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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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BATTLE GROUND PLAZA, LLC, Appellant,

v.

DEAN MALDONADO and JANE DOE MALDONADO, husband and wife, and  
their marital community; MILLS END, LLC; MILLS END CENTER, LLC;  
DRKBG, LLC; DOUGLAS RAY; EUGENE ANDERSON and WILLIAM  
MACRAE-SMITH, Co-Personal Representatives of the Estate of IRWIN P.  
JESSEN,

Respondents.

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BRIEF OF RESPONDENTS DOUGLAS RAY, EUGENE  
ANDERSON AND WILLIAM MACRAE-SMITH, CO-  
PERSONAL REPRESENTATIVES OF THE ESTATE OF  
IRWIN P. JESSEN

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**ORIGINAL**

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## TABLE OF CONTENTS

	Page
I. INTRODUCTION .....	1
II. ASSIGNMENTS OF ERROR .....	2
III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....	2
IV. STATEMENT OF THE CASE .....	4
A. Factual Background .....	4
B. Procedural Background.....	9
V. ARGUMENT .....	12
A. BGP’s claims were extinguished by the November 1, 2005, sale order.....	12
B. BGP’s claims are barred by res judicata .....	16
1. Federal law applies to determine whether BGP’s claims are barred by res judicata. ....	16
2. BGP’s claims are barred by res judicata under state law as well.....	21
a. Subject Matter .....	21
b. Cause of Action.....	27
c. Persons .....	27
3. Sellers did not engage in fraud or deception that would preclude application of res judicata. ....	29
C. Sellers complied with the terms of the right of first refusal. ....	30
D. The trial court properly dismissed BGP’s seniority claim.....	33
1. BGP’s seniority claim is not ripe. ....	34
2. BGP is not entitled to seniority.....	38
E. The trial court did not abuse its discretion with respect to the award of attorney fees to Sellers. ....	40
1. The record adequately demonstrates the basis for the trial court award.....	41

2. BGP is not entitled to an offset. ....	43
3. The trial court did not abuse its discretion to the extent it awarded Sellers attorney fees for BGP’s subordination claim and Maldonado’s cross claim. ....	44
4. The trial court did not abuse its discretion to the extent it awarded fees for time spent on the companion case. ....	46
5. The trial court did not abuse its discretion in awarding fees incurred in the Bankruptcy Court proceedings. ....	46
6. The trial court did not award fees for duplicative time. ....	48
7. The trial court did not abuse its discretion with respect to fees incurred after entry of summary judgment in favor of Sellers. ....	48
8. The trial court did not err in awarding costs. ....	49
F. Sellers are entitled to recover attorney fees incurred on appeal. ....	50
VI. CONCLUSION. ....	50

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>CASES</b>	
<i>Arnold v. Dep't of Ret. Sys.</i> , 74 Wn. App. 654, 875 P.2d 665 (1994), <i>rev'd</i> , 128 Wn.2d 765, 912 P.2d 463 (1996).....	37-38
<i>Banuelos v. TSA Wash., Inc.</i> , 134 Wn. App. 607, 141 P.3d 652 (2006).....	41
<i>Beers v. Ross</i> , 137 Wn. App. 566, 154 P.3d 277 (2007).....	39
<i>Brown v. Felsen</i> , 442 U.S. 127 (1979).....	16
<i>Collins v. Clark County Fire District No. 5</i> , 155 Wn. App. 48, 231 P.3d 1211 (2010) .....	49
<i>Déjà-Vu Everett-Fed. Way, Inc. v. City of Fed. Way</i> , 96 Wn. App. 255, 979 P.2d 464 (1999).....	17
<i>Fawn Lake Maint. Comm'n v. Abers</i> , 149 Wn. App. 318, 202 P.3d 1019 (2009).....	41
<i>Gekas v. Pipin (In re Met-L-Wood Corp.)</i> , 861 F.2d 1012 (7th Cir. 1988) .....	14
<i>Harris v. County of Orange</i> , 682 F.3d 1126 (9th Cir. 2012) .....	17, 18, 20
<i>Hayes v. City of Seattle</i> , 131 Wn.2d 706, 934 P.2d 1179, 943 P.2d 265 (1997).....	21, 26
<i>Hisle v. Todd Pacific Shipyards</i> , 151 Wn.2d 853, 93 P.3d 108 (2004).....	27
<i>Hulbert v. Port of Everett</i> , 159 Wn. App. 389, 245 P.3d 779 (2011).....	45
<i>In re Adams Apple, Inc.</i> , 829 F.2d 1484 (9th Cir. 1987) .....	17
<i>In re Leckie Smokeless Coal Co.</i> , 99 F.3d 573 (4th Cir. 1996) .....	13

<i>In re Marriage of Bobbitt</i> , 135 Wn. App. 8, 144 P.3d 306 (2006).....	41
<i>In re Marriage of Obaidi</i> , 154 Wn. App. 609, 226 P.3d 787 (2010).....	41
<i>In re Murray</i> , 31 B.R. 499 (Bankr. E.D. Pa. 1983) .....	13
<i>In re Sax</i> , 796 F.2d 994 (7th Cir. 1986) .....	17
<i>In re Trans World Airlines, Inc.</i> , 322 F.3d 283 (3d Cir. 2003).....	13
<i>In re Transcon. Energy Corp.</i> , 683 F.2d 326 (9th Cir. 1982) .....	14
<i>Johnson v. Jones</i> , 91 Wn. App. 127, 955 P.2d 826 (1998).....	41
<i>Kahin v. Lewis</i> , 42 Wn.2d 897, 259 P.2d 420 (1953).....	36-37
<i>Karlberg v. Otten</i> , 167 Wn. App. 522, 280 P.3d 1123 (2012).....	16, 18
<i>Krikava v. Webber</i> , 43 Wn. App. 217, 716 P.2d 916 (1986).....	28
<i>Mellor v. Chamberlin</i> , 100 Wn.2d 643, 673 P.2d 610 (1983).....	24-25, 26
<i>Mike’s Painting, Inc. v. Carter Welsh, Inc.</i> , 95 Wn. App. 64, 975 P.2d 532 (1999).....	44
<i>Norris v. Norris</i> , 95 Wn.2d 124, 622 P.2d 816 (1980).....	22-24
<i>Proshipline, Inc. v. Aspen Infrastructures, Ltd.</i> , 609 F.3d 960 (9th Cir. 2010) .....	16
<i>Regions Bank v. J.R. Oil Co., LLC</i> , 387 F.3d 721 (8th Cir. 2004) .....	14
<i>Rosenberg v. Rosenberg</i> , 141 Wash. 86, 250 P. 947 (1926).....	29

