. To say the least, there is something incongruous about waiting six months or more, and incurring more than \$50,000 in attorneys’ fees, before asserting that a lawsuit was obviously frivolous from the very start.<sup>53</sup>

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<sup>51</sup> Samsung implied below that because Mr. Bashir was included in the caption of the action, it had to send him separate interrogatories. CP 370. At least in retrospect, it is clear that Samsung in fact did not need to send any interrogatories separately to Mr. Bashir in order to prevail on summary judgment. In lieu of serving interrogatories, Samsung could have moved for a more definitive statement pursuant to CR 12(e). But even if Samsung had to serve the interrogatories, and even if Mr. Bashir’s answers were sanctionable—which the trial court did not find—then the sanction would have to be proportional to the costs Samsung incurred in preparing the interrogatories and reviewing the answers. Finally, before the trial court could impose sanctions on Mr. Bashir for his discovery answers, it would have to determine that he, and not Mr. Osemene, was responsible for any violation of CR 11 involved.

<sup>52</sup> As previously noted, Samsung’s Answer does not claim the Complaint is frivolous, nor does it announce an intent to seek sanctions or legal fees. See Appendix B to this Brief.

<sup>53</sup> See, e.g., *Kirk Capital Corp. v. Bailey*, 16 F.3d 1485, 1491 (8<sup>th</sup> Cir. 1994) (noting that “[o]n the face of it, there is something very inconsistent with the assertion that the plaintiffs filed a patently frivolous complaint meriting sanctions under Rule 11 and contending that it took 279.10 or

Under Washington law, “both practitioners and judges who perceive a possible violation of CR 11 must bring it to the offending party’s attention as soon as possible. *Without such notice, CR 11 sanctions are unwarranted.*”<sup>54</sup> Given Samsung’s theory that the entire complaint was frivolous, and given that the facts alleged in the original and amended complaints were readily accessible to Samsung through internal investigation, one can only conclude that Samsung did not comply with its duty to provide prompt notice of its intent to seek sanctions.<sup>55</sup> At the very least, Samsung should have given NTD informal notice of its intent to seek sanctions before filing its motion for summary judgment.<sup>56</sup>

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even 179.10 hours of legal work in order to reveal what defendants contend is obvious”). Here, the trial court awarded Samsung its fees for more than 160 hours of legal and paralegal time. CP 44-51.

<sup>54</sup> *Biggs II*, 124 Wn.2d at 198 (italicized emphasis added).

<sup>55</sup> *Compare Eller v. East Sprague Motors & R.V.’s, Inc.*, 159 Wn. App. 180, 185, 244 P.3d 447 (2010) (noting that the party resisting an allegedly frivolous claim immediately responded to filing of complaint by giving notice of intent to seek CR 11 sanctions).

<sup>56</sup> *See MacDonald*, 80 Wn. App. at 891 (noting that “[t]he moving party *must* notify the offending party as soon as it becomes aware of sanctionable activities, thereby providing the offending party with an opportunity to mitigate the sanction by withdrawing or amending the offending paper”) (italicized emphasis added). *See also Biggs II*, 124 Wn.2d at 198, note 2 (“adopt[ing] as or own the advice of the Advisory Committee that, in most cases, ‘counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a [CR 11] motion”). Samsung claimed, and was awarded, fees for more than 70 hours of attorney and paralegal time devoted to its motion for summary judgment despite not providing Mr. Osemene advance notice of its intent to seek sanctions. CP 44-51.

Samsung also failed to present any argument that paying all of its attorney’s fees and expenses was the minimal sanction necessary to carry out the deterrent purposes of CR 11.<sup>57</sup> There is no indication in the record that the trial court considered this issue. Having had NTD’s claims dismissed as a result of Mr. Osemene’s incompetence was already a substantial penalty to NTD and Mr. Bashir, and a significant incentive to be more careful in seeking legal advice in the future.<sup>58</sup> The net result of Samsung not giving Appellants early notice, and of the trial court not considering lesser sanctions, is that the sanctions lost their basis in deterrence and effectively became a fee shifting mechanism. This was improper, and provides another reason why this Court should reverse and remand.<sup>59</sup>

7. Even if some sanctions were warranted, the trial court abused its discretion by imposing them on NTD and Mr. Bashir rather than on Mr. Osemene

Even if some CR 11 sanction were warranted in this case, there is no justification in the record for imposing it on Mr. Bashir and NTD rather than on Mr. Osemene. As argued in Section 4(a) above, the core claim in the case—that Samsung breached the distributorship agreement—was not

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<sup>57</sup>See *Biggs II*, 124 Wn.2d at 197.

<sup>58</sup>Compare *Biggs II*, 124 Wn.2d at 202 n. 3 (noting that Biggs’ “exit from the legal profession alone may be enough to deter any future abuse”). Appellants express no opinion, apart from the arguments previously made above, as to what the proper level of sanctions *against Mr. Osemene* might have been.

<sup>59</sup>See, e.g., *Biggs II*, 124 Wn.2d at 201 (remanding in part because “there was no consideration of mitigation”).

frivolous. Indeed, neither Samsung nor the trial court ever identified any demonstrably false factual statements in the Complaint or Amended Complaint. If some of the claims put forth in the Amended Complaint may have been frivolous, it is because they suffered from legal rather than factual infirmities. Because Mr. Osemene bore the responsibility for formulating legal causes of action that conformed to NTD's factual allegations, the trial court abused its discretion by imposing the sanctions on Mr. Bashir and NTD.

That Mr. Osemene should bear exclusive liability for any sanctions in this matter is supported by a number of overlapping factors. First, the text of CR 11 itself makes it clear that the act that triggers sanctions is the signing of a filing that is either frivolous or put forth for an improper purpose.<sup>60</sup> It is the signer of the filing who certifies that it complies with the rule.<sup>61</sup> Here, Mr. Osemene signed the complaints, not Mr. Bashir or any other representative of NTD. CP 384, 401. Under Washington law, this is not by itself dispositive, because CR 11 authorizes the court to impose a sanction for an improper filing "upon the person who signed it, a represented party, or both."<sup>62</sup> However, the text of the rule, and its logical

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<sup>60</sup> "If a pleading, motion, or legal memorandum *is signed in violation of this rule*, the court . . . may impose . . . an appropriate sanction." CR 11(a) (emphasis added).

<sup>61</sup> "The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading . . . and that to the best of the party or attorney's knowledge . . . ." CR 11 (a).

<sup>62</sup> CR 11(a).

structure, clearly imply that the court is to focus first on the signer of the document, and to move beyond him or her only as “appropriate.”<sup>63</sup>

Second, while there is not much published Washington case law discussing whether the party or the attorney is the proper subject of sanctions, it suffices to confirm that sanctions can only properly be imposed on a person or entity “responsible for the frivolous filing.”<sup>64</sup> Although both the attorney and the party can be “responsible” for the filing of a sanctionable document signed only by the attorney, a party’s responsibility cannot be based solely on the fact that he or she hired the attorney. Otherwise, parties would always be responsible for their attorneys’ CR 11 violations.<sup>65</sup> Washington cases do not clearly establish the type or degree of responsibility necessary, but it appears to be something *at least* equal to “substantial contributing factor.” For example, in *In re Cooke*, a party apparently borrowed his attorney’s pleading paper without his consent, and signed and filed a statement of issues that the trial court determined was filed with an improper purpose.<sup>66</sup> Since only the party prepared, filed, and signed the pleading, “it was therefore

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<sup>63</sup> Any sanction imposed under CR 11 must be “appropriate.” It would be facially inappropriate to impose a sanction on a person or entity not responsible for the violation.

