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No. 71036-2

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

LESLIE BLAKEY SPENCER, an individual, and TAMMY S.
BLAKEY, an individual,

Appellants/Cross-Respondents,

v.

NANCY BLAKEY, as Personal Representative of The Estate of
Gregory B. Blakey, and GLENDA BLAKEY, an individual,

Respondents/Cross-Appellants.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE MARY YU

REPLY BRIEF OF APPELLANTS/CROSS-RESPONDENTS

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I. INTRODUCTION

Respondents Greg Blakey and Glenda Blakey breached the Co-Tenancy Agreement governing their shared ownership of industrial property with their siblings appellants Leslie Blakey Spencer and Tammy Blakey by authorizing Greg's wholly owned corporation, as well as several third parties, to use the property without Leslie's or Tammy's authorization, as required by the Co-Tenancy Agreement. This Court should reverse the trial court's dismissal of Leslie's and Tammy's claims for breach of the Co-Tenancy Agreement because – as the trial court initially recognized – “[t]he record is filled with disputed facts regarding each of the parties’ actions. . . [and] granting full summary judgment would require making findings of fact based on credibility.” (CP 1522)

This Court should also reverse the trial court's refusal to allow Leslie and Tammy to exercise their rights of first refusal under the Co-Tenancy agreement. Leslie and Tammy presented an offer “equivalent in amount” to the offer from a neighboring company, which largely consisted of an illusory “indemnity” for environmental remediation costs for which the Blakeys will likely never bear responsibility. In addition to remanding for a trial on Leslie's and Tammy's breach claims, this Court should remand with

instructions to allow Leslie and Tammy to exercise their rights of first refusal.

II. REPLY ARGUMENT

A. Greg and Glenda breached the Co-Tenancy Agreement by refusing to lease the property to other interested third parties so that Snopac could secretly use the property. Leslie and Tammy may recover all damages flowing from Greg's and Glenda's refusal to lease the property.

1. Greg's and Glenda's breach of the Co-Tenancy Agreement by allowing Snopac to use the property cannot be segregated from their refusal to lease the property to other interested third parties, including neighboring Manson Construction.

Greg¹ and Glenda breached the Co-Tenancy Agreement in bad faith by secretly allowing Snopac to use the property without Leslie's or Tammy's approval. That breach cannot be separated from their refusal to lease the property – Greg and Glenda refused to lease the property to allow Greg's then wholly-owned corporation to use it without paying rent and without making the repairs or providing the indemnity Greg and Glenda insisted to Leslie and Tammy were necessary to lease the property. A jury, not the trial

¹ Counsel for Leslie and Tammy extend their sincere condolences to the entire Blakey family regarding Greg Blakey's untimely death. For purposes of clarity only, this brief continues to refer to the parties by their first names and refers to the personal representative's brief as "Greg Br."

court on summary judgment, should have decided whether Greg's and Glenda's secret lease to Snopac breached the Co-Tenancy Agreement in bad faith and what damages flowed from that breach.

Greg does not dispute that he authorized Snopac, as well as a third party Double E Foods, to use the property without Leslie's or Tammy's knowledge or consent, in violation of the Co-Tenancy Agreement's requirement that the property not be leased without approval of three cotenants. (CP 102 ("the Property shall not be . . . leased . . . except upon approval by Tenants owning more than fifty percent"); 256-60 (Double E lease signed by Greg); Greg Br. 10 ("Snopac stored old equipment in the Property for 19 months, from September 2009 until May 2011.)) Glenda asserts that she "did not use the property" (Glenda Br. 7), but she does not deny that she authorized Snopac to use the property without Leslie's or Tammy's approval, or that she authorized Manson Construction to park cars on a portion of the property without any notice to Leslie and Tammy. (App. Br. 27; CP 265-66 (Manson lease signed by Glenda), 1891 (Glenda's deposition testimony: "Q: Were you aware that during 2010, Snopac was occupying the property? A: Yes."), 1920

(email from Glenda authorizing Greg to “store stuff in my portion of the building if you paid the taxes”))²

Leslie and Tammy would not have consented to a below market Snopac lease, not *any* lease to Greg’s company, as Greg alleges. Had Greg or Glenda actually sought their approval, Leslie and Tammy would have permitted Snopac to use the property if Snopac paid the market rental rate it previously paid (\$12,500/month). (CP 1328, 1334) Without either Leslie’s or Tammy’s consent, *i.e.*, deadlock between the tenants, Greg’s and Glenda’s lease of the property to Snopac and other third parties was a clear breach of the Co-Tenancy Agreement. (CP 102)

Ignoring their breach of the duty not to lease the property without three cotenants’ approval, both Greg and Glenda insist that they cannot be liable for their refusal to lease the property to interested third parties, *e.g.*, Manson (§ II.A.3, *infra*), because “[t]he Agreement . . . did not require [them] to agree to lease the Property.” (Greg Br. 1-2, 22-29; Glenda Br. 14-18) But a jury could conclude that Greg and Glenda asserted pretextual reasons for

² Leslie and Tammy argued in their opening brief that Glenda breached the Co-Tenancy agreement by authorizing Manson to use the property without Leslie’s or Tammy’s approval. (*Compare* Glenda Br. 9 n.3 *with* App. Br. 30-31)

refusing to lease the property *so that* they could then secretly lease the property to Snopac and other third parties without obtaining Leslie's or Tammy's approval or paying Leslie and Tammy their share of rents, both undisputed breaches of the Co-Tenancy Agreement. (CP 81-82, 102) *224 Westlake, LLC v. Engstrom Properties, LLC*, 169 Wn. App. 700, 729, ¶ 66, 281 P.3d 693 (2012) (party may recover damages that “are the proximate result of defendant’s breach”).

Greg's and Glenda's reliance on earthquake damage to rebuff Leslie's and Tammy's efforts to lease the property was plainly pretextual. (App. Br. 23-28) After asserting that damage from the 2001 Nisqually earthquake rendered the property so unsafe that it should be condemned, Greg and Glenda allowed Snopac, as well as two third-parties, to use the property without making the repairs or providing the indemnity they insisted to Leslie and Tammy were necessary conditions for leasing the property. (CP 168, 235-37, 246-49, 253-54, 256-60, 265-66, 370, 385-96, 1328, 1333-34, 1891, 1920) Leslie's and Tammy's expert testified that the actual cost of repairing the earthquake damage was \$10,000, not \$200,000 as Greg and Glenda alleged. (CP 1856-58) Indeed, Glenda falsely stated that she obtained a \$200,000 estimate for repairs when it in

fact was \$37,386. (*Compare CP 380 with 1343*) Greg asserts that Leslie's and Tammy's \$10,000 estimate is "extremely dubious" (Greg Br. 9 n.3), but he provides no support for that conclusion, or why as a matter of law a jury would be precluded from relying on it to find that Greg and Glenda acted in bad faith.

Indeed, Greg kept Snopac in the property for *seven years* after it suffered what he characterizes as "significant damage" caused by the 2001 earthquake (Greg Br. 7) and then had Snopac reoccupy the property for another 20 months, all without making any repairs. (CP 1328, 1333-34) Greg and Glenda also steadfastly refused to contribute to the repairs they insisted were necessary to prevent the property from being condemned, despite their stated desire to sell the property. (CP 82-83, 1249, 1328, 1334, 1343-44, 1350)

Greg and Glenda fail to distinguish *Cherberg v. Peoples Nat. Bank of Washington*, 88 Wn.2d 595, 564 P.2d 1137 (1977), in which the Supreme Court held that a jury could find a landlord acted in bad faith when it used the poor condition of a building as a pretext for breaching a lease. Glenda's assertion that *Cherberg* is "completely inapposite" (Glenda Br. 18; *see also* Greg Br. 27-28) because it involved a tortious interference claim, not a contract

claim, ignores that *Cherberg* had multiple holdings, one clarifying when a party can be liable in tort for breaching a contract and another affirming the denial of the landlord's motion for a directed verdict because the evidence supported "an inference of a bad faith motive for breach." 88 Wn.2d at 605-06. Leslie and Tammy cited *Cherberg* for the latter holding – here, as in *Cherberg*, a jury could conclude that Greg and Glenda acted in bad faith by using the purportedly poor condition of the property as an excuse to conceal their true motive to breach the lease by allowing Snopac and other third parties to use the property without obtaining Leslie's or Tammy's approval and without paying them their share of rents.³

Greg and Glenda refused to lease the property as a pretext to allow Greg's wholly owned company to use the property without authorization, in breach of the Co-Tenancy Agreement. Greg's sweetheart lease to Snopac and his failure to obtain a tenant at

³ As Washington courts have repeatedly recognized, citing additional authority in support of arguments already made is not the equivalent of raising a new argument. *Brutsche v. City of Kent*, 164 Wn.2d 664, 671 n.3, ¶ 13, 193 P.3d 110 (2008) (citing additional case in reply brief was not "the equivalent of raising a new issue"); *U.S. Filter Distribution Group Inc. v. Katspan, Inc.*, 117 Wn. App. 744, 753 n.6, 72 P.3d 1103 (2003) (denying motion to strike portions of reply brief because citation to additional authority "was merely an analogy used to support the arguments raised in its original brief"). Glenda's assertion to the contrary conflicts with this well-established law. (Glenda Br. 18 n.37)

market rates are two sides of the same coin. This Court should reject Greg's and Glenda's artificial attempt to segregate their unauthorized lease to Snopac from their refusal to lease the property to other parties and should remand for a jury to determine the damages proximately caused by Greg's and Glenda's bad faith breaches of the Co-Tenancy Agreement.