<i>Semtek Int'l, Inc. v. Lockheed Martin Corp.</i> , 531 U.S. 497 (2001).....	16-17
<i>Taylor v. Sturgell</i> , 553 U.S. 880 (2008).....	17
<i>Third Nat'l Bank v. Fischer</i> ( <i>In re Fischer</i> ), 184 B.R. 293 (Bankr. M.D. Tenn. 1995).....	18
<i>Unifund CCR Partners v. Sunde</i> , 163 Wn. App. 473, 260 P.3d 915 (2011).....	41
<i>United Savings &amp; Loan Bank v. Pallis</i> , 107 Wn. App. 398, 27 P.3d 629 (2001).....	39
<i>United States v. Liquidators of European Fed. Credit Bank</i> , 630 F.3d 1139 (9th Cir. 2011) .....	16
<i>Williams v. Leone &amp; Keeble, Inc.</i> , 171 Wn.2d 726, 254 P.3d 818 (2011).....	21, 28
<i>Woodley v. Myers Capital Corp.</i> , 67 Wn. App. 328, 835 P.2d 238 (1992).....	17
<i>Zink v. City of Mesa</i> , 137 Wn. App. 271, 152 P.3d 1044 (2007).....	41
<b>STATUTES AND RULES</b>	
FRCP 60(b).....	9, 10, 11, 15, 30
RAP 2.5(a) .....	31, 32
RAP 18.1(a) .....	50
RCW 4.84.185 .....	42, 49
11 U.S.C. § 363.....	passim
11 U.S.C. § 363(h) .....	13
<b>OTHER AUTHORITIES</b>	
Philip A. Trautman, <i>Claim and Issue Preclusion in Civil Litigation in Washington</i> , 60 WASH. L.R. 805, 813 (Sept. 1985) .....	22

## **I. INTRODUCTION**

This case involves a dispute over the rights to a half-acre parcel of property that Douglas Ray and Irwin Jessen (collectively “Sellers”) sold to Dean Maldonado.<sup>1</sup> Battle Ground Plaza, LLC, (“BGP”) claims that (1) it is entitled to exercise a right of first refusal over the property, and (2) its rights in the property and in a parking easement granted by Sellers to Maldonado are senior to Maldonado’s rights. The trial court correctly dismissed both of BGP’s claims on summary judgment. Because Douglas Ray had previously filed for bankruptcy, the Bankruptcy Court was required to, and did, approve the sale of the half-acre parcel to Maldonado. BGP did not challenge the sale in the Bankruptcy Court, and it is prohibited from collaterally attacking the sale in state court.

The trial court also correctly recognized that BGP’s seniority claim is unripe. That claim is predicated upon BGP’s rights in the adjacent shopping center property, which it purchased from Sellers in December 2000. However, because of an ongoing dispute over contamination at the shopping center site, that sale has not closed, and it may never close. If

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<sup>1</sup> Although Sellers initially dealt directly with Maldonado individually, they actually sold the property to an entity named Mills End, LLC, which subsequently assigned its rights in the property to DRKBG, LLC. CP 1587–90. Both of these entities are controlled by Maldonado. CP 12. For convenience, these parties are collectively referred to as “Maldonado.”

BGP does not complete the purchase of the property, its seniority claim becomes moot.

Finally, BGP's challenge to the trial court's award of attorney fees must be rejected. BGP questions the amount of fees awarded but has shown no abuse of discretion by the trial court.

Sellers respectfully request that the trial court's rulings be affirmed in all respects.

## **II. ASSIGNMENTS OF ERROR**

BGP assigns error to the trial court's (1) entry of summary judgment in favor of Sellers, (2) denial of BGP's motion for summary judgment and (3) award of attorney fees and costs to Sellers.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Under authority of 11 U.S.C. § 363, the Bankruptcy Court entered an order approving the sale of the half-acre parcel to Maldonado "free and clear" of all encumbrances, including BGP's right of first refusal. A sale of property under § 363 is "good against the world" and cannot be collaterally attacked. Is BGP barred from challenging the sale in a separate proceeding in state court?

2. BGP argues that its claims against Sellers can go forward unless the requirements for res judicata under Washington law are

satisfied. Federal res judicata requirements apply to determine the preclusive effect of a federal court judgment, with limited exceptions not applicable here. Do federal res judicata requirements apply to determine whether BGP's claims are barred by res judicata?

3. Under federal law, a subsequent action is barred when there has been (1) a final judgment on the merits, (2) involving the same parties, and (3) there is an identity of claims. The Bankruptcy Court's sale order is a final judgment; Sellers, Maldonado, and BGP were parties to the Bankruptcy Court action; and BGP seeks to enforce the same right in both proceedings—its right of first refusal. Is this action barred under federal law?

4. Alternatively, under state law, a subsequent action is barred if there is identity of (1) subject matter, (2) cause of action, (3) persons and parties, and (4) quality of persons for or against whom the claim is made. Both the Bankruptcy Court action and this lawsuit involve the same right, the same parties, and the same claim. Is this action barred under state law?

5. BGP sought a declaration that its rights to the half-acre parcel are superior to Maldonado's. BGP's rights to that property depend upon its rights as owner of the adjacent shopping center property. BGP has not closed the sale of that property and may never be able to do so

because it is insolvent. Did the trial court correctly dismiss BGP's seniority claim as unripe?

6. The trial court awarded Sellers \$93,557.50 in attorney fees and costs, out of an initial request of nearly \$230,000. The trial court explained the basis for its decision on the record and rejected each of BGP's arguments regarding particular amounts disputed on appeal. Has BGP shown a manifest abuse of discretion by the trial court?

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

##### **A. Factual Background**

On December 20, 2000, Sellers entered into a Purchase and Sale Agreement ("BGP Agreement") with BGP's predecessor, Bruce Feldman, Inc., for the sale of the Battle Ground Plaza Shopping Mall. CP 101. The BGP Agreement gave BGP a right of first refusal for an adjacent half-acre parcel owned by Sellers. CP 119. In accordance with the right of first refusal, Sellers agreed they would not sell the half-acre parcel "without giving written notice to Purchaser of all of the terms and conditions upon which Seller is willing to sell the adjacent property and giving Purchaser the opportunity to buy the adjacent land on those terms." *Id.* Because the half-acre parcel did not have direct access to the street, BGP and Sellers subsequently entered into an Easement Agreement allowing access

between the shopping center property and the half-acre parcel.<sup>2</sup> CP 123–24.