<sup>64</sup> *In re Cooke*, 93 Wn. App. 526, 529, 969 P.2d 127 (1999).

<sup>65</sup> See, e.g., *Kirk Capital Corp.*, 16 F.3d at 1492 (noting that the principle of holding clients responsible for the acts and omissions of their attorneys “simply does not apply in a Rule 11 sanction context. Otherwise every award against an attorney under Rule 11 could also be assessed against the client”).

<sup>66</sup> *In re Cooke*, 93 Wn. App. at 527-28

appropriate that the court sanction [the party] only.”<sup>67</sup> In *Miller v. Badgley*, the plaintiff Miller had signed a factually inaccurate affidavit.<sup>68</sup> In *Biggs II*, sanctions were upheld in principle (but remanded for recalculation) for a party who was himself an attorney, and who presumably played at least a substantial role in formulating the terms of the complaint against another attorney.<sup>69</sup> If these cases roughly set the standard, then there is simply no evidence that Mr. Bashir or NTD had the appropriate degree of responsibility for any legal infirmities in the complaints drafted and signed by Mr. Osemene.

This conclusion is strongly reinforced if one looks to Fed. R. Civ. P. 11 and the federal case law interpreting it. Between 1985 and the end of 1993, Fed. R. Civ. P. 11 was “substantially similar” to the *current* version of CR 11.<sup>70</sup> Cases interpreting Fed. R. Civ. P. 11 in effect during

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<sup>67</sup> *Id.* at 530.

<sup>68</sup> *Miller v. Badgley*, 51 Wn. App. 285, 303, 753 P.2d 530 (1988).

<sup>69</sup> *Biggs II*, 124 Wn.2d at 199-201. The published record does not clearly establish whether Biggs represented himself in the trial court action that ultimately resulted in sanctions. See *Biggs v. Vail*, 119 Wn.2d 129, 131-32, 830 P.2d 350 (1992) (*Biggs I*) (describing background of litigation and showing that the trial court initially imposed fees “under the frivolous lawsuit statute (RCW 4.84.185), to be paid by Biggs”).

<sup>70</sup> See, e.g., *Fisons*, 122 Wn.2d at 338, n. 68 (noting on September 16, 1993 that the state CR 11 and Fed. R. Civ. P. 11 are “substantially similar”); and *Miller*, 51 Wn. App. at 299 (1988) (noting that “CR 11 was amended in 1985 and contains substantially the same language adopted in 1983 by the federal rules”). Although Fed. R. Civ. P. 11 was amended effective December 1, 1993 in ways that have not been imitated by the state rule, Washington courts continue to look to federal courts for guidance in construing CR 11. *Splash Design, Inc. v. Lee*, 104 Wn. App. 38, 44 n. 7, 14 P.3d 879 (2001)

that time therefore ought to be particularly persuasive in interpreting CR 11. In one such leading case directly concerned with the issue of allocating a sanction between a party and his attorney, the Second Circuit held as follows:

We believe that a party represented by an attorney should not be sanctioned for papers signed by the attorney unless the party had actual knowledge that filing the paper constituted wrongful conduct, e.g., the paper made false statements or was filed for an improper purpose. . . . We further believe that when a party has participated in the filing of a paper signed by the attorney or has signed a paper himself but did not realize that such participation or signing was wrongful,<sup>71</sup> then sanctions against the party are also not appropriate.

Applied to the case on review here, the Second Circuit's logic strongly supports reversal of the award against Mr. Bashir and NTD. There is simply no evidence that they had "actual knowledge" that some of the claims Mr. Osemene advanced on their behalf may have lacked an adequate legal foundation.<sup>72</sup>

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<sup>71</sup> *Calloway v. The Marvel Entertainment Group*, 854 F.2d 1452, 1474, (2<sup>nd</sup> Cir. 1988) (reversed on other grounds by *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 110 S.Ct. 456 (1989)).

<sup>72</sup> See also *Kirk Capital Corp.*, 16 F.3d at 1591-92 (applying the pre-12/1/93 version of the Federal Rules, and holding as follows: "The trouble here was: the facts alleged would not have formed a legal basis for the relief sought. *This was an issue of law that the law firm, not the lay client, was called upon to make.* The belief or suspicion that [the client] 'is more sophisticated in litigation than he wants me to believe' is not enough. [The client] did not sign the Complaint and there is no factual basis for concluding that he did anything that would warrant any Rule 11 sanction. We therefore reverse the lower court's award of monetary sanctions against [the client]" (italized emphasis added)).

The 1993 amendments to Fed. R. Civ. P. 11 effectively gave *Calloway's* logic a formal embodiment in the Rule. Since December 1, 1993, the Federal Rule has contained an express prohibition on imposing a monetary sanction on a represented party for filing a paper not warranted by existing law or a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.<sup>73</sup> Although Washington State's CR 11 has not adopted this precise language, there is no reason to think it does not accurately reflect the policies underlying the state rule.

As previously noted, the policy underlying CR 11 is to deter baseless filings.<sup>74</sup> It is a fundamental principle of good public policy that incentives and disincentives should be focused on the actors whose choices one wants to influence. Our legal system typically makes attorneys, and not their clients, responsible for formulating legal strategy. Clients may have more or less experience with litigation, but if they hire attorneys, they should be able to rely on their competence and knowledge

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<sup>73</sup> Fed. R. Civ. P. 11(c)(5)(A) (prohibiting monetary sanctions on a represented party for violating Rule 11(b)(2)). See *Kirk Capital Corp.*, 16 F.3d 1487-1488 for an overview of this change in Fed. R. Civ. P. 11. See also *Marlin v. Moody National Bank, N.A.*, 533 F.3d 374, 380, (5<sup>th</sup> Cir. 2008) (noting that “[w]hile monetary sanctions are improper against a party for a violation of Rule 11(b)(2) (requiring ‘legal contentions [to be] warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing exiting law or for establishing new law’), they may be awarded against a party when a court determines *factual contentions* lacked evidentiary support”) (emphasis in original).

<sup>74</sup> *Bryant*, 119 Wn.2d at 220.

of the law.<sup>75</sup> Moreover, attorneys by profession are repeat players in the legal system, and can cause repetitive damage if they fail to understand and adhere to Rule 11.<sup>76</sup> The purpose of CR 11 will be most effectively served if sanctions for frivolous legal arguments are focused on attorneys, and not their clients.

For all of these reasons, it was an abuse of discretion for the trial court to impose CR 11 sanctions on Mr. Bashir and NTD. If any claims advanced on their behalf were frivolous, it was because they were flawed as a matter of law. Neither the record nor common sense supports the inference that any such legal flaws were substantially caused by Mr. Bashir or NTD. Sanctions, if any were warranted, should have been imposed on Mr. Osemene alone.