2. Greg's and Glenda's bad faith refusal to lease the property breached the Co-Tenancy Agreement's requirement that the parties utilize the property as an investment.

Greg's and Glenda's bad faith refusal to lease the property was by itself a breach of the Co-Tenancy Agreement, regardless of whether the unauthorized lease to Snopac motivated Greg's and Glenda's refusal to lease the property. In asserting false reasons for holding the property idle, Greg and Glenda undermined the primary purpose of the Co-Tenancy Agreement, which required the parties to "hold [the property] for investment," as they had done for 21 years by leasing the property. (CP 81, 1328, 1331-32)

The implied covenant of good faith would be superfluous if it did no more than mandate a party's compliance with specific contractual terms, as Greg and Glenda argue. (Greg Br. 24; Glenda Br. 16) The duty of good faith requires more — "faithfulness to an

agreed common purpose and consistency with the justified expectations of the other party.” *Edmonson v. Popchoi*, 172 Wn.2d 272, 280, ¶ 15, 256 P.3d 1223 (2011) (quoting Restatement (Second) of Contracts § 205 cmt. a (1981)).

Because of Greg’s and Glenda’s bad faith refusal to lease the property (as well as Greg’s bad faith decision to have Snopac vacate the property, § II.B, *infra*), the property was no longer “held for investment” but became a liability that generated no income.⁴ By undermining the primary purpose of the Co-Tenancy Agreement and denying Leslie and Tammy its “full benefit,” Greg and Glenda breached their implied duties of good faith and fair dealing. *See Frank Coluccio Const. Co., Inc. v. King Cnty.*, 136 Wn. App. 751, 764, ¶ 22, 150 P.3d 1147 (2007) (App. Br. 23-24).

Consistent with the implied duty of good faith and fair dealing, Paragraph 17 of the Co-Tenancy Agreement does not immunize Greg and Glenda for fraud, gross negligence or bad faith:

No Tenant shall be liable under this Agreement to any other Tenant for the performance of any act or the failure to act so long as such Venturer was not

⁴ Leslie and Tammy preserved their argument that Greg and Glenda violated their implied duty of good faith. (CP 1489-90 (“Defendants breached the duty of good faith and fair dealing when performing the Co-Tenancy Agreement through the following actions [r]efusing to lease the Property after Snopac moved out.”))

guilty of fraud, gross negligence or bad faith in such performance or failure.

(CP 101) Thus, Paragraph 17 allows Leslie and Tammy to hold Greg and Glenda accountable for their bad faith refusal to lease the property as an investment so that Snopac could instead use the property without paying rent.

Greg and Glenda overstate the holding of *Johnson v. Yousoofian*, 84 Wn. App. 755, 930 P.2d 921 (1996), *rev. denied*, 132 Wn.2d 1006 (1997), in arguing that their bad faith refusals to lease the property did not breach the Co-Tenancy Agreement. In *Johnson*, this Court held that a landlord did not breach a lease by refusing to give his consent to the assignment of the lease because the lease gave him an “absolute privilege” to withhold his consent. 84 Wn. App. at 763. Here, unlike *Johnson*, Greg and Glenda did not have an “absolute privilege” to refuse to lease the property – Paragraph 17 allowed the cotenants to hold each other accountable for their bad faith.⁵ Moreover, even if they could refuse in bad faith

⁵ The Washington Supreme Court, like many states, would likely reject *Johnson’s* “older common law view that a landlord may arbitrarily or unreasonably refuse to consent under a silent consent clause in a lease’s anti-assignment provision” and follow the “modern’ position . . . imposing an implied duty of good faith and fair dealing in interpreting a silent consent clause.” *Dick Broad. Co., Inc. of Tennessee v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 666 (Tenn. 2013) (listing cases).

to lease the property, Greg and Glenda breached their contractual duty not to lease the property without approval of three cotenants.

Tammy and Leslie did not waive or invite this error. Glenda cites Tammy's deposition testimony, in which she purportedly admitted "that Glenda Blakey's refusal to lease was not a breach of the agreement" (Glenda Br. 3), but the trial court correctly struck that statement as an inadmissible legal conclusion.⁶ *Stenger v. State*, 104 Wn. App. 393, 408, 16 P.3d 655 (striking declaration that "primarily consisted of . . . legal opinion as to DSHS/DCFS's obligations to Jason under state and federal law and the agency's satisfaction of these obligations"), *rev. denied*, 144 Wn.2d 1006 (2001). The cases cited by McCormick, upon which Glenda relies (Glenda Br. 19), all involved admissions regarding whether a party acted negligently, not whether a party's conduct breached a contract. *See McCormick's on Evidence: Admissions in opinion form; conclusions of law* § 256 at 267 n.3 (7th ed. 2013) ("Most often this issue arises in connection with statements of a participant

⁶ Glenda's argument that the trial court erred by striking Tammy's testimony does not seek any "affirmative relief" and thus cannot be raised as a cross-appeal. RAP 2.4(a); Karl Tegland, *Washington Practice: Rules Practice – RAP 2.4(a)* at 212 (7th ed. 2011) ("affirmative relief" under RAP 2.4(a) "normally mean[s] a change in the final result at trial"). This Court should reject Glenda's improper "cross-appeal."

in an accident that the mishap was the speaker's fault.”). McCormick recognized that where, as here, a party “give[s] an opinion regarding solely an abstract issue of law exclusion is warranted.” McCormick’s on Evidence, *supra*, § 256 at 268.

Moreover, Tammy did not in fact “admit” that Glenda’s refusal to lease the property was authorized by the Co-Tenancy Agreement. Tammy stated she was “not quite sure” whether Glenda had breached the Co-Tenancy Agreement and that “there might be some legal ramifications that I am not familiar with.” (CP 1772) Tammy ultimately concluded that Glenda’s false statement that \$200,000 was needed to repair the property and her reliance on that statement to refuse to lease the property was “not right.” (CP 1772) Tammy’s equivocal statement is consistent with her position here and in opposing summary judgment: whether Greg and Glenda breached the Co-Tenancy Agreement in bad faith was an issue of fact that a jury should have resolved, as the trial court initially recognized.

3. **The cotenants could have leased the property for \$12,500 a month to one of several interested parties had Greg and Glenda not refused to lease the property so that Snopac could secretly reoccupy it.**

But for Greg's and Glenda's bad faith refusal to lease the property, Leslie's and Tammy's efforts would have resulted in a lease to an interested third party, *e.g.*, neighboring Manson Construction, or a lease with Snopac properly approved by at least three of the four cotenants. Greg and Glenda's contention that Leslie and Tammy presented "no evidence" of their damages turns on its head the governing standard of review of the trial court's grant of summary judgment. Because Leslie and Tammy established the *fact* of damage it was for a jury to decide the *amount* of their damages.

Leslie and Tammy were not required to prove – on summary judgment – their damages with "reasonable certainty" by coming "forward with evidence that there was another tenant interested in leasing the Property." (Greg Br. 29-30; Glenda Br. 21 (both citing *California Eastern Airways v. Alaska Airlines*, 38 Wn.2d 378, 229 P.2d 540 (1951)) *California E. Airways*, as well as the other cases cited by Greg and Glenda, involved the proof required to recover consequential damages, *i.e.*, those not "resulting from the ordinary

and obvious purpose of the contract.” David DeWolf et al, 25 Wash. Prac., Contract Law And Practice § 14:7 at 269 (1998). The rents generated by the property were not consequential damages, but were benefits received under the “ordinary and obvious purpose” of the contract – utilizing the property as an investment by leasing it. (CP 81)

Likewise, Leslie and Tammy were not required to present a “paying tenant” because “the law does not require performance of futile acts.” *Music v. United Ins. Co. of Am.*, 59 Wn.2d 765, 768, 370 P.2d 603 (1962). Greg and Glenda made clear that they would never lease the property to a tenant presented by Leslie and Tammy. Greg and Glenda offered as a pretext the excuse that the building needed \$200,000 in structural repairs before it could be used – even though Snopac used the building for seven years after the earthquake. (CP 1334-35)

Regardless, there were other tenants interested in leasing the Property. (Greg Br. 29-30; Glenda Br. 21) Manson Construction wanted to lease the property, as evidenced by a November 2011 email from a real estate consultant to a Manson employee suggesting Manson “approach[] the Blakeys” with an offer of \$12,317 per month to rent the property. (CP 1321-22; *see also* CP

1350 (email in which Greg states “Manson has attempted to rent the property in the past.”), 1760 (Tammy’s deposition discussing Manson’s offer to lease part of the property from June 2007 to July 2011)) Manson’s subsequent purchase of the property confirms that it had a substantial interest in using the property.