Thereafter, Sellers decided to sell the half-acre parcel to Dean Maldonado. On May 18, 2005, Maldonado executed a Purchase and Sale Agreement (“Maldonado Agreement”) for the property and tendered it to Sellers. CP 317–24. Because Maldonado was concerned about whether he would be able to use the shopping center parking lot, the Maldonado Agreement included the following provision:

3. Conditions to Purchase. Buyer’s obligation to purchase the Property is conditioned on the following:  none  and/or **Review and acceptance of the Reciprocal Easement Agreements and a satisfactory Level 1 Environmental Survey . . . .**

CP 317 (all emphasis—bold, italic, underline—in original).

Addendum “A” to the Maldonado Agreement cites the right of first refusal granted under the BGP Agreement and states that, in accordance with that right, Sellers notified BGP of an earlier offer by Maldonado. CP 323. The Addendum then states that BGP responded by asserting that the right of first refusal “had not yet ripened because the sale of the underlying property had not yet closed.” CP 324.

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<sup>2</sup> BGP had previously submitted a counteroffer to Sellers proposing that the easement would include a cross parking agreement between the shopping center property and the half-acre parcel. CP 1631.

In accordance with their obligation under the BGP Agreement, Sellers notified BGP of their intent to sell the half-acre parcel to Maldonado and provided BGP with a copy of the Maldonado Agreement. CP 279. BGP responded by reiterating its belief that the right of first refusal was not ripe until the sale between Sellers and BGP had closed. CP 280.

Thereafter, Sellers executed the Maldonado Agreement. CP 257. Because Douglas Ray, one of the Sellers, had previously filed for bankruptcy, the sale had to be approved by the Bankruptcy Court. *See* CP 311–15. After Sellers filed a motion to approve the sale, BGP objected, asserting that the sale would impair BGP’s (unripe) right of first refusal. CP 327–33. The court approved the sale in an order dated July 5, 2005. CP 344–45. The order expressly stated that the sale was “free and clear of liens and encumbrances pursuant to 11 U.S.C. § 363, including but not limited to the right of first refusal granted to Battle Ground Plaza, LLC . . . .” *Id.* BGP did not seek relief from or appeal this order. CP 257.

In August 2005, Sellers prepared a Reciprocal Easement Agreement creating cross parking rights between the half-acre parcel and the shopping center. CP 571–75. However, the parties (Sellers and Maldonado) did not execute that agreement. CP 257.

Before the sale of the half-acre parcel closed, Maldonado discovered a sewer pipe on the property that had to be removed. *Id.* In an addendum, the parties agreed to a reduction in the purchase price and extended the closing date to November 15, 2005. CP 349.

Sellers notified BGP of the modification on October 18, 2005. CP 281. Although the sale of the shopping center still had not closed, BGP attempted to exercise its right of first refusal, albeit on terms different from those agreed to by Maldonado. CP 282–84. In particular, the agreement with Maldonado required a closing date of November 15, 2005, with a possible extension to no later than December 15, 2005. CP 349. In contrast, BGP did not offer to close by either of these dates. Instead, the BGP offer proposed payment of \$5,000 earnest money by December 19, 2005, or upon satisfaction or waiver of certain contingencies, with no date specified for closing. CP 284.

After the 72-hour period for exercising its right of first refusal had already expired, BGP requested copies of all Reciprocal Easement Agreements referenced in the Maldonado Agreement. CP 363. In light of BGP's failure to comply with the requirements of the right of first refusal, Sellers did not respond to this request and thus did not provide a copy of the unexecuted draft agreement between Sellers and Maldonado. CP 257.

The Bankruptcy Court approved the sale to Maldonado on the revised terms agreed to by the parties, in an order dated November 1, 2005. CP 365–65. During the hearing on the motion to approve the sale the court noted that BGP’s “attempted exercise of the right of first refusal did not mirror Addendum B, which supersedes the original Purchase and Sale Agreement” between Sellers and Maldonado. *See* CP 379. The November 1 order, like the July 5, 2005, order expressly stated that the sale was “free and clear of liens and encumbrances pursuant to 11 U.S.C. § 363, including but not limited to the right of first refusal granted to Battle Ground Plaza, LLC . . . .” CP 365. BGP did not appeal from the November 1, 2005, sale order or from a subsequent order denying its motion for reconsideration of the sale order. CP 257.

On November 13, 2005, Sellers and Maldonado executed a Reciprocal Easement Agreement. CP 537–47. Sellers then conveyed the property to Maldonado. CP 9. Maldonado has since constructed a building on the property and has leased space to tenants. CP 214.

On June 19, 2006, after Maldonado sought approval to begin construction on the half-acre parcel, BGP obtained a copy of the Reciprocal Easement Agreement executed by Sellers and Maldonado. CP 1591–96. Asserting that Sellers violated the terms of the right of first refusal by failing to disclose the agreement, BGP filed this lawsuit in state

court seeking an order (1) requiring Sellers to comply with the right of first refusal provision in the BGP Agreement and (2) declaring that BGP's rights in the half-acre parcel and under the Reciprocal Easement Agreement are senior to Maldonado's. CP 1–4.

**B. Procedural Background**

After BGP filed suit, Maldonado moved to dismiss the case for lack of subject matter jurisdiction. CP 11–14. Maldonado argued that BGP's claims should be decided by the Bankruptcy Court that had issued the sale order resolving the rights of the parties to the half-acre parcel. *Id.* The trial court agreed, remanding BGP's claims to the Second Bankruptcy Court<sup>3</sup> for further proceedings. CP 59–61.

Following the transfer to the Second Bankruptcy Court, Sellers filed a motion for summary judgment, asserting that BGP could not collaterally attack the November 1, 2005, sale order by filing a separate lawsuit seeking to enforce its right of first refusal. CP 209. The Second Bankruptcy Court granted Sellers' motion, concluding that BGP should have sought relief in the Bankruptcy Court pursuant to FRCP 60(b) rather than filing a separate lawsuit in state court. CP 216. The court rejected BGP's argument that the requirements for res judicata had not been

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<sup>3</sup> For clarity, Sellers will distinguish between the sale proceedings in the Bankruptcy Court ("Bankruptcy Court") and proceedings in the Bankruptcy Court following transfer by the state court ("Second Bankruptcy Court").

satisfied, explaining that those requirements do not apply to a bankruptcy sale under 11 U.S.C. § 363, which “is a judgment that is good as against the world, not merely as against parties to the proceedings.” CP 218. The Second Bankruptcy Court also ruled that, even if it considered BGP’s claims on the merits, Sellers would still be entitled to summary judgment because, as a matter of law, they complied with the right of first refusal provision in the BGP Agreement. CP 220–22.