8. The trial court also abused its discretion by refusing to consider the affidavits of Mr. Bashir and Mr. Sutter, and by allowing Mr. Osemene to continue as counsel without inquiring about a conflict waiver

There are two additional, related reasons why the trial court abused its discretion in this case. First, once the trial court awarded Samsung its fees but did not specify who should pay them, Mr. Osemene had a clear

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<sup>75</sup>See, e.g., RPC 1.1 (requiring an attorney to provide competent representation to a client).

<sup>76</sup>Mr. Osemene has been previously sanctioned for Rule 11 violations, and thus has more reason than most attorneys to be familiar with the Rule. The following unpublished case is not cited as authority for any legal principle, but instead to establish the fact that Mr. Osemene has been previously sanctioned: *Colmex, Inc. v. Harris*, 2008 WL 2487991 (Div. 1, 2008). A copy of *Colmex* is attached to this Brief as Appendix F.

conflict of interest.<sup>77</sup> CP 180. Mr. Osemene, who had been sanctioned little more than a year before, must have understood at that point that every dollar in sanctions to be paid by his clients was a dollar less to be paid by him. Yet there is no evidence in the record that he said anything about this to his clients or the court. Neither Samsung nor the trial court raised the issue of Mr. Osemene's continued capacity to represent his clients. RP (12/15/10) at pp. 2-24.

Second, the trial court subsequently announced that it was ruling on the quantity of sanctions—and on the critical question of who should bear them—without considering the affidavits of Mr. Bashir and Mr. Sutter. RP (12/15/10) at p. 21:18-21. It appears that it did so *because Mr. Osemene* failed to properly file them as part of his opposition to Samsung's motion to quantify the sanction amount. Assuming that this was procedurally proper, it nonetheless resulted in a serious substantive miscarriage of justice. The use of a patently conflicted attorney's missteps as a grounds for ignoring his clients' declarations—declarations that should have alerted the court to the attorney's responsibility for any sanctions because they show the core breach of contract claim to have

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<sup>77</sup> See *Calloway*, 854 F.2d at 1456 (noting that attorney and his firm representing Calloway “had a blatant conflict of interest and should have withdrawn as Calloway’s counsel in defending the motions for sanctions. Because of this representation, no argument was made on Calloway’s behalf that [the attorney] was solely responsible for pursuit of the [unfounded] claim . . . . Nor was an argument made that even if sanctions should be imposed on Calloway, [the attorney] and his firm should be jointly and severally liable for them”).

been well grounded in fact—stripped the process of the appearance of fairness to Mr. Bashir and NTD. If this Court does not rule that any sanctions against Mr. Bashir and NTD are barred as a matter of law, it should nonetheless remand so that they have an effective chance to argue to the trial court that the sanctions should fall on Mr. Osemene, rather than on themselves.

## VII. CONCLUSION

The trial court abused its discretion by imposing \$51,164.89 in CR 11 sanctions on NTD and Mr. Bashir. If there was a CR 11 violation in this case, it was Mr. Osemene's responsibility as the attorney who signed the complaints and formulated the legal claims, not that of Mr. Bashir and NTD. Because NTD's claims were dismissed, Mr. Bashir and NTD have already been adequately sanctioned for choosing Mr. Osemene. This Court should reverse and remand for further proceedings, with guidance to the trial court to ensure its compliance with the text, logic, and purpose of CR 11.

Respectfully submitted this 18<sup>th</sup> day of April, 2011

David Corbett PLLC

By:

  
David J. Corbett, WSBA # 30895  
Attorney for Appellants

CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on April 18, 2011 I sent a copy of the attached Opening Brief of Appellants, with Appendices A through F via email PDF attachment to Bryan C. Graff of Ryan, Swanson and Cleveland PLLC, attorney for Respondent, at [graff@ryanlaw.com](mailto:graff@ryanlaw.com). Mr. Graff has agreed to accept service of pleadings in this matter via email.

Dated this 18<sup>th</sup> day of April, 2011 at Tacoma, Washington.

By:   
David J. Corbett

# **APPENDIX A**

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7 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SNOHOMISH

8 NOSWORTHY TELECOMMUNICATION  
9 DISTRIBUTORSHIP, INC. ("NTD"), a  
10 Washington corporation, and AMIR BASHIR,  
a married man,

11 Plaintiffs,

12 vs.

13 SAMSUNG TELECOMMUNICATION  
14 AMERICA, L.L.C., a Delaware limited  
liability company, and SAMSUNG  
15 TELECOMMUNICATION AMERICA, L.P.,

16 Defendants.

Snohomish Cty. Sup. Ct. No. 10-2-04544-7

Court of Appeals No. 66595-2-1

APPELLANTS' SUPPLEMENTAL  
DESIGNATION OF CLERK'S PAPERS

17 TO: CLERK OF THE SUPERIOR COURT

18 Pursuant to RAP 9.7, please prepare and transmit to the Court of Appeals, Division 1, the  
19 following supplemental Clerks's Papers designated by Appellants Nosworthy

20 Telecommunication Distributor, Inc. ("Nosworthy"), and Amir Bashir:

Sub No.	Title of Document	Date of Filing
7	Answer and Affirmative Defenses	5/28/2010
65	Order Setting Amount of Sanctions	12/15/2010
81	Notice of Withdrawal and Substitution of Legal Counsel	2/28/2011

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APPELLANTS' SUPPLEMENTAL DESIGNATION OF  
CLERK'S PAPERS - 1

**David Corbett PLLC**  
2106 N. Steele Street  
Tacoma, WA 98406  
(253) 414-5235



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CERTIFICATE OF SERVICE

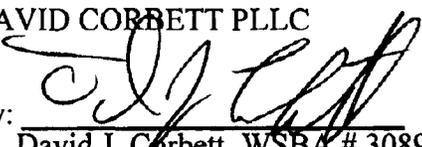
I certify under penalty of perjury of the laws of the State of Washington that that on April 18, 2011 I sent Mr. Bryan Graff, counsel for Respondents, a PDF copy of the Appellants' Supplemental Designation of Clerk's Papers via email to the following address:

graff@ryanlaw.com.

Mr. Graff has previously agreed to accept service of filings in this matter by email.

DATED this 18<sup>th</sup> day of April, 2011.

DAVID CORBETT PLLC

By:   
David J. Corbett, WSBA # 30895  
Attorney for Respondent

## **APPENDIX B**



FILED

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SUPERIOR COURT OF WASHINGTON IN AND FOR SNOHOMISH COUNTY

NOSWORTHY TELECOMMUNICATION  
DISTRIBUTOR, INC. ("NTD"), a Washington  
corporation, and AMIR BASHIR, a married man,

Plaintiffs

v.

SAMSUNG TELECOMMUNICATIONS  
AMERICA, LLC, a Delaware limited liability  
company, and SAMSUNG  
TELECOMMUNICATIONS AMERICA, L.P.,  
Joint and Severally, ("STA")

Defendants.