Likewise, Greg’s own decision to have Snopac reoccupy the property refutes his assertion that there were no parties interested in leasing the property. Had Greg not breached the Co-Tenancy Agreement by sneaking Snopac back onto the property, Snopac would have been forced to negotiate a lease for its use of the property at a fair market rate, not its payment of minimal expenses as Greg authorized. Greg’s unauthorized lease to Double E Foods further refutes his contention that no parties wanted to lease the property. (CP 256-60)

Leslie and Tammy did not “s[i]t silently and do nothing” (Greg Br. 9, 12), but were thwarted by Greg’s and Glenda’s active opposition to their efforts to lease the property. (*See also* Glenda Br. 21 (“Leslie & Tammy did nothing to procure a lease”)) When Tammy posted a “For Lease” sign on the property, Greg removed it and instructed the property’s real estate agent not to lease the building. (CP 1328, 1334-35, 1344; *see also* CP 115, 588 (emails

reflecting Leslie's efforts to lease the property)) Moreover, Leslie and Tammy could not "complain" about Snopac's use of the property from 2009-2011 because *neither Greg nor Glenda told them about it*. (Greg Br. 11) Greg further ignores that Leslie and Tammy were not even aware of the need to find a new tenant until the day Snopac left because he breached his duty as Managing Tenant to obtain a written lease from Snopac requiring it to give advance notice of its departure. (§ II.B, *infra*)

Because Leslie and Tammy established the *fact* of damage – their inability to earn rent by leasing the property – a jury should determine the rent they would have earned had Greg and Glenda not prevented the lease of the property in bad faith. (App. Br. 28-31; *Lewis River Golf, Inc. v. O.M. Scott & Sons*, 120 Wn.2d 712, 717, 845 P.2d 987 (1993) ("the doctrine respecting the matter of certainty, properly applied, is concerned more with the *fact of damage than with the extent or amount of damage*.")) (quotation omitted) (emphasis in original)) In 2007, Snopac's CFO, Stewart Terry, calculated the fair market monthly rent at \$12,500 based on its square footage and potential uses. (CP 1339-40) Likewise, Dan Whitaker, a commercial real estate consultant for Manson

suggested that Manson offer to rent the property for \$12,317 in November 2011. (CP 1321)⁷

The calculations of two persons familiar with the property, its potential uses, and the neighboring real estate provide more than a sufficient basis for a jury to calculate the fair market rent for the property. (App. Br. 29-30) The cases cited by Greg and Glenda recognize that a party may recover damages, even consequential damages such as lost profits, where, as here, “there be data from which the profits can be ascertained with a reasonable degree of certainty and exactness.” (Glenda Br. 20-21 (citing *California E. Airways*, 38 Wn.2d at 380))

Greg’s evidentiary objections to the Terry and Whitaker calculations ignore that they parallel the amount of rent that Snopac was paying when it vacated the property in 2008. (CP 1328,

⁷ Leslie and Tammy relied on the Whitaker email in response to Greg and Glenda’s first motion to dismiss their damage claims and the trial court considered the email as part of the record when it ruled on Greg’s and Glenda’s subsequent summary judgment motions. (*Compare* CP 1212, 2019 (summary judgment record includes “[a]ll other pleadings and papers on file with the Court”) *with* Greg Br. 31 (Whitaker email “was not brought to the attention of the Superior Court”))

1332, 1339-40) (App. Br. 34)⁸ Thus, even without these experts' calculations, a jury could rely on Snopac's historic rent as direct evidence of the property's fair market rental rate. *See, e.g., Spradlin Rock Products, Inc. v. Pub. Util. Dist. No. 1 of Grays Harbor Cnty.*, 164 Wn. App. 641, 655-62, ¶¶ 25-39, 266 P.3d 229 (2011) (party's repeated payments at specified rates established basis for calculating damages from breach of contract); *cf. Eagle Grp., Inc. v. Pullen*, 114 Wn. App. 409, 418, 58 P.3d 292 (2002) ("A plaintiff ordinarily proves lost profits based on its profit history."), *rev. denied*, 149 Wn.2d 1034 (2003). Snopac paid monthly rent of \$12,500 when it vacated the property in 2008 despite the allegedly "significant damage" caused by the Nisqually earthquake. (CP 1332) The insider rent paid by Snopac for the building co-owned by its President is, if anything, an understatement of the buildings' true rental value. (Greg Br. 29 (admitting that Snopac lease was "hardly an arm's length transaction"))

⁸ Greg waived his evidentiary objections (Greg Br. 30-31) to these calculations of market rent by not objecting or moving to strike them in the superior court. *Smith v. Showalter*, 47 Wn. App. 245, 248, 734 P.2d 928 (1987) (respondents waived deficiencies in affidavits because they made "no objection or motion to strike . . . prior to entry of summary judgment"); *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352, 588 P.2d 1346 (1979) (same). Indeed, Greg stipulated to the admissibility of the Terry email by failing to object to it in response to Leslie and Tammy's ER 904 notice. (CP 1999)

Leslie's and Tammy's own opinions on the property's rental value likewise provided more than a sufficient basis for a jury to determine their damages. *See Cunningham v. Town of Tieton*, 60 Wn.2d 434, 436, 374 P.2d 375 (1962) ("the owner may testify as to the value of his property because he is familiar enough with it to know its worth"). Leslie and Tammy both opined that \$12,500 was "the fair market lease rate." (CP 1328, 1333) Leslie and Tammy confirmed that this amount was "proposed by Snopac's CFO" "based upon [his] due diligence of the commercial real estate market," further undermining Greg's assertion that this calculation is neither "admissible or competent" evidence of their damages. (CP 1328, 1333)

Greg's and Glenda's remaining damages arguments fail. Ignoring that Snopac used over 9,000 square feet of the warehouse to store Snopac equipment (CP 385-94), Greg argues that Leslie and Tammy cannot recover damages for Snopac's use of the property because Snopac used only a "small portion" of the property and that Tammy and Leslie "submitted no evidence to the Superior Court concerning [the] extent of Snopac's use of the Property." (Greg Br. 31-32; *see also* CP 594 (Snopac's CFO stating he is "scared" Snopac may "have to move" after Leslie and Tammy

discovered their use of the property)) Double E Foods and Manson used other portions of the property without permission. (CP 256-60, 265-66)

Greg's argument that Leslie and Tammy "benefited equally" from Snopac's "unauthorized use of the property" for less than its market value also misses the mark. (Greg Br. 31) Leslie and Tammy lost the difference between what Snopac did pay and what it should have paid. Snopac used the property for 20 months from early 2009 to September 2011 in exchange for paying the property's taxes and other minimal expenses that averaged roughly \$2,000 per month – more than \$10,000 less per month than it paid just a year earlier. (CP 163, 253-54, 593) The cotenants would not have been liable for utility payments because Leslie had shut them off, only for Greg to turn them back on when he had Snopac secretly reoccupy the property. (CP 163, 253-54, 1311)

Leslie and Tammy likewise did not "benefit" from Snopac subleasing the property as "Landlord" and then accepting the rent for itself, rather than splitting it between the cotenants as required by the Co-Tenancy Agreement. (CP 81-82, 256-60; *see also* Glenda Br. 10 ("Cotenants must share cotenancy income")) Leslie and Tammy are entitled to recover, at a minimum, the market value of

Snopac's unauthorized use of the property, as well as the market value of third parties Manson's and Double E Foods' unauthorized use of the property. (App. Br. 30-31; *Ducolon Mech., Inc. v. Shinstine/Forness, Inc.*, 77 Wn. App. 707, 712, 893 P.2d 1127 (1995) (restitution damages entitle plaintiff to "the reasonable value of the benefit conferred to the defendant"))

Having proven the fact of damage, any uncertainty in the amount of Leslie's and Tammy's damages falls on Greg and Glenda. *Spradlin Rock Products*, 164 Wn. App. at 664, ¶ 45 ("Washington courts abide by the principle that the wrongdoer shall bear the risk of the uncertainty which its own wrong has created.") (internal quotation omitted). A jury should determine the extent of Leslie's and Tammy's damages.

B. Greg breached his fiduciary duties as the cotenant's attorney in fact by refusing to lease the property, by removing the property's long-term tenant in an effort to "destroy" Leslie financially, and by failing to obtain written leases from Snopac.

Greg does not dispute that as the cotenants' attorney-in-fact he was "a fiduciary who is bound to act with the utmost good faith and loyalty." *In re Estate of Palmer*, 145 Wn. App. 249, 263, ¶ 30, 187 P.3d 758 (2008). Greg's fiduciary duties prohibited him from using the property for his own benefit, to the detriment of the

other cotenants. *Wilkins v. Lasater*, 46 Wn. App. 766, 775, 733 P.2d 221 (1987) (fiduciary cannot use property “for his own profit or claim any advantage by reason of his relation to it, either directly or indirectly”). A fact-finder should have decided whether Greg violated his fiduciary duties by refusing to lease the property so that Snopac could reoccupy the property without paying rent (II.A, *supra*), by removing Snopac to further his stated goal of ruining Leslie financially, or by failing to obtain written leases from Snopac protecting the cotenants. (App. Br. 32-38) *Valentine v. Dep’t of Licensing*, 77 Wn. App. 838, 846, 894 P.2d 1352 (“Whether a party has breached a [fiduciary] duty owed to another is generally a question of fact.”), *rev. denied*, 127 Wn.2d 1020 (1995).