BGP filed a motion to alter or amend the judgment arguing, for the first time, that the state court action constituted (1) a permissible independent action or (2) a motion for relief from judgment pursuant to FRCP 60(b). *See* CP 246–48. The Second Bankruptcy Court denied this motion. CP 247.

BGP appealed the Second Bankruptcy Court’s ruling to the Bankruptcy Appellate Panel (“BAP”), which affirmed the lower court’s decision. CP 223–50. BGP then appealed the BAP’s decision to the Ninth Circuit Court of Appeals. *See* CP 261–63. The Ninth Circuit reversed on the ground that the Second Bankruptcy Court lacked jurisdiction to resolve BGP’s claims. CP 256. In reaching this conclusion, the court noted, “There is no doubt that BG Plaza’s claims would undermine the effect of the bankruptcy court’s well-reasoned determination that Sellers did not violate the right of first refusal.

However, such attacks in a second court are routine—and routinely rejected . . . .” CP 262. The court ruled that the case should be dismissed and jurisdiction returned to the state court, which “was perfectly capable of taking jurisdiction and assessing whether BG Plaza’s claim is precluded given that the sale had already been finalized and approved in the previous bankruptcy proceeding.” CP 263.

Following remand to the state court, Sellers filed a motion for summary judgment, in which they argued that BGP’s claims were barred by the Bankruptcy Court’s sale order. CP 189–201. BGP also moved for summary judgment, seeking a determination that, as a matter of law, Maldonado’s rights under the Reciprocal Easement Agreement were junior to BGP’s interest in the shopping center property. CP 179–88.

The trial court granted Sellers’ motion, concluding BGP’s claims were extinguished by the November 1, 2005, sale order. CP 1009–13. The court denied BGP’s motion, ruling that its claim for priority was not ripe because the sale of the shopping center to BGP had not closed. *Id.*

Following the trial court’s ruling on the parties’ summary judgment motions, Sellers sought to recover their attorney fees, pursuant to a prevailing party fee provision in the BGP Agreement. CP 838–55,

1146–64, 1390–97. The court awarded Sellers \$93,557.50 in attorney fees and costs.<sup>4</sup> CP 1488.

BGP now appeals from the trial court decisions (1) granting Sellers’ motion for summary judgment, (2) denying BGP’s motion for summary judgment, and (3) awarding attorney fees and costs to Sellers. CP 1491–1503.

## V. ARGUMENT

### A. BGP’s claims were extinguished by the November 1, 2005, sale order.

BGP’s appeal of the order granting Sellers’ motion for summary judgment is predicated upon its assertion that the doctrine of res judicata does not bar relitigation of the claims initially asserted by BGP in the Bankruptcy Court. Appellant’s Brief at 18–26. BGP ignores the basis for the trial court’s ruling—the fact that the November 1, 2005, sale order extinguished BGP’s claim to enforce its right of first refusal.<sup>5</sup> CP 1011. It

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<sup>4</sup> Due to an apparent mathematical error, the trial court seems to have awarded more than the amount requested with respect to the fees and costs incurred by Bullivant Houser Bailey. Although the court awarded only \$93,557.50 of an overall request for \$100,114.77, the court allocated \$90,250 of this figure to Bullivant Houser. CP 1390, 1461. The requested fees and costs attributable to Bullivant Houser totaled \$86,661.77. CP 1396 (all columns except 11A and 12A can be attributed to Bullivant). Thus, the court awarded \$3,588.23 more than requested. It is unclear why BGP did not point out this error to the trial court in a motion pursuant to CR 60(a).

<sup>5</sup> BGP’s summary judgment response did not address the merits of Sellers’ argument regarding the application of § 363. CP 445. BGP apparently concluded the Ninth Circuit decision directed the trial court to decide the case on res judicata grounds. *Id.*

is immaterial whether the requirements for res judicata have been satisfied where, as here, an order has been issued in accordance with 11 U.S.C. § 363.

Section 363 authorizes the sale of property that is part of a bankruptcy estate. That authority extends to the sale of property, such as the half-acre parcel, jointly owned by the debtor and a non-debtor.<sup>6</sup> And, it permits sales “free and clear” of a broad range of property interests, such as the right of first refusal asserted by BGP.<sup>7</sup> Accordingly, Ray moved for an order approving the sale of the half-acre parcel, “free and clear of liens, encumbrances, and other interests . . . .” CP 347–49. BGP received notice of the proposed sale and filed an objection, asserting that the terms of the Sellers’ agreement with Maldonado applied equally to BGP, and thus BGP was entitled to, among other things, an inspection of the property and review of certain documents. CP 352–58. The Bankruptcy Court denied BGP’s objection and, on November 1, 2005, entered an order granting Ray’s motion to sell the property. CP 364–65. The order expressly stated that (1) the sale was made pursuant to § 363, and (2) the sale was free and

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In fact, while the Ninth Circuit made clear its conclusion that BGP’s claims should be dismissed, it did not limit the bases on which the trial court could do so. CP 263.

<sup>6</sup> 11 U.S.C. § 363(h); *In re Murray*, 31 B.R. 499, 502 (Bankr. E.D. Pa. 1983).

<sup>7</sup> *See, e.g., In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 582 (4th Cir. 1996) (§ 363 not limited to *in rem* interests); *In re Trans World Airlines, Inc.*, 322 F.3d 283, 289 (3d Cir. 2003) (recognizing that trend is toward an expansive reading of “interests in property” to include all obligations that may flow from ownership of the property).

clear of all encumbrances including, specifically, “the right of first refusal granted to Battle Ground Plaza, LLC . . . .” CP 365.

As the Second Bankruptcy Court and the BAP expressly recognized, orders entered pursuant to § 363 have preclusive effect regardless of whether the requirements for res judicata have been satisfied. CP 216–20, 243–46. That is because a proceeding under § 363 is an *in rem* proceeding.<sup>8</sup> Thus, “[a] bankruptcy sale under 11 U.S.C. § 363, free and clear of all liens, is a judgment that is good as against the world, not merely as against parties to the proceedings.”<sup>9</sup> ***The judgment is protected from collateral attack, not by res judicata, but because of the nature of the rights transferred under § 363.***<sup>10</sup>

The policy justifications for this result are clear and are illustrated by the facts of this case. As the Ninth Circuit has explained, “If sale orders were not final, parties could continue to litigate issues regarding the assets long after their sale, which is certainly an outcome worth prohibiting.”<sup>11</sup>

In accordance with these principles, both the Second Bankruptcy Court and the BAP recognized the preclusive effect of the Bankruptcy Court’s November 1, 2005, sale order, concluding that the order was a

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<sup>8</sup> *Gekas v. Pipin (In re Met-L-Wood Corp.)*, 861 F.2d 1012, 1017 (7th Cir. 1988).