NO. 10-2-04544-7

DEFENDANTS' ANSWER AND  
AFFIRMATIVE DEFENSES

Defendants Samsung Telecommunications America, LLC and Samsung  
Telecommunications America, LP (collectively, "STA"), by and through their undersigned  
counsel of record, answer plaintiffs Nosworthy Telecommunication Distributor, Inc.'s  
("NTD") and Amir Bashir's (collectively with NTD, "Plaintiffs") Amended Complaint as  
follows:

**I. FACTUAL BACKGROUND**

1.1 Answering paragraph 1.1, STA is without sufficient information to form a  
belief as to the truth or falsity thereof and, therefore, denies same.

1.2 Answering paragraph 1.2, STA is without sufficient information to form a  
belief as to the truth or falsity thereof and, therefore, denies same.

DEFENDANTS' ANSWER AND AFFIRMATIVE  
DEFENSES - I



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1           1.3     Answering paragraph 1.3, STA admits that it has sought distributor  
2 relationships in the Pacific Northwest. STA is without sufficient information to form a belief  
3 as to the truth or falsity of the remaining allegations in paragraph 1.3 and, therefore, denies  
4 same.

5           1.4     Answering paragraph 1.4, STA admits that it entered into a distributor  
6 agreement with NTD in or around March 2009. STA further admits that its representatives,  
7 including its National Sales Manager – Distribution, Terry Bloom, as well as its Regional  
8 Sales Manager, Darrin Roberts, have engaged in discussions with NTD representatives. STA  
9 denies the remaining allegations in paragraph 1.4 and all inferences to be drawn therefrom.

10          1.5     Answering paragraph 1.5, STA admits it entered into a distributor agreement  
11 with NTD in or around March 2009. The distributor agreement speaks for itself. STA denies  
12 that “Exhibit A” to Plaintiffs’ Complaint is a complete copy of the distributor agreement, and  
13 STA further denies all remaining allegations in paragraph 1.5 and all inferences to be drawn  
14 therefrom.

15          1.6     Answering paragraph 1.6, STA admits the distributor agreement required NTD  
16 to obtain appropriate training. The distributor agreement speaks for itself. STA denies all  
17 remaining allegations in paragraph 1.6 and all inferences to be drawn therefrom.

18          1.7     Answering paragraph 1.7, the terms of the distributor agreement and the  
19 referenced email speak for themselves. STA denies all remaining allegations in paragraph 1.7  
20 and all inferences to be drawn therefrom.

21          1.8     Answering paragraph 1.8, STA admits that NTD representatives, Mr. Bashir  
22 and Mr. Bob Sutter, attended training at STA’s facilities in Richardson, Texas. STA further  
23 admits that its representatives, including STA’s former Vice President of Sales and  
24 Marketing, Bart Kohnhorst, met with and had discussions with NTD representatives. STA  
25 denies all remaining allegations in paragraph 1.8 and all inferences to be drawn therefrom.



1           1.9     Answering paragraph 1.9, STA denies that NTD or its representatives received  
2 assurances that NTD's costs and expenditures would be reimbursed by STA. STA is without  
3 sufficient information to form a belief as to the truth or falsity of the remaining allegations in  
4 paragraph 1.9 and, therefore, denies same.

5           1.10    Answering paragraph 1.10, STA is without sufficient information to form a  
6 belief as to the truth or falsity thereof and, therefore, denies same.

7           1.11    Answering paragraph 1.11, STA admits that NTD organized two unsuccessful  
8 open houses aimed at promoting its distribution of STA products. STA further admits that  
9 STA representative, Mr. Bloom, provided assistance to NTD. STA is without sufficient  
10 information to form a belief as to the truth or falsity of the remaining allegations in paragraph  
11 1.11 and, therefore, denies same.

12          1.12    Answering paragraph 1.12, STA is without sufficient information to form a  
13 belief as to the truth or falsity thereof and, therefore, denies same.

14          1.13    Answering paragraph 1.13, STA admits that NTD's first open house was  
15 poorly attended and that STA representatives, including Mr. Roberts, attempted to help NTD  
16 prepare for the second open house. STA is without sufficient information to form a belief as  
17 to the truth or falsity of the remaining allegations in paragraph 1.13 and, therefore, denies  
18 same.

19          1.14    Answering paragraph 1.14, STA admits that its representative, Saul Friedman,  
20 attended NTD's second open house in order to assist. STA is without sufficient information  
21 to form a belief as to the truth or falsity of the remaining allegations in paragraph 1.14 and,  
22 therefore, denies same.

23          1.15    Answering paragraph 1.15, STA admits that on March 30, 2009, Mr.  
24 Kohnhorst sent an email to Mr. Bashir responding to NTD's request of STA to provide a  
25 stock rotation option for NTD's opening order. Mr. Kohnhorst's March 30, 2009 email  
26 speaks for itself. STA further admits that Mr. Kohnhorst had a telephone conversation on



1 June 10, 2009 with Mr. Bashir, NTD's President. STA denies all remaining allegations in  
2 paragraph 1.15 and all inferences to be drawn therefrom.

3 1.16 Answering paragraph 1.16, STA admits that Mr. Kohnhorst sent a letter to Mr.  
4 Bashir dated June 15, 2009, confirming the parties' agreement to terminate the distribution  
5 agreement between STA and NTD. Mr. Kohnhorst's June 15, 2009 letter speaks for itself.  
6 Answering further, STA admits that NTD returned inventory to STA consistent with the  
7 parties' agreed upon termination of the distribution agreement. STA is without sufficient  
8 information to form a belief as to the truth or falsity of the remaining allegations in paragraph  
9 1.16 and, therefore, denies same.

10 1.17 Answering paragraph 1.17, STA admits it received a demand letter dated  
11 October 5, 2009, from Justin C. Osemene, an attorney representing NTD. The October 5,  
12 2009 letter speaks for itself. Answering further, STA admits that its representatives have  
13 spoken to Mr. Osemene. STA is without sufficient information to form a belief as to the truth  
14 or falsity of the remaining allegations in paragraph 1.17 and, therefore, denies same.

15 1.18 Answering paragraph 1.18, STA admits that Charles L. Carpenter, in-house  
16 legal counsel for STA, responded to Mr. Osemene's October 5, 2009 letter on October 15,  
17 2009 via email. Mr. Carpenter's October 15, 2009 email speaks for itself. STA denies all  
18 remaining allegations in paragraph 1.18 and all inferences to be drawn therefrom.

19 1.19 Answering paragraph 1.19, STA denies each and every allegation and all  
20 inferences to be drawn therefrom.

21 **II. PARTIES**

22 2.1 Answering paragraph 2.1, STA admits NTD conducted business in Lynnwood,  
23 Snohomish County, Washington during its brief business relationship with STA. STA is  
24 without sufficient information to form a belief as to the truth or falsity of the remaining  
25 allegations in paragraph 2.1 and, therefore, denies same.

26



1           2.2     Answering paragraph 2.2, STA admits that, as of the date of this Answer, NTD  
2 is a duly registered Washington corporation, and that NTD has its principal place of business  
3 in Snohomish County, Washington. STA further admits that Mr. Bashir is NTD's registered  
4 agent and Chief Executive Officer. STA denies that NTD's UBI No. is 602-141-519. STA is  
5 without sufficient information to form a belief as to the truth or falsity of the remaining  
6 allegations in paragraph 2.2 and, therefore, denies same.