Snopac did not vacate the property and its 21-year tenancy because it could not agree with the cotenants on lease terms. (Greg Br. 35) Although Glenda initially requested a rent increase to \$14,500 per month, after Snopac rejected that increase, the cotenants agreed that Snopac could continue to occupy the property for the established rent of \$12,500 per month. (CP 1279-80 (Snopac’s CFO’s deposition testimony: “I talked to Tammy Blakey in the afternoon of June 15th and got it back to \$12,500. . . . Q: Was 12,500 acceptable to Snopac? A: Yes.”)) Thus, the cotenants and

Snopac *did* “reach[] agreement on the amount of the rent” contrary to Greg’s assertion on appeal. (*Compare* 1279-80 *with* Greg Br. 35)

As Leslie and Tammy consistently argued below – including in opposition to Greg’s second motion for summary judgment – Greg’s true reason for removing Snopac from the property was to further his mission to “financially destroy” Leslie and undermine his sisters’ ability to fight his separate suit seeking to redeem his sisters’ ownership interests in Snopac for virtually nothing. (App. Br. 32-34; *compare* CP 1931 (“Greg’s reasons for causing Snopac to exit the building and for obstructing the re-rental of the building were to cut off cash flow to Plaintiffs—with whom he was now embroiled in litigation regarding the value of Snopac. Indeed, during this same time period, Greg told his mother ‘he intended to financially destroy Leslie.’”) *with* Greg Br. 34; *see also* CP 1215, 1219, 1494)

Indeed, Greg had already demonstrated his commitment to financially ruining his sisters in his suit attempting to redeem his sisters’ interests in Snopac. There Greg repeatedly lied – including under oath – about the value of Snopac’s assets and purposefully attempted to decrease the value of his sisters’ shares in Snopac by loading Snopac with millions in debt. (CP 1294-1304) Greg was so

dedicated to undermining his sisters' ability to fight his Snopac lawsuit that he was willing to spend substantial funds on tenant improvements for the building Snopac moved into after the cotenancy property, rather than on the cotenancy property, because it would cut off income to his sisters. (CP 1328, 1332-33)

Moreover, as with Greg's pretextual assertions that the property was unfit to be leased, a jury could reasonably conclude that Greg removed Snopac from the property *so that* Snopac could secretly reoccupy it later without paying rent and without obtaining the approval of two other cotenants as required by the Co-Tenancy agreement. By removing Snopac and then later having it secretly reoccupy the property, Greg could achieve his two primary goals – cutting off income to his sisters and allowing Snopac to return to its sweetheart lease, this time without paying *any* rent. Leslie and Tammy are entitled to recover the rent lost as a result of Greg's decision to remove the property's paying tenant of 21 years to further his own financial and personal interests, rather than those of the cotenants, in breach of his fiduciary duties and the Co-Tenancy Agreement.

Likewise, Greg's bad faith decision to place his and Snopac's interests above those of the other cotenants, not a purported failure

to agree on lease terms, left the cotenants without written leases providing them the standard protections afforded commercial landowners. (Greg Br. 35)⁹ The Co-Tenancy Agreement did not, as Greg claims, “specifically prohibit[] the managing tenant from entering into an agreement for . . . lease of the Property.” (Greg Br. 35) While Greg could not lease the property by himself (CP 83-84), after the property was leased, he had a duty manage the tenancy and to prevent waste by obtaining written leases from Snopac providing standard protections for property owners in a commercial lease. (CP 83-84 (Greg had “complete, absolute and exclusive power and authority to manage the business and affairs of the Tenancy . . . including, without limitation, the execution, acknowledgment and delivery of any and all documents”), 102 (duty not to commit waste)) Snopac was the property’s sole tenant from

⁹ The trial court had already dismissed Leslie and Tammy’s claim that Greg should have obtained written leases from Snopac by the time the trial court considered Greg’s *second* motion for summary judgment. (CP 1522, 1943) Leslie and Tammy opposed dismissal of that claim when opposing Greg’s *first* summary judgment motion. (CP 1220, 1488 (Greg violated fiduciary duties by “[r]efusing to have a written lease with commercially reasonable terms in place with Snopac, his wholly-owned company”)) Contrary to Greg’s misguided preservation argument (Greg Br. 35-36), Leslie and Tammy were not required to repeat their arguments in order to preserve review of that claim; they were entitled to appeal its dismissal after entry of a final judgment as with any other claim. RAP 2.2(a)(1); RAP 2.4(a).

1987-2008, yet Greg consistently failed to obtain written leases that provided standard terms for protecting the cotenants, including terms requiring that Snopac provide advance notice of renewal, maintain and insure the building, provide indemnification for the cotenants, and make advance rent and damage deposits. (App. Br. 34-38; CP 1254)

Greg's failure to obtain written leases with Snopac left the cotenants with no recourse when Snopac suddenly vacated the property. Because Snopac was not required to provide advance notice of its departure or advance rent deposits the cotenants had no warning that they should be looking for another tenant and had no deposits to cover the months the property was left vacant by Snopac's unannounced departure. (CP 1384) Likewise, because Greg did not require Snopac to provide damage deposits or insure the building, the cotenants had no funds from which to repair the building, including the allegedly significant earthquake damage. (CP 1384) Greg recognized the importance of these protections when he obtained them for his own corporation. (CP 256-60 (Double E Foods lease requiring it to return property "in as good a condition as when delivered," maintain property and liability insurance, give 60 days notice of renewal, and indemnify Snopac))

Greg received direct financial benefit by not requiring Snopac to execute commercially reasonable leases. Greg could operate Snopac without the normal obligations a commercial tenant must consider when running a business, including payment of insurance premiums, maintenance costs, advance rent and damage deposits, and providing indemnification to the cotenants. Greg's failure to obtain from Snopac written leases protecting the cotenants was in bad faith – or at a minimum grossly negligent – and violated both his fiduciary duties as well as his duty to prevent waste to the property. (App. Br. 36; CP 102)

C. Greg and Glenda breached the Co-Tenancy Agreement by selling the property to Manson for a “fire sale” price, denying Leslie and Tammy the opportunity to sell the property for its actual market value.

Greg pursued, with Glenda's approval, the sale to Manson not because he thought Manson's “offer” represented the market value of the property but because he wanted to further retaliate against Leslie and Tammy for questioning his management of Snopac. (App. Br. 40; CP 1328, 1336) In so doing, Greg violated his fiduciary duties, and both he and Glenda violated the Co-Tenancy Agreement's requirement to utilize the property as an investment and may be held liable under Paragraph 17 for acting in bad faith,

or, at a minimum, with gross negligence. Whether Greg and Glenda breached the Co-Tenancy agreement by selling the property to Manson on artificially inflated terms in order to prevent their sisters from gaining ownership should have been resolved by a jury, not the trial court on summary judgment.¹⁰

Over sixty percent of Manson's offer consisted of an "indemnity" for environmental cleanup costs Greg and Glenda alleged would total \$1.7 million. Greg and Glenda accepted this "indemnity" as the primary consideration for the sale of the property when the cotenants in fact faced no liability as a matter of law because former owners of property have no liability for cleanup costs unless pollution occurs on the property during their

¹⁰ In arguing that Leslie and Tammy waived their claim for damages relating to the sale of the property, Greg in fact demonstrates that Leslie and Tammy preserved it by raising it *before* the trial court's first summary judgment ruling. (Greg Br. 39) The trial court fully considered Leslie and Tammy's claim and expressly ruled on it in its summary judgment order. (CP 1522 ("the court is granting partial summary judgment on Plaintiffs' damages related to selling the property to Manson for 'below market value.'")) Likewise, Leslie and Tammy did not concede that the Co-Tenancy Agreement allowed Greg's and Glenda's bad faith and grossly negligent sale of the property – they stated only that the Co-Tenancy Agreement permitted a sale below market value, without conceding that the agreement permitted such a sale when done in bad faith or with gross negligence. (Glenda Br. 37-38)

ownership. (CP 1267; App. Br. 39 (citing CERCLA § 107(a) (42 U.S.C. 9607(a)); RCW 70.105D.040(1)))¹¹

Greg assertion – made for the first time on appeal – that Snopac may have polluted the property cannot override his unambiguous deposition testimony that no pollution occurred on the property during Snopac’s tenancy and the cotenants’ ownership. (*Compare* Greg Br. 38 *with* CP 1267), *Cf. Marshall v. AC & S, Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989) (party cannot contradict “clear answers to unambiguous deposition questions” with later declaration) (alteration and quotation omitted). Regardless of Greg’s newly raised assertion, it is undisputed that no regulatory agency has named the cotenants or Snopac as a party that must contribute to environmental remediation costs and Greg and Glenda presented no evidence that an agency intended to do so. (CP 847, 1371-72)

Indeed, Snopac and the cotenants are notably absent from a December 2013 list published on the Environmental Protection Agency’s website identifying parties that received “General Notice Letters” informing them “that they may be liable for cleanup costs

¹¹ Manson’s offer was not the first “bona fide” offer for the property. (Greg Br. 36-37) Another party had offered to purchase the property for \$1.7 million a year before Manson made its offer. (CP 726)

at the site.” (App. A-B) The EPA excluded Snopac and the cotenants from this list despite having sent Snopac an “Information Collection Request” a year earlier, in November 2012.¹² (App. C) That the EPA excluded Snopac and the cotenants from its list of potentially responsible parties, even after seeking information regarding their liability, directly undermines Greg’s allegation that Manson’s indemnification protects the cotenants from \$1.7 in remediation liability and “substantial expenses including attorney’s fees” they will “undoubtedly incur” in obtaining “a future determination that the co-tenants are not liable.” (Greg Br. 41, 44; *see also* Glenda Br. 33-34) Whether Greg sold the property to retaliate against Leslie and Tammy was an issue of fact that should have been resolved by a jury.

Even assuming the cotenants could be liable for environmental remediation costs, the report relied on by Greg and Glenda was far from “uncontroverted” as they now claim on appeal and in fact contained glaring errors. (Glenda Br. 33) Leslie and Tammy’s expert took issue with Greg and Glenda’s report, stating “it is impossible to know what these costs ultimately will be” and it

¹² Leslie and Tammy have filed a separate motion asking this Court to consider the EPA’s documents and website as additional evidence on review under RAP 9.11 and as a matter of judicial notice.

is “highly speculative at best that Manson ultimately will be required to provide plaintiffs and defendants with any indemnity for environmental cleanup.” (CP 1372; *see also* CP 848)

Greg and Glenda’s report did not consider the allocation of costs to any other parties, including the four parties primarily responsible for pollution on the Lower Duwamish (Boeing, the Port of Seattle, the City of Seattle, and King County), who “will bear the majority of the costs.” (CP 746, 847, 1370-72) It used outdated and “overly aggressive estimates for cleanup,” assuming that the most expensive cleanup method would be used, when in fact a less expensive option was likely to be used. (CP 1371-72) Greg and Glenda do not address these factual issues.