<sup>9</sup> *Regions Bank v. J.R. Oil Co., LLC*, 387 F.3d 721, 731 (8th Cir. 2004).

<sup>10</sup> *Id.* at 732.

<sup>11</sup> *In re Transcon. Energy Corp.*, 683 F.2d 326, 328 (9th Cir. 1982).

final order, good against the world, which could not be collaterally attacked in BGP's state court lawsuit. CP 220, 246. Those courts recognized that BGP could have attacked the sale order directly, either by seeking appellate review of the order or by filing a motion to vacate the order under FRCP 60(b). *Id.* It did neither, choosing instead to file this lawsuit in state court.

BGP has argued it had no reason to seek relief from the sale order because it did not know about the Reciprocal Easement Agreement until after that order was entered. CP 245. While the time for filing a notice of appeal had passed by the time the Sellers and Maldonado executed the agreement, BGP could have timely filed a motion under FRCP 60(b), which authorizes motions for relief from judgment on the basis of newly discovered evidence within one year of the judgment sought to be vacated. BGP filed this lawsuit on July 5, 2006, well within one year of the November 5, 2005, sale order. BGP has offered no explanation as to why it did not exercise its right to attack the sale order directly instead of seeking to collaterally attack the order in this lawsuit.

BGP's failure to attack the sale order directly—either by filing a notice of appeal or by seeking relief under FRCP 60(b)—precludes this lawsuit, regardless of whether *res judicata* applies. The trial court

correctly dismissed BGP's right of first refusal claim on summary judgment.

**B. BGP's claims are barred by res judicata**

Even if BGP's claims were not barred under § 363, the doctrine of res judicata applies to preclude recovery. Res judicata ensures the finality of decisions, encourages reliance on judicial decisions, bars vexatious litigation, and frees the court to resolve other disputes.<sup>12</sup> The doctrine prevents relitigation of claims and issues that were litigated *or could have been litigated* in the prior action.<sup>13</sup>

**1. Federal law applies to determine whether BGP's claims are barred by res judicata.**<sup>14</sup>

BGP begins its analysis of this issue by asserting that Washington law applies to determine whether the requirements for res judicata have been met. Appellant's Brief at 17–18. In support of this assertion, BGP relies upon the United States Supreme Court's decision in *Semtek International v. Lockheed Martin*.<sup>15</sup> In that case, the Court considered whether the res judicata effect of a federal court judgment in a diversity

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<sup>12</sup> *Brown v. Felsen*, 442 U.S. 127, 131 (1979); *United States v. Liquidators of European Fed. Credit Bank*, 630 F.3d 1139, 1152 (9th Cir. 2011) (goals of res judicata include “fairness, finality, and avoidance of duplicate judicial proceedings”); see also *Karlberg v. Otten*, 167 Wn. App. 522 ¶ 33, 280 P.3d 1123 (2012) (res judicata “puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings”).

<sup>13</sup> *Proshipline, Inc. v. Aspen Infrastructures, Ltd.*, 609 F.3d 960, 968 (9th Cir. 2010); *Karlberg*, 167 Wn. App. 522 ¶ 33.

<sup>14</sup> The briefing by both parties below assumed that state res judicata law applied.

<sup>15</sup> *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001).

case should be determined by the law of the state in which the federal court sits. The Court explained that the res judicata effect of a federal court judgment must be determined in accordance with federal law.<sup>16</sup> The Court then held that, under federal law, the res judicata effect of a federal court judgment in a diversity case should be decided by applying the res judicata rules of the state in which the court is sitting.<sup>17</sup>

Because the Bankruptcy Court did not exercise diversity jurisdiction, we look to federal law to determine whether BGP's claims are barred by res judicata.<sup>18</sup> Under federal law, three requirements must be satisfied before a judgment will be given preclusive effect: (1) a final judgment on the merits, (2) the same parties or privity between the parties, and (3) identity of claims.<sup>19</sup>

Each of these requirements is satisfied here. First, as both the Second Bankruptcy Court and the BAP recognized, the November 1, 2005, sale order constitutes a final judgment on the merits.<sup>20</sup> CP 216, 243.

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<sup>16</sup> *Id.* at 507.

<sup>17</sup> *Id.* at 499; *see also Taylor v. Sturgell*, 553 U.S. 880, 891 (2008).

<sup>18</sup> *Woodley v. Myers Capital Corp.*, 67 Wn. App. 328, 336, 835 P.2d 238 (1992) (applying federal test to determine res judicata effect of bankruptcy court order); *Déjà-Vu Everett-Fed. Way, Inc. v. City of Fed. Way*, 96 Wn. App. 255, 262, 979 P.2d 464 (1999) (court applied federal law to determine preclusive effect of federal order dismissing plaintiff's civil rights lawsuit against defendant); *Taylor*, 553 U.S. at 891 (federal res judicata rules apply to judgments in federal question cases).

<sup>19</sup> *Harris v. County of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012); *Déjà-Vu*, 96 Wn. App. at 262.

<sup>20</sup> *See In re Adams Apple, Inc.*, 829 F.2d 1484, 1487 (9th Cir. 1987) (an order disposing of property rights of individuals is final); *In re Sax*, 796 F.2d 994, 996 (7th

Second, BGP, Sellers, and Maldonado were all parties to and participated in the Bankruptcy Court proceedings. There is no dispute that BGP had notice of and an opportunity to respond to the motion filed by Ray in the Bankruptcy Court to approve the sale of the half-acre parcel.

Finally, there is an identity with respect to the claims at issue in the Bankruptcy Court and the claims asserted by BGP here. In order to determine whether this requirement has been satisfied, the court considers four criteria:

- (1) whether rights or interests established in the prior judgment would be destroyed or impaired by the prosecution of the second action;
- (2) whether substantially the same evidence is presented in the two actions;
- (3) whether the two suits involve infringement of the same right; and
- (4) whether the two suits arise out of the same transactional nucleus of facts.<sup>21</sup>

The federal and state res judicata tests coincide with respect to this element, and thus BGP addresses whether there is an identity of claims in its opening brief. Appellant's Brief at 22–24. However, BGP discusses

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Cir. 1986) (bankruptcy sale orders are final decisions); *Third Nat'l Bank v. Fischer (In re Fischer)*, 184 B.R. 293, 301 (Bankr. M.D. Tenn. 1995) (order confirming sale of assets is considered a final judgment). State law also requires a final judgment on the merits. See *Karlberg* 167 Wn. App. 522 ¶ 34. BGP does not dispute that the November 1, 2005, sale order constitutes a final judgment.