7           2.3     Answering paragraph 2.3, STA admits that Samsung Telecommunications  
8 America, LLC (a/k/a Samsung Telecommunications America, LP) is a limited liability  
9 company organized and existing under the laws of the State of Delaware. Answering further,  
10 STA admits that Samsung Telecommunications America, LLC has a principal place of  
11 business in the State of Texas, a branch office located in Bellevue, King County, Washington,  
12 and has a Washington State business license, UBI No. 602108510. STA is without sufficient  
13 information to form a belief as to the truth or falsity of any remaining allegations in paragraph  
14 2.3 and, therefore, denies same.

15           2.4     Answering paragraph 2.4, STA admits it conducted or transacted business with  
16 NTD in Lynnwood, Snohomish County, Washington for a short period of time in 2009. STA  
17 is without sufficient information to form a belief as to the truth or falsity of all remaining  
18 allegations in paragraph 2.3 and, therefore, denies same.

19                                   **III.           JURISDICTION AND VENUE**

20           3.1     Answering paragraph 3.1, STA admits.

21           3.2     Answering paragraph 3.2, STA admits venue is proper with this Court  
22 pursuant to RCW 4.12.025. STA denies the remaining allegations in paragraph 3.2.

23                                   **IV.           FIRST CAUSE OF ACTION**

24                                   **MONIES OWED AND BREACH OF CONTRACT**

25           4.1     Answering paragraph 4.1, STA restates its answers above as if fully set forth  
26 herein.

1 4.2 Answering paragraph 4.2, STA denies all allegations in paragraph 4.2 and all  
2 inferences to be drawn therefrom.

3 4.3 Answering paragraph 4.3, STA denies all allegations in paragraph 4.3 and all  
4 inferences to be drawn therefrom.

5 **V. SECOND CAUSE OF ACTION**

6 **INTENTIONAL AND FRAUDULENT MISREPRESENTATIONS**

7 5.1 Answering paragraph 5.1, STA restates its answers above as if fully set forth  
8 herein.

9 5.2 Answering paragraph 5.2, STA denies all allegations in paragraph 5.2 and all  
10 inferences to be drawn therefrom.

11 5.3 Answering paragraph 5.3, STA denies all allegations in paragraph 5.3 and all  
12 inferences to be drawn therefrom.

13 5.4 Answering paragraph 5.4, STA denies all allegations in paragraph 5.4 and all  
14 inferences to be drawn therefrom.

15 **VI. THIRD CAUSE OF ACTION**

16 **UNJUST ENRICHMENT**

17 6.1 Answering paragraph 6.1, STA restates its answers above as if fully set forth  
18 herein.

19 6.2 Answering paragraph 6.2, STA denies all allegations in paragraph 6.2 and all  
20 inferences to be drawn therefrom.

21 **VII. FOURTH CAUSE OF ACTION**

22 **UNLAWFUL CONVERSION**

23 7.1 Answering paragraph 7.1, STA restates its answers above as if fully set forth  
24 herein.

25 7.2 Answering paragraph 7.2, STA denies all allegations in paragraph 7.2 and all  
26 inferences to be drawn therefrom.

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**VIII. FIFTH CAUSE OF ACTION**

**BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING**

8.1 Answering paragraph 8.1, STA restates its answers above as if fully set forth herein.

8.2 Answering paragraph 8.2, STA denies that it intentionally, willfully, or otherwise breached the implied covenant of good faith and fair dealing. Answering further, STA states that the remaining allegations in paragraph 8.2 assert legal conclusions, which do not require an answer.

8.3 Answering paragraph 8.3, STA denies all allegations in paragraph 8.3 and all inferences to be drawn therefrom.

**IX. SIXTH CAUSE OF ACTION**

**LOSS OF BUSINESS AND ECONOMIC OPPORTUNITIES**

9.1 Answering paragraph 9.1, STA restates its answers above as if fully set forth herein.

9.2 Answering paragraph 9.2, STA denies all allegations in paragraph 9.2 and all inferences to be drawn therefrom.

9.3 Answering paragraph 9.3, STA denies all allegations in paragraph 9.3 and all inferences to be drawn therefrom.

**X. SEVENTH CAUSE OF ACTION**

**UNFAIR OR DECEPTIVE TRADE PRACTICES**

10.1 Answering paragraph 10.1, STA restates its answers above as if fully set forth herein.

10.2 Answering paragraph 10.2, STA admits it has engaged in business and commerce in Snohomish County, Washington. STA denies any remaining allegations in paragraph 10.2 and all inferences to be drawn therefrom.





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**DECLARATION OF SERVICE**

I hereby declare as follows:

1. I am a citizen of the United States and a resident of the state of Washington. I am over the age of 18 years and not a party to the within action. I am employed by the law firm of Ryan, Swanson & Cleveland, PLLC, 1201 Third Avenue, Suite 3400, Seattle, Washington, 98101-3034.

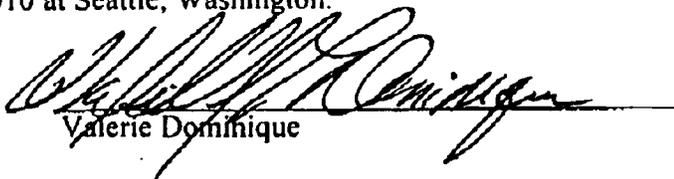
2. On the 26<sup>th</sup> day May, 2010, I caused to be served upon counsel of record at the address and in the manner described below the following documents:

ANSWER; and  
DECLARATION OF SERVICE

Justin C. Osemene  
Intellex Law Group  
University Station  U.S. Mail  
P.O. Box 45331  
Seattle, WA 98145  
  
13824 North Creek Drive, Suite 2301  U.S. Mail  
Mill Creek, WA 98012

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

DATED this 26<sup>th</sup> day of May, 2010 at Seattle, Washington.

  
Valerie Dominique

## **APPENDIX C**

**FILED**

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SONYA KRASKI  
SNOHOMISH COUNTY CLERK  
EX-OFFICIO CLERK OF COURT

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SNOHOMISH**

**NOSWORTHY  
TELECOMMUNICATION  
DISTRIBUTOR, INC, ("NTD"), a  
Washington corporation, and AMIR  
BASHIR, a married man;**

Plaintiffs,

vs.

**SAMSUNG TELECOMMUNICATION  
AMERICA, LLC, a Delaware limited  
liability company, and SAMSUNG  
TELECOMMUNICATION AMERICA,  
L.P., Joint and Severally, ("STA")**

Defendants

Case No. 10-2-04544-7

Court of Appeal No. 66595-2-1

**NOTICE OF WITHDRAWAL AND  
SUBSTITUTE OF LEGAL COUNSEL**

*(Clerks' Action Required)*

**TO: THE CLERKS OF THE SUPERIOR COURT & COURT OF APPEALS**  
**TO: BRYAN C. GRAFF, Esq., Attorney for the Defendants;**  
**AND TO: AMIR BASHIR & CHARLIE SHANE, Esq., Plaintiffs' Substitute Counsel**

YOU AND EACH OF YOU PLEASE TAKE NOTICE THAT the undersigned, whose address is stated below, hereby submits his Notice of Withdrawal as Plaintiffs' Attorney of Record in the above entitled actions. This withdrawal shall be effective immediately without court order unless an objection to the withdrawal is served upon said withdrawing Attorney prior to the date set forth in this Notice. Should withdrawal by court order be made necessary, terms will be requested.