Greg and Glenda also fail to explain why they did not follow standard practice for the sale of property with potential environmental liability, in which the buyer deposits a portion of the sale price into an escrow account, with the balance turned over to the seller after environmental liabilities are determined. (App. Br. 41; CP 1372) Had Greg and Glenda done so, they would have ensured that the cotenants actually received the \$1.7 million dollars attributed to “indemnifying” the cotenants from a liability that does

not now, and likely will not ever, exist. A jury could reasonably conclude that their failure to do so was grossly negligent.

That the sale “took place . . . in strict compliance with the Superior Court’s orders” does not absolve Greg and Glenda of liability for their bad faith and gross negligence. (Greg Br. 38; Glenda Br. 37-38) Greg and Glenda obtained those orders in bad faith by misrepresenting to the trial court the extent of the cotenant’s liability for potential environmental cleanup costs. That they took their bad faith scheme into the courtroom does not absolve them of their liability. *See, e.g., Tyner v. State Dep’t of Soc. & Health Servs., Child Protective Servs.*, 141 Wn.2d 68, 86, 1 P.3d 1148 (2000) (where party “fail[s] to supply sufficient material information . . . a court order will not break the causal chain”).

No authority supports Glenda’s argument that Leslie and Tammy’s failure to stay the order approving the sale to Manson is tantamount to a failure to mitigate damages as a matter of law. (Glenda Br. 38) The Rules of Appellate Procedure do not require a party to stay a decision in order to obtain review of that decision. RAP 7.2(c) (providing for enforcement of decisions on review but not stayed); RAP 12.8 (explaining effect of reversal of decision that was enforced). Glenda’s argument would require an appellant to

stay every decision as a condition to pursuing an appeal and would write RAP 12.8's restitutionary principles out of the rules.

The below market sale clearly damaged Leslie and Tammy. The property was worth substantially more than the \$1 million cash actually paid by Manson. Greg and Glenda asserted throughout these proceedings that Manson's offer purportedly worth \$2.7 million represented the property's "fair value." (CP 29, 431, 438) In 2008, Glenda stated that the property was worth \$3,000,000 and a year later the cotenants listed the property for sale at \$2.9 million. (CP 478, 1343) The property's assessed value was \$1.78 million in 2012. (CP 535) A jury should decide whether Greg and Glenda acted in bad faith, or at a minimum with gross negligence, by pushing through a sale of the property whose primary consideration was an illusory "indemnity."

D. The trial court erred by denying Leslie and Tammy their rights of first refusal.

The Co-Tenancy Agreement provided a detailed procedure for ensuring that cotenants dissenting from a sale could retain ownership of the property. The trial court frustrated the Co-Tenancy Agreement's purpose when it concluded that Leslie and Tammy could not purchase Greg's and Glenda's interests in the

property because they did not “mirror” Manson’s overall financial assets. (2/28/12 RP 63) Leslie and Tammy did all the Co-Tenancy Agreement required of them by making an offer “equivalent in amount and method of payment” to Manson’s. (CP 100) Leslie and Tammy offered to immediately pay Greg and Glenda \$250,000 each and demonstrated that they had total assets valued over \$2,450,000 to cover Manson’s “indemnity” purportedly worth \$1.7 million. This Court should reverse the trial court’s orders authorizing the sale of the property to Manson and remand with instructions to allow Leslie and Tammy to purchase Greg’s and Glenda’s interests in the property.

Greg misstates the standard of review of the trial court’s decision to deny specific performance. (Greg Br. 40) While a trial court has discretion in choosing the appropriate remedy for a party’s breach of contract, whether a party fulfilled the conditions necessary to entitle it to specific performance under a contract presents a question of law that this Court reviews de novo. *Dullanty v. Comstock Dev. Corp.*, 25 Wn. App. 168, 171, 605 P.2d 802 (1980) (whether party “promptly satisf[ied] his burden of closing the transaction” entitling him to specific performance was conclusion of law reviewed de novo) (App. Br. 42); *Pardee v. Jolly*,

163 Wn.2d 558, 569, ¶ 16, 182 P.3d 967 (2008) (“Whether Pardee fulfilled the terms of the contract and is entitled to specific performance is a question of law.”); *see also Crafts v. Pitts*, 161 Wn.2d 16, 29, 162 P.3d 382 (2007) (“While a decree of specific performance rests within the sound discretion of the trial court, this does not permit a court to deny specific performance when otherwise appropriate.”) (Greg Br. 40). Particularly where, as here, the trial court resolved the issue on a documentary record without hearing testimony, whether Leslie and Tammy fulfilled the Co-Tenancy Agreement’s requirement to make an offer “equivalent in amount” to Manson’s offer is a question of law this Court reviews *de novo*. *Gronquist v. Dep’t of Corrections*, 159 Wn. App. 576, 590, ¶ 29, 247 P.3d 436, *rev. denied*, 171 Wn.2d 1023 (2011).

Leslie and Tammy complied with the Co-Tenancy Agreement’s requirement for exercising their rights of first refusal – that they submit an offer “equivalent in amount and method of payment” to Manson’s offer. (CP 100) Leslie and Tammy did not have to pay the \$1 million purchase price as Greg argues (Greg Br. 41) – Leslie and Tammy were only required to pay Greg’s and Glenda’s portions of the \$1 million cash payment from Manson (\$250,000 each), which they undisputedly could do with either

over \$500,000 in liquid assets or \$500,000 in conditionally approved loans available to them shortly after the trial court's February 28 order and before its final orders approving the sale. (*Compare* CP 866, 869, 2276-2360 *with* Greg Br. 42 (“There was no disclosure to the court . . . when the loans were anticipated to be approved”)) Indeed, the trial court denied Leslie’s and Tammy’s right of first refusal not because they could not match Manson’s cash payment, but because it believed they could not match Manson’s \$1.7 million “indemnity.” (2/28/12 RP 63 (“Having cash available and indemnification, you know those are two different realities.”); *see also* CP 864 (Greg and Glenda’s former attorney’s statement that Leslie and Tammy “show[ed] that they have the cash to make the initial payment”))¹³

But Leslie and Tammy did match the “indemnity” provided by Manson by demonstrating that the indemnity was drastically overvalued and that, in any event, they had \$2.5 million in assets to

¹³ Leslie did not admit that she and Tammy failed to match Manson’s offer. Leslie was describing the trial court’s reasoning when she said “there was no evidence before the Court to show that we were able [to] match Manson’s offer.” (CP 913) That is hardly a concession that she believed they failed to match Manson’s offer. (Greg Br. 43; Glenda Br. 35-36) Likewise, Leslie’s statement that they could have matched Manson’s offer “prior to any summary judgment filings” (CP 910) is not a concession that they did not ultimately match Manson’s offer. Leslie’s and Tammy’s statements regarding their frustration with their former lawyer do not establish that they failed to match Manson’s offer.

cover the indemnity's alleged \$1.7 million value. (Greg Br. 41; Glenda Br. 31-36) The basis for the indemnity's purported value of \$1.7 million was an environmental report prepared by Manson. That report had numerous problems (§ II.C, *supra*), which Leslie and Tammy pointed out well before the trial court approved the sale. (*Compare* CP 2278 ("report fails to take into account the allocation of responsibility to parties other than present owners") *with* Greg Br. 44-45, Glenda Br. 36-37)

Moreover, the indemnity was in fact worthless because the cotenants could not be liable for any remediation costs as a matter of law after they sold the property. (*See* § II.C, *supra*) The Co-Tenancy Agreement expressly recognized that cotenants could substitute "money equivalent" for consideration "other than money." (CP 100) The money equivalent for the indemnity was zero, especially in light of the EPA's exclusion of the cotenants from its list of responsible parties. (App. A-B) The trial court erred in concluding that Leslie and Tammy did not match the illusory "indemnity."