<sup>21</sup> *Harris*, 682 F.3d at 1132.

only the second part of the test—whether the same evidence would be presented in both actions. *Id.* at 23–24. BGP notes that the Bankruptcy Court did not hear evidence regarding the Reciprocal Easement Agreement because the agreement had not been executed at the time the court entered the November 1, 2005, sale order. *Id.* at 24. While the Bankruptcy Court did not consider the actual terms of the final agreement executed by Sellers and Maldonado, the court clearly was aware that such an agreement was part of the sale. The initial motion to approve the sale of the half-acre parcel attached a copy of the Maldonado Agreement. CP 311–24. Paragraph 3 of that agreement expressly requires as a condition to purchase—in bold, underlined, italics—“review and acceptance of the Reciprocal Easement Agreements . . . .” CP 317. In addition, BGP raised the issue in its opposition to the second motion to approve the sale, arguing that Sellers “are obliged to produce certain documents including cross parking easements . . . .” CP 355. Notably, it made no request for such documents until after the 72-hour period to exercise its right of first refusal had expired. CP 363.

Moreover, the identity of claims element requires only that the evidence in the two actions be “substantially” the same—it need not be

identical.<sup>22</sup> In this case, the evidence presented in both cases includes the agreement between Sellers and Maldonado and addenda thereto, the agreement between Sellers and BGP, and the circumstances surrounding the execution and application of those agreements. The *specific* terms of the Reciprocal Easement Agreement were not determinative. Because the evidence is substantially the same in both actions, the evidence requirement is therefore satisfied.

The other requirements for identity of cause of action are present as well, as BGP apparently concedes. With respect to the first requirement, it is clear that rights established in the Bankruptcy Court—i.e., the rights of Maldonado as purchaser of the half-acre parcel as well as the rights of Sellers flowing from a final judgment approving the sale—would be destroyed if BGP were allowed to proceed with its claims. That is, if BGP’s request for specific performance is granted and it is allowed to exercise its right of first refusal, the sale to Maldonado would be undone. That sale occurred more than seven years ago, and in the meantime, Maldonado has developed the property, making improvements valued at over \$2 million, and has leased space to tenants. CP 214; 10/20/11 RP at 25.

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<sup>22</sup> *Id.*

Both this action and the Bankruptcy Court action involved the alleged infringement of the same right—BGP’s right of first refusal under the BGP Agreement.

Finally, both actions arose out of the same transactional nucleus of facts—the sale to Maldonado and BGP’s objections thereto.

Each of the federal requirements for res judicata is present in this case. Thus, even if the Court were to conclude that it is appropriate to apply res judicata to determine whether BGP can pursue its right of first refusal claim against Sellers, the answer is the same—that claim must be dismissed.

**2. BGP’s claims are barred by res judicata under state law as well.**

Dismissal is warranted even if, as BGP asserts, Washington law applies to determine whether BGP’s claims are barred by res judicata. Under Washington law, res judicata requires identity of (1) subject matter, (2) cause of action, (3) persons and parties, and (4) quality of persons for or against whom the claim is made.<sup>23</sup>

**a. Subject Matter**

As the Washington Supreme Court recognized, “there is a dearth of case law defining whether the subject matter of a case differs.”<sup>24</sup>

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<sup>23</sup> *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726 ¶ 7, 254 P.3d 818 (2011).

<sup>24</sup> *Hayes v. City of Seattle*, 131 Wn.2d 706, 712, 934 P.2d 1179, 943 P.2d 265 (1997).

According to one leading commentator, the Washington courts have “seldom” decided a case on the basis of whether the identity of subject matter requirement has been satisfied.<sup>25</sup> Instead, “that element is found to be present, or, if absent, the court will find that one of the other elements is also missing, with some explanation as to the latter, but not as to subject matter.”<sup>26</sup>

While not directly addressing the subject matter identity requirement, the Washington Supreme Court’s decision in *Norris v. Norris*<sup>27</sup> is instructive.<sup>28</sup> In that case, plaintiff filed suit seeking to quiet title to a ranch against competing claims by his son and grandson. Plaintiff and his wife had executed reciprocal wills leaving the surviving spouse a life estate in the ranch with the remainder going to plaintiff’s son and grandson. Thereafter, plaintiff and his wife were told that they could avoid probate by executing a community property agreement, so they did so.<sup>29</sup>

After plaintiff’s wife died, he learned there would be adverse tax consequences if the community property agreements were used. Accordingly, plaintiff elected to have his wife’s will probated and to

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<sup>25</sup> Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 WASH. L.R. 805, 813 (Sept. 1985).

<sup>26</sup> *Id.*

<sup>27</sup> 95 Wn.2d 124, 622 P.2d 816 (1980).

<sup>28</sup> See Trautman, 60 WASH. L.R. at 813.

<sup>29</sup> *Norris*, 95 Wn.2d at 126.

disregard the community property agreement. Plaintiff apparently did not realize that, by doing so, he would no longer own the ranch property outright.<sup>30</sup>

Thereafter, plaintiff's wife's estate was distributed pursuant to her will. Plaintiff did not appeal from the probate decree.<sup>31</sup> Plaintiff later decided, however, that he had complete ownership of the ranch pursuant to the community property agreement and filed a quiet title action to enforce his rights under that agreement.<sup>32</sup>

The trial court ruled in favor of plaintiff, but the court of appeals reversed, concluding that plaintiff's acceptance of benefits by probating the will precluded enforcement of the community property agreement. The supreme court affirmed the lower appellate court's decision, concluding also that the probate decree should be given res judicata effect.<sup>33</sup>

In reaching this conclusion, the court noted that plaintiff did not assert his claim under the community property agreement during the probate proceedings and he did not appeal from the probate decree. The court concluded that, because the probate court had jurisdiction over the

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<sup>30</sup> *Id.* at 126–27.

<sup>31</sup> *Id.* at 127.

<sup>32</sup> *Id.* at 128.

<sup>33</sup> *Id.* at 130–31.

ranch property, res judicata applied to prevent plaintiff's "attempt to now overthrow the decree of distribution."<sup>34</sup>

In *Norris*, the subject matter of the probate action and the quiet title action was identical—the scope of the plaintiff's rights to the ranch. Because the probate court had jurisdiction over that property and decided how it should be distributed, that decision precluded plaintiff's subsequent lawsuit.