**NOTICE OF WITHDRAWAL &  
SUBSTITUTE LEGAL COUNSEL**

Page 1 of 2

**INTELLEX LAW GROUP, LLP**  
ATTORNEYS  
*A Business & Technology Law Practice*  
University Station, P. O. Box 45331, Seattle, WA 98145  
13824 North Creek Drive, Suite 2301  
Mill Creek, WA 98012  
Tel.: 425-385-2707 Fax: 425-385-2708

1 NOTICE is hereby further given that a substitute Attorney for Plaintiff has been engaged and  
2 all future pleadings on this action should be directed to Plaintiff's new legal counsel of record  
3 list below:

4 **Messrs. Amir Bashir & Charlie Shane, Esq.**  
5 **The Law Office of Charlie Shane, PLLC**  
6 **PO Box 1762**  
7 **Kingston, WA 98346**  
8 Phone: (206) 708-3587  
9 Facsimile: (206) 400-2747

10 DATED this 28<sup>th</sup> day of February, 2011.

11 Respectfully submitted,  
12 **INTELLEX LAW GROUP, PLLC**



13 Justin C. Osemene, WSBA # 28082  
14 Withdrawing Attorney for Plaintiffs

## **APPENDIX D**

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SUPERIOR COURT OF WASHINGTON IN AND FOR SNOHOMISH COUNTY

NOSWORTHY TELECOMMUNICATION  
DISTRIBUTOR, INC. ("NTD"), a Washington  
corporation, and AMIR BASHIR, a married man,

Plaintiffs,

v.

SAMSUNG TELECOMMUNICATIONS  
AMERICA, LLC, f/k/a SAMSUNG  
TELECOMMUNICATIONS AMERICA, L.P.,

Defendant.

NO. 10-2-04544-7

ORDER SETTING AMOUNT OF  
CR 11 SANCTIONS

[PROPOSED]

THIS MATTER, having come before the undersigned Judge on Defendant's Motion to Set Amount of CR 11 Sanctions, the Court having reviewed and considered that motion and the accompanying Declaration of Bryan C. Graff with the attached exhibit, any response, any reply, all evidence presented, having reviewed the files and records herein, and being otherwise fully advised in the premises, now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that Defendant's Motion to Set Amount of CR 11 Sanctions is GRANTED; and it is further

ORDERED, ADJUDGED AND DECREED that plaintiffs Nosworthy Telecommunication Distributor, Inc. and Amir Bashir shall pay to defendant Samsung Telecommunications America, LLC, f/k/a Samsung Telecommunications America, LP the

[PROPOSED] ORDER SETTING AMOUNT OF CR 11 SANCTIONS - 1

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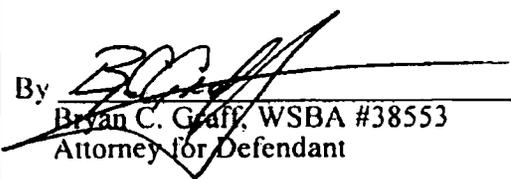
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1 sum of \$51,164.89, with interest accruing thereon at the legal rate from the date of entry of  
2 this Order.

3 DATED this 15<sup>th</sup> day of December, 2010.

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7 JUDGE, SNOHOMISH COUNTY SUPERIOR  
COURT

8 Presented by:  
9 RYAN, SWANSON & CLEVELAND, PLLC

10  
11 By   
12 Bryan C. Graft, WSBA #38553  
Attorney for Defendant

13 1201 Third Avenue, Suite 3400  
14 Seattle, Washington 98101-3034  
15 Telephone: (206) 464-4224  
Facsimile: (206) 583-0359  
graff@ryanlaw.com

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## **APPENDIX E**

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

NOSWORTHY TELECOMMUNICATION  
DISTRIBUTOR, INC., a Washington  
corporation, and AMIR BASHIR, a married  
man,

Appellants,

vs.

SAMSUNG TELECOMMUNICATION  
AMERICA, L.L.C., a Delaware limited  
liability corporation, and SAMSUNG  
TELECOMMUNICATION AMERICA, L.P.,

Appellants.

Ct. App. No. 66595-2-I

Declaration of David Corbett  
Regarding Non-availability of  
Transcript of Summary  
Judgment Hearing

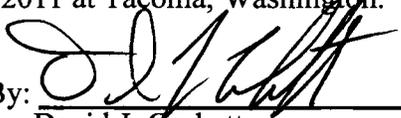
DAVID J. CORBETT declares and states as follows.

1. I am over the age of 18, and am otherwise competent to testify in this matter.
2. I am the current attorney for Appellants Nosworthy Telecommunications Distributor, Inc. ("Nosworth") and Amir Bashir. I entered my notice of appearance in this matter after it had already been noted for appeal.
3. On Wednesday, April 6, 2011 I corresponded via email with Karen Avery, court reporter for Snohomish County Superior Court Judge Wynne about the availability of a transcript for the November 24, 2010 summary judgment hearing in this matter. A true and correct copy of that correspondence is attached to this Declaration as Exhibit 1.

///

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

DATED this 18<sup>th</sup> day of April, 2011 at Tacoma, Washington.

By:   
David J. Corbett

# **EXHIBIT 1**

**From:** Avery, Karen (Karen.Avery@co.snohomish.wa.us)  
**To:** david@davidcorbettlaw.com;  
**Date:** Wed, April 6, 2011 4:57:41 PM  
**Cc:**  
**Subject:** RE: Nosworthy v. Samsung: Snohomish Sup. Ct. No. 10-2-04544-7

Mr. Corbett

The November 24, 2010, hearing was heard on the Civil Motions calendar before Judge Wynne. As a general rule, we do not report those hearings unless specially requested. There is no record made for this hearing.

Judge Wynne requested I report the December 15 hearing. That is why there was a record for that hearing.

I hope this helps.

Karen Avery

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**From:** David Corbett [mailto:david@davidcorbettlaw.com]  
**Sent:** Wednesday, April 06, 2011 2:51 PM  
**To:** Avery, Karen  
**Subject:** Nosworthy v. Samsung: Snohomish Sup. Ct. No. 10-2-04544-7

Karen,

I apologize for bothering you again about this case. The Statement of Arrangements filed by my predecessor, Mr. Osemene, indicates that there is no transcript available for the November 24, 2010 summary judgment hearing in this matter. I believe I need to double check with you that in fact there is no such transcript, and no possibility of procuring one. Thank you in advance for your answer.

Sincerely,  
Dave Corbett  
Attorney for appellants Nosworthy and Bashir

David Corbett PLLC  
2106 N. Steele Street  
Tacoma, WA 98406  
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This email is intended to be confidential, and is for the use of the intended recipient only. If you are not the intended recipient, please delete the message and notify me that you have received it.

# **APPENDIX F**

Not Reported in P.3d, 145 Wash.App. 1019, 2008 WL 2487991 (Wash.App. Div. 1)  
(Cite as: 2008 WL 2487991 (Wash.App. Div. 1))

NOTE: UNPUBLISHED OPINION, SEE RCWA  
2.06.040

Court of Appeals of Washington,  
Division I.