Even if Manson's "indemnity" had an actual value of \$1.7 million, Leslie and Tammy provided the same promise to indemnify Greg and Glenda that Manson did and, like Manson, demonstrated

that they had assets sufficient to cover the indemnity. Leslie and Tammy had total assets worth over \$2,450,000. (CP 2276-2360) Leslie and Tammy could have also secured any indemnity by borrowing against the property itself, which all parties agreed was worth at least \$2.7 million. The Co-Tenancy Agreement did not require Leslie and Tammy to do any more than Manson, *e.g.*, post a bond or pledge their assets. (CP 100 (dissenting cotenants' purchase "shall be upon the same terms and conditions as the proposed sale")) Leslie's and Tammy's promise to indemnify Greg and Glenda was no more "naked" than Manson's, who did not pledge any assets or post any bond to secure the indemnity. (Greg Br. 43; Glenda Br. 35)¹⁴

Greg and Glenda do not take issue with the value of Leslie's and Tammy's assets, but instead argue that because they included illiquid assets, *e.g.*, real estate, they did not match the indemnity. (Greg Br. 42; Glenda Br. 34) As Greg and Glenda concede, there has been no determination that the cotenants bear liability for

¹⁴ Leslie and Tammy were not required to provide earnest money before the trial court decided if their offer was "equivalent in amount" to Manson's offer and thus whether they had successfully "rejected" it under the Co-Tenancy Agreement's tiebreaker provision. (*Compare* Glenda Br. 33 *with* CP 100 (providing that cotenants rejecting a purchase offer must make payments on "same terms and conditions as the proposed sale of the Property *which was rejected* by the Tenancy") (emphasis added))

environmental remediation costs. Should that determination ever actually be made, the lengthy process of allocating environmental liability will afford Leslie and Tammy ample time to liquidate their assets. (CP 152 (Greg and Glenda's expert's statement that "it's not unrealistic to expect that allocation of remedial costs could take 2-3 years to complete"))

Moreover, the Co-Tenancy Agreement did not require Leslie and Tammy to match the liquidity or amount of Manson's overall assets – only the actual resources Manson committed to its offer. (*Compare* CP 100 *with* Greg Br. 42 (“Manson provided the declaration of its CFO showing that it had \$26 million in cash or cash equivalents on hand to pay the purchase price Manson also had assets of \$367 million and annual sales of \$433 million to back up the indemnity.”), Glenda Br. 34) Indeed, under Greg and Glenda's interpretation of the Co-Tenancy Agreement, a cotenant could *never* match an offer made by a party with more assets, a result directly contrary to both the letter and purpose of the Co-Tenancy Agreement's right of first refusal clause. Moreover, Greg and Glenda only presented evidence of Manson's assets, not its liabilities, making impossible any determination of the resources it actually had available to back the indemnity.

Greg misleadingly asserts that Tammy stated she would “pledge her assets to secure only one half of the obligation under the indemnity agreement.” (Greg Br. 43-44) Tammy agreed to pledge her assets to match Manson’s offer to indemnify Greg and Glenda – she was not required to pledge her assets to secure her and Leslie’s potential exposure. (CP 517) Greg and Glenda also ignore that prior to the trial court entering its final order approving the sale to Manson, Leslie supplemented her assets statement to demonstrate that she had \$6.5 million in assets and thus had more than enough assets to secure her share of the indemnity obligation. (CP 869-70)¹⁵

Because the indemnity was dramatically overvalued, if not worthless, the trial court erred in denying Leslie and Tammy their rights of first refusal. Leslie and Tammy did match the resources Manson actually committed to its purchase offer. This court should reverse the trial court’s orders authorizing the sale to Manson and remand with instructions to allow Leslie and Tammy to purchase Greg’s and Glenda’s interests in the property.

¹⁵ Leslie and Tammy’s attorney during the initial hearings instructed them to only disclose enough assets to cover the indemnity. (CP 867, 870) After discharging that attorney, Leslie and Tammy supplemented their asset statements to disclose that they had well over \$2.5 million in assets. (CP 866-70)

III. CONCLUSION

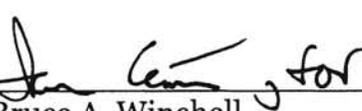
The trial court erred by denying specific performance of Leslie's and Tammy's rights of first refusal and by dismissing their damages claims on summary judgment. This court should remand with instructions to allow Leslie and Tammy to exercise their rights of first refusal and for a trial on their damages claims.

Dated this 18th day of July, 2014.

SMITH GOODFRIEND, P.S.

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DECLARATION OF SERVICE

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

That on July 18, 2014, I arranged for service of the foregoing Reply Brief of Appellants/Cross-Respondents, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 18th day of July, 2014.

V. Vigoren
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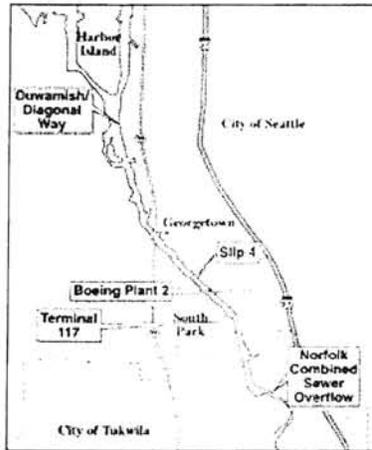
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Lower Duwamish Waterway Superfund Site

Site History: The Lower Duwamish Waterway Superfund Site is a 5 mile stretch of the Duwamish River that flows into Elliott Bay in Seattle, Washington. The waterway is flanked by industrial corridors, as well as the South Park and Georgetown neighborhoods. The site was added to EPA's [National Priorities List](#) in 2001.



Map of "Early Action" cleanup areas.

A century of heavy industrial use has left the waterway contaminated with toxic chemicals from many sources – industries along its banks, stormwater pipes, and runoff from upland activities, streets and roads. Pollution in the river sediments includes polychlorinated biphenyls (PCBs), dioxins/furans, carcinogenic polycyclic aromatic hydrocarbons (cPAHs), and arsenic. Many of these chemicals stay in the environment for a long time, and have built up to unsafe levels in resident fish and shellfish. Because of contamination, state and local health departments warn against eating crab, shellfish, or bottom-feeding fish from the Lower Duwamish River (salmon are ok because they move quickly through the waterway).

EPA and the [Washington Department of Ecology](#) are working to clean up contaminated sediment and control sources of additional contamination in the waterway.

Proposed Plan

- **Public Comments to the Proposed Plan for the Lower Duwamish Waterway Superfund Site**
The public comment period for the Lower Duwamish Waterway proposed cleanup plan ran from February 28 to June 13, 2013. EPA received 2,327 public comment submissions. Comments came from individuals, academic institutions, businesses, government agencies, non-governmental organizations, and Tribal representatives. EPA is carefully reviewing and considering the comments. In response to public request, EPA is making these comments available for viewing on an FTP (file transfer protocol) site. Agency responses to the comments will be posted later this year. Please contact Julie Congdon, Community Involvement Coordinator, at 206.553.2752 or congdon.julie@epa.gov for information on how to access the comments.
- Proposed Plan for the Lower Duwamish Waterway Superfund Site (PDF) (121 pp, 3.6MB) - February 2013
- Proposed Plan Footprint Map (PDF) (1 pp, 41MB)
- Appendix A: Source Control Strategy (PDF) (74 pp, 1.1MB)
- Appendix B: Environmental Justice Analysis (PDF) (78 pp, 1.6MB)

"Early Action" Cleanup Areas

Early Action cleanup areas are parts of a Superfund site that may become a threat to people or the environment before the long-term cleanup is completed. The following areas within the Lower Duwamish Superfund Site have already begun or completed cleanup activities.

- Slip 4 - Sediment cleanup project to remove PCB-contaminated sediments from about 4 acres of the waterway near the Boeing Plant 2 site.
- Terminal 117 - Sediment and upland cleanup project to remove PCB contamination from the site of the former Duwamish Manufacturing and Malarkey Asphalt Company, in the South Park neighborhood.
- Boeing Plant 2 - Sediment and upland cleanup project at former Boeing

Learn More

Community Resources (Contacts, fact sheets, meetings, comment opportunities, join our mailing list)

Documents

Maps & Photos

Information for contractors and job seekers (SuperJTI Program)

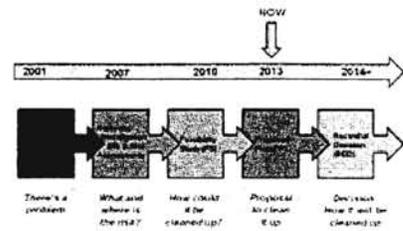
Contact:
Julie Congdon (congdon.julie@epa.gov)
206-553-2752

Contacto en Español:
Michael Ortiz (ortiz.michael@epa.gov)
206-553-6234

Community Advisory Group:
Duwamish River Cleanup Coalition
EXIT Disclaimer

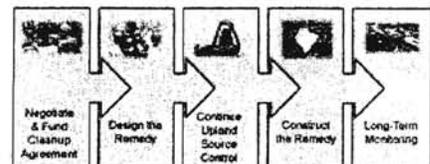
Lead State Agency:
Dept. of Ecology's Lower Duwamish Cleanup Program

Key Milestones



Timeline of key milestones in the Superfund cleanup process (click on image for larger view).

Post-Decision Steps



Next steps in the cleanup process following the Record of Decision (click on image for larger view).

Related Cleanup Sites

- Boeing EMF

- airplane manufacturing facility.
 - Jorgensen Forge - Sediment and upland cleanup project at site of several former steel-related industrial operations. This site is jointly managed by EPA and Ecology.
 - Duwamish Diagonal - Sediment cleanup project just upstream from Harbor Island, completed in 2005 by King County's Sediment Management Program.
 - Norfolk CSO - Sediment cleanup project around the Norfolk Combined Sewer Overflow (CSO) near the south end of Boeing Field. The site is being managed by King County's Sediment Management Program.
- Harbor Island (Lead)
 - Basin Oil
 - Rhone-Poulenc
 - Philip Services Georgetown

Documents

- Final Feasibility Study
- Remedial Investigation Report - July 2010
- Presentations, notes, and articles from the Activated Carbon Workshop - February 14-15 (links to EPA's file sharing site)

Find other documents

Fact sheets

Who Pays for the Cleanup?

EPA's policy is to have the polluters pay for cleaning up pollution they created. Since pollution has been entering the Duwamish River for over 100 years from many different sources, it can be difficult to determine who is responsible for paying for the cleanup.

Lower Duwamish Waterway Group - In the interim, four organizations have stepped forward to pay for the Remedial Investigation and Feasibility Study: City of Seattle, King County, Port of Seattle, and the Boeing Company, collectively known as the Lower Duwamish Waterway Group

General Notice Letters - General notice letters inform recipients that they are identified as PRPs at Superfund sites, that they may be liable for cleanup costs at the site, and explains the process for negotiating the cleanup with EPA.