Similarly, in this case, the subject matter in the bankruptcy action and this lawsuit are the same—BGP's right of first refusal on the half-acre parcel. The Bankruptcy Court had jurisdiction over the half-acre parcel and adjudicated BGP's rights thereto. Under the reasoning of *Norris*, that decision must be given res judicata effect.

Unlike the *Norris* decision, the cases cited by BGP are not on point. In *Mellor v. Chamberlin*,<sup>35</sup> sellers sold their commercial property to Mellor in 1968 under a real estate contract. In 1974, the owner of the adjacent property, Buckman, informed Mellor that (1) he was using her property as a parking lot and did not own that property and (2) the buildings on his property encroached onto her property.<sup>36</sup> Mellor began paying Buckman rent for use of her property and sued the sellers in April

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<sup>34</sup> *Id.* at 132.

<sup>35</sup> 100 Wn.2d 643, 673 P.2d 610 (1983).

<sup>36</sup> *Id.*, 100 Wn.2d at 644.

1975 for misrepresentation relating to the parking lot. That case was resolved by settlement and dismissed in July 1976.<sup>37</sup> In April 1976, Mellor completed payments under the contract and received a warranty deed. In September 1978, after a year of negotiations, Mellor paid Buckman \$5,000 for a two-foot strip of her property and received a quit claim deed. Then, in January 1979, he sued the sellers again to recover the \$5,000 paid to Buckman, alleging breach of the warranties in the deed.<sup>38</sup> In holding that the first and second lawsuits involved different subject matter and, therefore, res judicata did not bar the latter suit, the court noted that, until Buckman decided to enforce her encroachment claim, Mellor had suffered no damages, and he had no claim to make against the sellers.<sup>39</sup> The first suit could not have involved the same subject matter as the second because the encroachment claim did not exist at the time the first lawsuit was resolved.

Here, in contrast, the right of first refusal was at issue in the Bankruptcy Court proceeding and was resolved in that proceeding. BGP asks the Court in this action to decide that BGP has properly asserted a right of first refusal when that issue has already been decided against it.

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 645.

<sup>39</sup> *Id.* at 647.

Moreover, the fact that BGP did not know the terms of the Reciprocal Easement Agreement until after the sale order was approved is not significant. As the Second Bankruptcy Court and the BAP recognized, BGP knew that the sale was subject to such an agreement, even before the terms had been determined. The exact terms of the agreement were not determinative.

*Hayes v. City of Seattle*<sup>40</sup> is also readily distinguishable. In that case, plaintiff initially filed suit asserting that the Seattle City Council acted arbitrarily and capriciously when ruling on his building application. The trial court agreed with plaintiff, and the Council subsequently reconsidered its decision. Thereafter, plaintiff filed suit seeking damages and attorney fees and alleging that the Council had violated his civil rights.<sup>41</sup> The trial court entered summary judgment in favor of plaintiff, and the City appealed. The court of appeals affirmed in part and reversed in part, and the City sought review in the supreme court. That court ruled that plaintiff's lawsuits did not involve the same subject matter because the first action focused exclusively on the propriety of the Council's decision-making process while the second action sought money damages.<sup>42</sup> Here, by contrast, the exact same issue that BGP now wishes

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<sup>40</sup> 131 Wn.2d 706, 934 P.2d 1179, 943 P.2d 265 (1997).

<sup>41</sup> *Id.*, 131 Wn.2d at 710–11.

<sup>42</sup> *Id.* at 713.

to dispute—BGP’s right of first refusal—was decided in the Bankruptcy Court. The fact that the remedy BGP seeks the second time differs from the first is not a difference helpful to BGP.

Finally, in *Hisle v. Todd Pacific Shipyards*,<sup>43</sup> union members filed suit seeking a declaration that they were entitled to additional pay under the terms of a collective bargaining agreement (“CBA”). They and other union members had previously filed a lawsuit in federal court seeking to nullify the CBA.<sup>44</sup> The supreme court ruled that identity of subject matter was not present between the two actions because the first lawsuit sought to invalidate the CBA while the second action presumed the validity of the CBA and sought to apply the terms of the Minimum Wage Act to the provisions of the agreement.<sup>45</sup> Here, in contrast, both cases involve the same challenge—whether BGP should be permitted to exercise its right of first refusal with respect to the half-acre parcel.

***b. Cause of Action***

The test for identity of cause of action is identical to that applied by the federal courts to determine whether there is an identity of claims. As discussed above, this requirement is satisfied here.

***c. Persons***

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<sup>43</sup> 151 Wn.2d 853, 93 P.3d 108 (2004).

<sup>44</sup> *Id.*, 151 Wn.2d at 858.

<sup>45</sup> *Id.* at 866.

BGP asserts that the requirements regarding identity of persons and parties and quality of persons for or against whom claim is made are not satisfied because BGP did not assert a claim against anyone in the Bankruptcy Court action. Appellant’s Brief at 25. In support of this assertion, BGP cites this Court’s decision in *Krikava v. Webber*.<sup>46</sup> That case is not on point and offers no guidance regarding the circumstances presented here. The *Krikava* court ruled that res judicata bars subsequent claims between co-parties in an earlier action only if such claims were actually asserted in the earlier action.<sup>47</sup>

Here, because of the nature of the proceedings in Bankruptcy Court, BGP did not assert affirmative claims against Sellers.<sup>48</sup> However, there is no dispute that BGP was a party to proceedings in Bankruptcy Court that addressed and resolved BGP’s right of first refusal. Nor is there any dispute that the parties are in the same procedural posture in this case as they were in the Bankruptcy Court—i.e., Sellers and Maldonado sought to have the sale of the half-acre parcel to Maldonado approved while BGP claimed it was entitled to exercise its right of first refusal regarding that

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<sup>46</sup> 43 Wn. App. 217, 716 P.2d 916 (1986).

<sup>47</sup> *Id.*, 43 Wn. App. at 221.

<sup>48</sup> It should be noted that res judicata requires identity of *persons* and parties and identity of the quality of *persons* for or against whom a claim is made. *Williams*, 171 Wn.2d 726 ¶ 7. Thus, the fact that BGP may not have been formally denominated as a “party” in the Bankruptcy Court does not preclude application of res judicata.

property. This lawsuit involves the same right claimed by the same party. The identity of persons and quality of persons requirements are satisfied.