COLMEX, INC. a Washington corporation; Zoila R.  
Saritam, individually and as shareholder; and  
Romualdo Zamora, individually and as Shareholder,  
Respondent,

v.

Patricia D. HARRIS and "John Doe" individually and  
as part of their marital community comprised thereof,  
Defendant,

Justin C. Osemene, a single man, Appellant.

No. 59933-0-I.  
June 16, 2008.

Appeal from Snohomish Superior Court; Honorable  
Richard J. Thorpe, Judge.

Justin C. Osemene, Intellex Law Group, PLLC, Se-  
attle, WA, for Appellant.

Michael P. Jacobs, Riach Gese PLLC, Lynnwood,  
WA, for Respondent.

APPELWICK, LAU, and COX, JJ.

UNPUBLISHED OPINION  
PER CURIAM.

\*1 Purporting to act on behalf of a Washington corporation and two of its directors, attorney Justin Osemene filed this action against a third director. The trial court found that Osemene lacked authority to represent the corporation and one of the directors and dismissed both parties from the action. The court also awarded attorney fees incurred in resisting the unauthorized litigation and imposed civil rule (CR) 11 sanctions. Finding no error, we affirm.

#### FACTS

Patricia Harris, Romualdo Zamora, and Zoila Saritama are the three shareholders and directors of Colmex, Inc., a Washington Corporation that owned the El Porton restaurant in Everett. Saritama and her husband, Jonny Strauss, managed and operated the restaurant. Harris was originally the sole shareholder

of Colmex, but eventually transferred 55 percent of the shares to Saritama and 25 percent of the shares to Zamora. At some point in 2005, Colmex retained attorney Justin Osemene to represent the corporation in conjunction with the stock transfers and other matters.

In late 2006, dissension arose among the three Colmex shareholders involving operation of the restaurant and Harris's contact with the Washington State Liquor Control Board, which suspended the restaurant's liquor license. On November 8, 2006, Harris and Zamora, represented by attorney Michael Jacobs, filed a Derivative Complaint for Recovery of Damages (derivative complaint) on behalf of Colmex. The complaint named Saritama and Strauss as defendants and alleged breaches of fiduciary duty, waste of corporate assets, abuse of control, and gross mismanagement.

On November 27, 2006, Osemene prepared and filed a Complaint for Breach of Contract, Monies Owed, Breach of Fiduciary Duty, Intentional Misrepresentation, Unlawful Conversion, Unjust Enrichment, and For Violations and Additional Relief under the Unfair Business Practices-Consumer Protection Act (complaint for breach of contract). The complaint named Harris as the defendant and Colmex, Zamora and Saritama as plaintiffs. The complaint recited that Zamora and Saritama had filed the action in their individual capacities and as shareholders. Among other things, Zamora and Saritama alleged that Harris's unauthorized representations to the Washington State Liquor Control Board had effectively divested them of their interest in Colmex and that they were entitled to restitution for the amount of their investments.

On December 8, 2006, Harris and Zamora attended a special Board (the Board) of Directors meeting. Saritama, the third director, received notice of the meeting but did not attend. At the meeting, the Board adopted resolutions removing Saritama as a corporate officer, removing Strauss as manager of the restaurant, and authorizing Harris's actions involving the Washington State Liquor Control Board. The Board also directed Osemene to dismiss the action against Harris immediately and then discharged him

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from any further representation of Colmex.

\*2 Jacobs notified **Osemene** of the Board's resolutions and asked him to document his authority to file the complaint for breach of contract on behalf of Zamora. On January 4, 2007, Jacobs filed a Motion to Repair Injury under RCW 2.44.020, seeking an order removing Colmex and Zamora as plaintiffs in the action and alleging that **Osemene** lacked authority to pursue the action on their behalf. In support, Jacobs submitted copies of the Board's resolutions and a declaration from Zamora stating that he had not authorized **Osemene** to file suit against Harris on his behalf as an individual or shareholder and that **Osemene** had never discussed the action with him. The hearing on the motion was scheduled for January 12, 2007.

On January 10, 2007, Harris, Zamora, and Saritama attended a special Board meeting. Both Jacobs and **Osemene** were also present. The parties' accounts of the meeting vary greatly, but it is undisputed that the meeting broke down and the Board took no action. By this time, the restaurant was also seriously in debt.

**Osemene** did not appear at the hearing on January 12, 2007. The trial court granted Jacobs' motion and entered an Order to Repair Injury, finding that **Osemene** did not have authority to file the action on behalf of Colmex and Zamora and that he had continued to pursue the action after both parties had directed him to remove them from the complaint. The court dismissed Colmex and Zamora from the action and ordered **Osemene** to pay Zamora attorney fees of \$2,830.80.

On February 6, 2007, **Osemene** moved to set aside the attorney fee award under CR 60(b)(1). He also asked the court to impose CR 11 sanctions on Jacobs for filing the Motion to Repair Injury. Following a hearing on February 22, 2007, the trial court denied **Osemene's** motions, finding that he had failed to demonstrate any basis for relief under CR 60(b)(1) or a prima facie defense. The court awarded Zamora \$2,542 in additional attorney fees and imposed \$500 in CR 11 sanctions against **Osemene** for bringing a baseless motion for CR 11 sanctions against Jacobs.

**Osemene** moved for reconsideration citing CR 59(a)(9). He again asked the court to impose CR 11

sanctions on Jacobs for filing the Motion to Repair Injury. The trial court denied the motion for reconsideration on April 11, 2007, and awarded Zamora \$1,400 in attorney fees. The court imposed \$500 in additional CR 11 sanctions against **Osemene** for filing a baseless motion for CR 11 sanctions against Jacobs.

#### DECISION

On appeal, **Osemene** challenges the trial court's orders requiring him to pay a total of \$6,772.80 in attorney fees and \$1,000 in CR 11 sanctions. He argues the trial court erred in refusing to vacate the Order to Repair Injury and denying his subsequent motion for reconsideration.

#### *Motion to Vacate*

**Osemene** contends the trial court erred when it denied his motion to vacate the Order to Repair Injury under CR 60(b)(1). CR 60(b)(1) allows relief from a judgment on a showing of "[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order." As the moving party, **Osemene** also had to demonstrate at least a prima facie defense to the opposing party's claim. See *Topliff v. Chicago Ins. Co.*, 130 Wn.App. 301, 308, 122 P.3d 922 (2005) (citing *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968)). We review the trial court's ruling on a motion to vacate for an abuse of discretion. *Rivers v. Wash. State Conf. of Mason Contrs.*, 145 Wn.2d 674, 697, 41 P.3d 1175 (2002).

\*3 On appeal, **Osemene** explains that he decided not to appear or respond to the Motion to Repair Injury because he "inferred, assumed, and concluded" that he had been "constructively discharged" and that the motion was, in any event, contrary to the court rules. But an attorney's deliberate decision not to appear or respond, based on a legal assessment of the situation, does not constitute a "mistake" or "inadvertence" justifying relief under CR 60(b)(1). See *Lane v. Brown & Haley*, 81 Wn.App. 102, 108-09, 912 P.2d 1040 (1996); see also *Mosbrucker v. Greenfield Implement, Inc.*, 54 Wn.App. 647, 652, 774 P.2d 1267 (1989) (an "irregularity" for purposes of CR 60(b)(1) occurs "when there is a failure to adhere to some prescribed rule or mode of proceeding").