- List of General Notice Letter recipients (PDF) (3 pp, 81K) - Updated December 4, 2013
- More about Notice of Liability Letters

Information Collection Requests - To help us learn more about known or suspected releases of contamination, we're continuing to send Superfund Information Collection Requests (also called "CERCLA 104e letters") to current and former property owners near the site.

- List of Information Collection Request recipients (PDF) (9 pp, 67K) - November 2012
- Fact Sheet: Information on 104(e) and General Notice Letters (1 pg, 1 MB)
- More about Information Collection Request letters

List of GNL Entity Recipients (116)

Ace Galvanizing, Inc.
Airgas-NorPac, Inc.
Alaska Logistics LLC
Alaska Marine Lines, Inc.
Ameriflight LLC
Art Brass Plating
Ash Grove Cement Company
Ball Corporation
Basin Oil Co., Inc.
Bayer CropScience LP
Birmingham Steel Corporation
Blaser Die Casting Co.
Boyer Towing, Inc.
BNSF Railway Company
BNY Mellon N.A. – Trust for Giuseppe and Assunta Desimone
Capital Industries, Inc.
CDL Recycle, LLC
CertainTeed Gypsum Manufacturing, Inc.
Chevron U.S.A. Inc.
Chiyoda International Corporation
City of Tukwila
ConGlobal Industries, Inc.
Container Properties LLC
Continental Holdings, Inc.
Crowley Marine Services, Inc.
Crown Beverage Packaging, Inc.
Crown Cork & Seal USA, Inc.
David J. Joseph Company, The
Delta Marine Industries, Inc.
Douglas Management Company
Drummond Lighterage Co.
Duwamish Marine Center
Duwamish Properties, a partnership
Duwamish Shipyard Inc.
Earle M. Jorgensen Company
Ellis Garage, LLC
Emerald Services, Inc.
Evergreen Trails, Inc.
First South Properties, LLC
Fletcher Challenge Investments Overseas Limited (Re: Fletcher General Construction)
Fletcher Challenge Investments Overseas Limited (Re: General Construction Co.)

Frank H. Hopkins Family, LLC and Frederick J. Hopkins Family, LLC
Gary Merlino Construction Co., Inc.
General Construction Company
General Recycling of Washington, LLC
General Services Administration
Georgia-Pacific LLC
Glacier Northwest, Inc.
Great Western Chemical Company
Halvorsen, Mary Catherine
Hansen, Mark
Holcim (US), Inc.
Hurlen, Harald
Independent Metals Company, Inc.
Industrial Container Services - WA LLC
Insurance Auto Auctions, Inc.
James D. Gilmur
Jorgensen Forge Company
Kaiser Cement Corporation
Kaiser Gypsum Company, Inc.
Kelly-Moore Paint Company, Inc.
King Electrical Manufacturing Company
Lafarge North America, Inc.
Latitude Forty-Seven, LLC
Lehigh Northwest Cement Company
Linde Gas North America, LLC
Lipsett Company, LLC
Longview Fibre Paper and Packaging, Inc.
Long Painting Company
Malarkey, Michael O'Neil
Manson Construction Company
Marcia A. Rodgers Industrial, LLC
Marine Power & Equipment, Inc.
McLeod, Dennis & Patricia
Merrill Creek Holdings LLC
MMGL Corp. (Formerly Schnitzer Investment Corp.)
Monsanto Company
MRC Holdings, Inc.
Norcliffe Company
Northland Services, Inc.
Northwest Container Services, Inc.
PACCAR, Inc.
Pacific Terminals, Ltd.
PSC, LLC

Praxair, Inc. (Re: Liquid Carbonic Corp.)
Puget Sound Coatings
Puget Sound Energy, Inc.
Puget Sound Truck Lines, Inc.
Puget Sound Tug & Barge Co.
R&A Properties, LLC
Rainier Commons LLC
Reichhold, Inc.
RJ & BA LLC
S. Michael Rodgers Industrial, LLC
Saint-Gobain Containers, Inc.
Scougal Rubber Corporation
SCS Refrigerated Services, LLC
SeaTac Marine Properties, LLC
Seattle Boiler Works, Inc.
Seattle Iron & Metals Corporation
Shalmar Group LLC, The
Silver Bay Logging, Inc.
Simco Properties, LLC
South Park Marina Limited Partnership
Sternco Industrial Properties Partnership
Sternoff Metals Corporation
Swan Bay Holdings, Inc.
The Chemithon Corporation
Trotsky, Herman & Jacqueline
U.S. Army Corps of Engineers
Union Pacific Railroad Company
United Iron Works, Inc.
V. Van Dyke, Inc.
Washington State Department of Transportation
Wells Fargo Bank, N.A.
Wells Trucking & Leasing, Inc.

List of Entities Receiving 104(e) Information Requests
as of November 20, 2012

- 1 2-3 LLC
- 2 3B's Land Development, LLC
- 3 5621, LLC
- 4 A Royal Wolf Portable Storage, Inc. (Response from Mobil Mini)
- 5 Abrasive Accessories
- 6 Ace Galvanizing, Inc.
- 7 Ace Radiator
- 8 Advance Hard Chrome, Inc. (Response from Repair Technology)
- 9 Affordable Truck Repair Service
- 10 Airco (Response from Linde Gas North America LLC)
- 11 Air Products and Chemicals, Inc.
- 12 Airgas-NorPac, Inc.
- 13 Alaska Logistics LLC
- 14 Alaska Marine Lines, Inc.
- 15 Alaska Washington Building Materials Co.
- 16 Alki Construction Company, Inc.
- 17 American Civil Constructors West Coast, Inc.
- 18 American Environmental Construction, LLC
- 19 American Life, Inc.
- 20 American President Lines Ltd.
- 21 Ameriflight LLC
- 22 Anderson, Joseph B.
- 23 Argonaut Properties, Inc.
- 24 Art Brass Plating, Inc.
- 25 Ash Grove Cement Company
- 26 Automatic Sprinkler Corporation of America
- 27 Ball Corporation
- 28 Barnes, Robert A.
- 29 Basin Oil Co., Inc.
- 30 Bayer CropScience LP
- 31 Bay Motor Freight
- 32 Bethlehem Steel Corporation
- 33 Big John's Truck Repair
- 34 Bill's Mobile Service LLC
- 35 Birmingham Steel Corporation
- 36 Blaser Die Casting Co.
- 37 Blue Properties LLC

38 BNSF Railway Company
39 BNY Mellon N.A. – Trust for Giuseppe and Assunta Desimone (Mellon Trust of
Washington - Trust for Giuseppe & Assunta Desimone)
40 Boeing Company, The
41 Boom Boys Cranes, LLC
42 Border To Border, Inc.
43 Bowhead Transportation Company, Inc.
44 Boyer Towing, Inc. & Boyer Logistics, Inc.
45 Boyer, Kirsten, and Maia Halvorsen
46 BPB Gypsum (Response from CertainTeed)
47 Brake & Clutch Supply, Inc.
48 Bunge Foods Processing LLC
49 Cadman, Inc. (Joint Response with Lehigh)
50 Capital Industries, Inc.
51 Carl F. Miller Company
52 Carmody, W.F. and Patricia
53 Cascade Barge and Equipment
54 CDL Recycle, LLC
55 CDM Constructors Inc.
56 CertainTeed Gypsum Manufacturing, Inc. (Response Re: BPB Gypsum)
57 Chevron U.S.A. Inc.
58 Chiyoda International Corporation
59 City of Seattle
60 City of Tukwila
61 CleanScapes, Inc.
62 CleanSoils, Inc.
63 CLPF-Seattle Distribution Center LP
64 Commercial Floor Distributors, Inc.
65 ConGlobal Industries, Inc.
66 Container Properties LLC
67 Continental Can Co.
68 Continental Holdings, Inc. (Responded Re: Continental Can Co.)
69 Cook Investment Company
70 Copper Door Investors, LLC
71 Crowley Marine Services, Inc.
72 Crown Beverage Packaging, Inc.
73 Crown Cork & Seal USA, Inc.
74 Crown Zellerbach (Response received from Georgia-Pacific, LLC)
75 Custom Seafood Service, Inc.
76 Cypress Island Seafood LLC

77 David J. Joseph Company, The
78 Dawn Foods
79 Delta Marine Industries, Inc.
80 Desimone Jr., Richard L.
81 Diamond, Joel & Julie
82 Dick's Towing & Road Service
83 Don's Radiator
84 Douglas Management Company
85 Drummond Lighterage Co. (Response from Crowley)
86 Dunn Property Investors, LLC
87 Duwa Investment Group
88 Duwamish Marine Center, Inc.
89 Duwamish Properties, a partnership
90 Duwamish Properties, LLC
91 Duwamish Shipyard Inc.
92 Duwamish Yacht Club
93 Eagle Systems, Inc.
94 EAI Corporation
95 East Marginal Associates L.L.P.
96 East Marginal Way Building LLC
97 East Marginal Way Building Tenants in Common
98 Ellis Garage, LLC
99 Elm Grove LLC
100 Emerald Services, Inc.
101 Ener-G Foods, Inc.
102 Euchner, Paul F.
103 Evergreen Boat Transport Co.
104 Evergreen Marine Leasing, Inc. (Response from Wells Fargo Bank, N.A)
105 Evergreen Trails, Inc.
106 Exotic Metals Forming Company LLC
107 Ferguson Enterprises, Inc.
108 First South Properties LLC
109 Fletcher Challenge Investments Overseas Limited (Response Re: Fletcher General)
110 Fletcher General Construction (Response from Fletcher Challenge Investments Overseas
Limited)
111 Ford Motor Company
112 Fox Avenue, LLC
113 Fox Avenue Warehouse Corporation
114 Frank H. Hopkins Family, LLC and Frederick J. Hopkins Family, LLC
115 Fraser, Inc.

116 Gary Merlino Construction Co.
117 Gary Merlino Construction Co., Inc.
118 GDS Holding Company (Response received from Global Diving & Salvage)
119 GE Aviation Systems LLC
120 Gene Summy Lumber Co.
121 General Construction Company
122 General Electric Company
123 General Recycling of Washington, LLC
124 General Services Administration
125 Georgia-Pacific LLC (Responded for Crown Zellerbach)
126 Gilmur, James D.
127 Glacier Northwest, Inc.
128 Global Diving & Salvage, Inc.
129 Global Intermodal Systems, Inc.
130 Great Western Chemical Company
131 Guimont, William
132 Hale Family Trust Limited Partnership
133 Halvorsen, Mary Catherine
134 Hansen, Mark
135 Harbor Marine Enterprises, Inc.
136 Harris Corporation
137 Hart Crowser (Responded Re: Documents from Evergreen Marine Leasing)
138 Hasbro, Inc.
139 Haslund MP, LLC & Haslund MP II, LLC
140 HD Supply Waterworks, Ltd. (Responded for Western Utilities Supply Co.)
141 Hemphill Brothers, Inc.
142 Hogland Transfer Company, A Corporation
143 Holcim (US), Inc.
144 Hurlen, Harald
145 Hurlen, Thomas
146 Icicle Seafoods, Inc.
147 ICONCO, Inc.
148 Ilahie Holdings, Inc.
149 Imperial Limestone Co. Ltd.
150 Independent Metals Company, Inc.
151 Industrial Container Services - WA, LLC
152 Industrial Lumber Sales
153 Insurance Auto Auctions, Inc.
154 International Belt & Rubber Supply, Inc.
155 JM Asphalt Patching & Construction Co.

156 J. M. Huber Corporation
157 J.A. Jack & Sons
158 JD Anderson LLC
159 Jim Clark Marina
160 Jorgensen Forge Corp.
161 Kaczmarek, William J. and Virginia A.
162 Kaiser Cement Corporation
163 Kaiser Gypsum Company, Inc.
164 Kelly-Moore Paint Company, Inc.
165 Kelly-Ryan, Inc.
166 Key Industries, Inc.
167 Key Mechanical Co.
168 Kiewit Construction Company (Re: Continental Can Co.)
169 Kiewit Construction Company (Re: General Construction)
170 King County
171 King Electrical Manufacturing Company
172 Lafarge North America, Inc.
173 Lane Mountain Silica Co.
174 Latitude Forty-Seven LLC
175 Lee and Eastes Tank Lines, Inc.
176 Lehigh Northwest Cement Company (Joint Response with Cadman)
177 Level 3 Communications, LLC (Response received from Continental Holdings, Inc. Re:
Continental Can Co.)
178 Linde Gas North America, LLC
179 Lipsett Company, LLC
180 Lonestar Investors LP
181 Longview Fibre Paper and Packaging, Inc.
182 Long Painting Company
183 Lukas Machine, Inc.
184 Lukas, Billie Macksene
185 LVI Environmental Services, Inc.
186 M&T Chemicals
187 Malarkey, Michael O'Neil
188 Manson Construction Company
189 Manson International, Inc. (Response Received from Manson Construction Co.)
190 Manson-Dutre JV (Response from Manson Construction Co.)
191 Marcia A. Rodgers Industrial, LLC
192 Marginal Group LLC
193 Marine Power & Equipment Co., Inc.
194 Maust Corporation, The

195 McGraw-Hill Companies, Inc.
196 McNiven C FBO
197 McLeod, Dennis and Patricia
198 Meeson's Traffic Services, Inc. & Thomas Meeson, Seaspn Terminals, Ltd
199 Merrill Creek Holdings LLC
200 MMGL Corp. (Formerly Schnitzer Investment Corp.)
201 Mobile Mini, Inc. (Responded Regarding A Royal Wolf Portable Storage and TMS)
202 Moeller Design & Development, Inc.
203 Monsanto Company (Monsanto Chemical Company)
204 Morton Marine Equipment, Inc.
205 MRC Holdings, Inc.
206 MRI Corporation
207 Murphy Overseas LLC
208 National Steel Construction Co.
209 Nitze-Stagen & Co., Inc.
210 Norcliffe Company
211 North Pacific Seafoods, Inc.
212 North Star Casteel Products, Inc.
213 Northland Services, Inc.
214 Northwest Container Services, Inc.
215 Northwest Seafood Processors, Inc.
216 Nucor Steel Seattle, Inc.
217 Nuprecon, L.P.
218 Oroweat Foods Company
219 Othello Street Warehouse Corp.
220 PACCAR, Inc.
221 Pacific Northwest Distributing, LLC
222 Pacific Northwest Transfer
223 Pacific Pile & Marine, LP
224 Pacific Plastics, Inc.
225 Pacific Terminals, Ltd. (Response from Crowley Marine Services)
226 Pangborn Corporation
227 PCT Construction, Inc.
228 Perovich, Robert C.
229 Petro Alaska
230 Philip Services Corporation
231 Pioneer Human Services
232 Poncho's Legacy LLC
233 Port of Seattle
234 Praxair, Inc. (Re: Liquid Carbonic Corporation)

235 Proler International
236 Puget Sound Coatings
237 Puget Sound Energy, Inc.
238 Puget Sound Truck Lines, Inc.
239 Puget Sound Tug and Barge Co.
240 Quality Asphalt Paving
241 R&A Properties, LLC
242 R2R Investments LLC
243 Rainier Commons LLC
244 Rainier Petroleum Corporation
245 Reagan Properties LLC
246 Ream Family LP
247 Red Samm Construction
248 Reichhold, Inc.
249 Remedco, Inc.
250 Repair Technology, Inc.
251 Reynolds Metals Company
252 Richard Desimone & Co.
253 Rick's Master Marine
254 Riverside Industrial Park LLC
255 Riverside Mill, LLC
256 Riverview Marina (River View Marina)
257 RJ & BA LLC
258 S & B Building LLC
259 S. Michael Rodgers Industrial, LLC
260 Safety-Kleen Systems, Inc. (Re: Vintage Oil, Inc.)
261 Saint-Gobain Containers, Inc.
262 Sam Wylde Flour Co.
263 Samson Tug & Barge Company, Inc.
264 Schnitzer Steel Industries, Inc.
265 Scougal Rubber Corporation
266 SCS Holdings, LLC
267 SCS Refrigerated Services, LLC
268 Sea King Industrial Park LLC (or George McElroy & Assoc. Inc.)
269 Seafreeze Acquisition LLC
270 SeaTac Marine Properties, LLC
271 Seattle Barrel Company
272 Seattle Boiler Works, Inc.
273 Seattle Bulk Rail Station, Inc.
274 Seattle Injector Co., LLC

275 Seattle Iron and Metals Corporation
276 Seattle Transload, Inc.
277 SEW-Eurodrive, Inc.
278 SGM Global LLC (Strategic Global Mobility)
279 Shalmar Group LLC, The
280 Shultz Distributing, Inc.
281 Silver Bay Logging, Inc.
282 Simco Properties, LLC
283 Smoki Foods, Inc.
284 SnoPac Products, Inc.
285 Sound Delivery Logistic, Warehouse, and Service LLC
286 South Park Marina Limited Partnership
287 Southpark Investment Company
288 Southpark Truck & Trailer Repair
289 STC Industries, Inc.
290 Steinman, Merle
291 Sternoff Metals Corporation
292 Sternoff Metals, LLC
293 Swan Bay Holdings, Inc. (Douglas Management as Respondent)
294 Tempress, Inc. (Responded Re: Tempress Technologies, Inc.)
295 Tempress Technologies, Inc.
296 The Chemithon Corporation
297 Trim Systems Operating Corporation
298 TMS (Response from Mobil Mini, Inc.)
299 Trotsky, Herman & Jacqueline
300 Tukwila Towing
301 Tully's Coffee Corporation
302 U.S. Army Corps of Engineers
303 UNIMAR International, Inc.
304 Union Pacific Railroad Company
305 United Iron Works, Inc.
306 United Marine Shipbuilding, Inc.
307 United Western Supply Company
308 University Mortgage & Investment LLC
309 USF Reddaway, Inc.
310 V. Van Dyke, Inc.
311 Washington State Department of Transportation
312 Washington State Liquor Control Board
313 Washington Transportation, Inc.
314 Weatherly Holdings LLC

- 315 Wells Fargo Bank, N.A. (Regarding Evergreen Marine Leasing, Inc.)
- 316 Wells Trucking & Leasing, Inc.
- 317 Western Cartage, Inc.
- 318 Western Marine Construction, Inc.
- 319 Western Utilities Supply Co. (Response from HD Supply Waterworks)
- 320 Wheco Corporation
- 321 Woeck, Richard (Re: Marine Power & Equipment, UNIMAR, and United Marine Shipbuilding)
- 322 Willingham, Inc.
- 323 Wilmar Investments LLC
- 324 Yantz, Karla
- 325 Young Corporation (Indal Corporation)