Nor has **Osemene** addressed the legal basis for the Order to Repair Injury, much less demonstrated any defense to the opposing party's motion. The trial court's Order to Repair Injury was based on RCW 2

Not Reported in P.3d, 145 Wash.App. 1019, 2008 WL 2487991 (Wash.App. Div. 1)  
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.44.020, which provides:

If it be alleged by a party for whom an attorney appears, that he does so without authority, the court may, at any stage of the proceedings, relieve the party for whom the attorney has assumed to appear from the consequences of his act; it may also summarily, upon motion, compel the attorney to repair the injury to either party consequent upon his assumption of authority.

A related provision, RCW 2.44.030, authorizes the trial court to stay proceedings while an attorney documents his or her authority to appear in the action. Under these provisions, "either the client or the opposing party can raise a challenge to an attorney's authority." Johnsen v. Petersen, 43 Wn.App. 801, 806, 719 P.2d 607 (1986).

**Osemene** has not submitted any legal arguments challenging the trial court's reliance on RCW 2.44.020. Nor has he challenged the validity of the Board's resolutions directing him to dismiss the action against Harris and discharging him as Colmex's counsel. Because he failed to demonstrate any authority for his continued representation of Colmex or Zamora, **Osemene** has not established a prima facie defense to the Motion to Repair Injury.

**Osemene** devotes much of his brief to claims that Jacobs misled the trial court by failing to disclose his misconduct at the January 10, 2007, Board meeting and by failing to disclose which parties he had been representing. But these arguments rest on conclusory factual allegations that are, at best, disputed. Nor has **Osemene** established that such allegations affected the motion before the trial court, which challenged **Osemene's** authority to represent Colmex and Zamora.

**Osemene** also asserts that the trial court made various errors during the hearings on his motions. But his failure to submit a report of proceedings precludes appellate review of the alleged errors. See Bulzomi v. Dep't of Labor & Indus., 72 Wn.App. 522, 525, 864 P.2d 996 (1994).

In summary, **Osemene** has not identified any mistake or inadvertence justifying his failure to respond to the Motion to Repair Injury or established a prima facie defense. Accordingly, the trial court did

not abuse its discretion in denying **Osemene's** CR 60(b)(1) motion to vacate.

#### *Motion for Reconsideration*

\*4 **Osemene** moved for reconsideration of the denial of his motion to vacate, citing CR 59(a)(9), which provides for reconsideration on the grounds that "substantial justice has not been done." We review the trial court's ruling on a motion for reconsideration solely for an abuse of discretion. Olpinski v. Clement, 73 Wn.2d 944, 951, 442 P.2d 260 (1968).

Courts rarely grant reconsideration under CR 59(a)(9) for lack of substantial justice because of the other broad grounds afforded under CR 59(a). See Lian v. Stalick, 106 Wn.App. 811, 825, 25 P.3d 467 (2001). In seeking reconsideration, **Osemene** merely repeated the arguments that he made in his motion to vacate. As set forth above, **Osemene** failed to demonstrate any error or abuse of discretion in the trial court's failure to vacate the Order Repairing Injury. Under the circumstances, **Osemene** has failed to demonstrate that the trial court abused its discretion in denying reconsideration based on CR 59(a)(9).

#### *Attorney Fees*

**Osemene** next contends the trial court erred in requiring him to pay a total of \$6,772.80 in attorney fees. Although the precise nature of his legal argument is unclear, **Osemene** asserts that there are circumstances in which an attorney can represent both a corporation and its shareholders or directors and that, in any event, despite the references in the complaint, he did not intend to pursue Zamora's individual interests in the action. But these contentions fail to establish trial court error because they do not address the legal basis for the trial court's award of attorney fees.

**Osemene** made no showing that he had authority to pursue the complaint for breach of contract on behalf of Colmex or Zamora. Under RCW 2.44.020, the court may compel an attorney who has appeared without authority to "repair the injury." When an attorney "starts or pursues litigation without authorization, an obvious and foreseeable injury to the opposing party is the cost of defense, for which the proper method of 'repair' is the award of monetary judgment." Johnsen, 43 Wn.App. at 807. Here, the trial court awarded attorney fees to reimburse the costs of defending against **Osemene's** attempts to continue the litigation. **Osemene** has not demonstrated any

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error in the trial court's decision to award attorney fees.

**Osemene** also appears to challenge the amount of the award. But in each instance, the trial court reviewed an affidavit setting forth the attorney's hourly rate and an itemized billing report listing the specific expenses incurred in responding to **Osemene's** motions. Because **Osemene** has not challenged the sufficiency of the evidence or the reasonableness of the amount of the award, he has not shown any abuse of discretion in the trial court's determination of the amount of the attorney fees.

#### CR 11 Sanctions

**Osemene** challenges the trial court's imposition of CR 11 sanctions totaling \$1,000. The court imposed the sanctions after **Osemene** twice moved for the imposition of CR 11 sanctions against Jacobs. We review the trial court's imposition of CR 11 sanctions for an abuse of discretion. Biggs v. Vail, 124 Wn.2d 193, 197, 876 P.2d 448 (1994).

\*5 CR 11 is intended to prevent baseless filings and filings made for an improper purpose. MacDonald v. Korum Ford, 80 Wn.App. 877, 883, 912 P.2d 1052 (1996). "A filing is 'baseless' when it is '(a) not well grounded in fact, or (b) not warranted by (i) existing law or (ii) a good faith argument for the alteration of existing law.'" MacDonald, 80 Wn.App. at 883-84 (quoting Hicks v. Edwards, 75 Wn.App. 156, 163, 876 P.2d 953 (1994)).

In moving for CR 11 sanctions, **Osemene** asserted that Jacobs lacked authority to bring the Motion to Repair Injury and that he was merely attempting to increase the dissension among the Colmex shareholders. But **Osemene** completely failed to address or challenge the legal basis for the Motion to Repair Injury. Under RCW 2.44.020, either the client or the opposing party may challenge an attorney's authority to file a lawsuit. Johnsen, 43 Wn.App. at 806. Nor did **Osemene** demonstrate any authority to continue his representation of Colmex and Zamora. Under the circumstances, the record amply supports the trial court's findings that **Osemene's** motions for CR 11 sanctions were baseless and unsupportable. The trial court did not abuse its discretion in imposing CR 11.

Zamora has requested an award of attorney fees on appeal for continuing to respond to **Osemene's**

pursuit of the underlying litigation. See RAP 18.1(a); Johnsen, 43 Wn.App. at 808. The request is granted subject to compliance with RAP 18.1(d).

Sanctions are imposed on **Osemene** in the amount of \$250 payable to the court for failure to comply with the rules of appellate procedure applicable to brief length and formatting.

Affirmed.

Wash.App. Div. 1, 2008.  
 Colmex, Inc. v. Harris  
 Not Reported in P.3d, 145 Wash.App. 1019, 2008 WL 2487991 (Wash.App. Div. 1)

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