**3. Sellers did not engage in fraud or deception that would preclude application of res judicata.**

BGP argues that, even if the requirements for res judicata are present, the doctrine should not apply because the Bankruptcy Court sale order “was obtained by fraud and deception.” Appellant’s Brief at 26–28. In support of this assertion, BGP cites two decisions holding that res judicata does not bar relitigation of claims in a second lawsuit if the party was “induced by fraud or other unlawful means” to omit those claims from an earlier lawsuit.<sup>49</sup>

That is not what happened here. BGP incorrectly asserts, “The Sellers never advised the Bankruptcy Court of their intention to enter into the Reciprocal Easement Agreement.” Appellant’s Brief at 26. There is no dispute that Sellers provided a copy of the Maldonado Agreement to the Court and to BGP at the time of the initial motion to approve the sale. That agreement *expressly* states, in bold type, that Maldonado’s purchase of the half-acre parcel is conditioned upon “[r]eview and acceptance of the Reciprocal Easement Agreements.” CP 317.

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<sup>49</sup> *Rosenberg v. Rosenberg*, 141 Wash. 86, 91, 250 P. 947 (1926) (citing *White v. Miley*, 137 Wash. 80, 241 P. 670 (1925)).

There is (and can be) no dispute that BGP and the Bankruptcy Court were aware that the sale of the half-acre parcel to Maldonado contemplated a Reciprocal Easement Agreement. No such agreement had been finalized at the time of the sale, and thus there was nothing to provide to BGP or the court at that time. Moreover, nothing prevented BGP from pursuing its rights in the Bankruptcy Court after it learned of the Reciprocal Easement Agreement. As discussed above, BGP could have, and should have, filed a motion for relief under FRCP 60(b) if it believed that the Reciprocal Easement Agreement constituted grounds for overturning the sale order.

C. **Sellers complied with the terms of the right of first refusal.**

Even if the Court were to consider BGP's claims on the merits, BGP's claims must still be dismissed. BGP asserts that Sellers cannot now argue that they complied with the terms of the right of first refusal because their summary judgment motion focused on the fact that BGP's claims were barred by the Bankruptcy Court's sale order. Appellant's Brief at 15–16. Sellers did address this issue in their reply, in response to BGP's assertion that Sellers had “apparently conceded” that they had breached the right of first refusal provision. CP 443, 775–77.

BGP relies on case law holding that summary judgment may not be granted on an issue not raised in a party's opening motion. BGP

ignores the fact that RAP 2.5(a) expressly authorizes a party to “present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground.” Thus, the Court may affirm the summary judgment entered in favor of Sellers on the alternative ground that Sellers complied with the terms of the first refusal provision regardless of whether Sellers raised the issue below.

In fact, the Second Bankruptcy Court reached this result when considering the summary judgment motion filed by Sellers. CP 220–22. The court began its analysis by recognizing that the right of first refusal provision in the BGP Agreement required Sellers to provide BGP with notice of the terms and conditions upon which Sellers were willing to sell the half-acre parcel. In accordance with this provision, Sellers provided a copy of the Maldonado Agreement, which included an explicit reference to a Reciprocal Easement Agreement, to BGP. The court explained that “[a] reasonable person could only conclude” that the Maldonado Agreement placed BGP on notice that Maldonado wanted a Reciprocal Easement Agreement and that Sellers were willing to sell the half-acre parcel under terms that would include such an agreement. CP 220.

The Second Bankruptcy Court rejected BGP’s argument that its right of first refusal, which had been extinguished by the July 5, 2005, sale

order, was reactivated when Sellers drafted a Reciprocal Easement Agreement in August 2005. The court explained that the draft Reciprocal Easement Agreement was not a new term of the Maldonado Agreement but “merely a fulfillment of the arrangements contemplated by and set forth in” that agreement. CP 221. The court added that, under BGP’s approach, “parties to a purchase and sale agreement could not, years later, execute a document that was contemplated by an agreement, or that may change the original terms, without retriggering a party’s right of first refusal. This would lead to endless litigation and undermine the policy of finality of a court-approved sale.” *Id.*

The Second Bankruptcy Court applied the same analysis to BGP’s assertion that it should have been provided with a copy of the Reciprocal Easement Agreement executed in November 2005. The court concluded that BGP was “well acquainted” with access issues relating to the half-acre parcel dating back to the time it entered into the BGP Agreement and “should not now be allowed to have a second ‘bite at the apple’ when it failed to act the first time around.” CP 222.

The BAP concurred with the Second Bankruptcy Court’s analysis, explaining that, after BGP failed to exercise its right of first refusal, Sellers had no obligation to inform BGP that a condition to the sale of the half-acre parcel, as disclosed in the Maldonado Agreement, had been

potentially satisfied (by the draft Reciprocal Easement Agreement) or subsequently satisfied (by the executed Reciprocal Easement Agreement). CP 242–43.

Thus, even if the Court were to conclude that BGP's right of first refusal claim is not barred by its failure to directly attack the §363 sale or res judicata, that claim should still be dismissed. As a matter of law, Sellers did not breach their obligations under the right of first refusal provision in the BGP Agreement.

**D. The trial court properly dismissed BGP's seniority claim.**

In its complaint, BGP sought a declaration that its rights to the half-acre parcel and under the Reciprocal Easement Agreement (if it is given effect) are senior to those of Maldonado. CP 3. BGP then moved for summary judgment, asserting that the Reciprocal Easement Agreement was junior to BGP's interest in the shopping center property. CP 182.

In response, and in their own motion for summary judgment, Sellers argued that BGP's request for a declaration regarding its seniority rights was not yet ripe and thus did not meet the requirements for a declaratory judgment. CP 199, 696–99. Sellers based their argument on the fact that the sale of the shopping center to BGP had not closed and might never close. Thus, BGP was not (and may never be) the owner of the shopping center.

The trial court agreed and entered an order denying BGP's summary judgment motion as "not ripe." CP 1011. The court subsequently entered a Summary Judgment in favor of Sellers ruling:

1. In the event that plaintiff purchases the Battle Ground Plaza Shopping Center, what is left of plaintiff's second claim for relief (the "seniority claim") and the Maldonado defendants' cross claims may be reasserted against Douglas Ray and the Estate of Irwin P. Jessen.
2. In that event, and to the extent the plaintiff's seniority claim and the Maldonado defendants' cross claims are reasserted, they shall be reasserted in the case of *Battle Ground Plaza, LLC v. Douglas M. Ray, et al.*, Clark County Superior Court, Case No. 02-00973-9 currently pending before the Honorable John F. Nichols, Department
- 3.

CP 1489.

**1. BGP's seniority claim is not ripe.**

BGP initially took the position that any rights it had under the BGP agreement, including the right of first refusal, were not ripe because the sale of the shopping center property had not closed. In March 2005, upon receipt of Maldonado's initial offer for the half-acre parcel, BGP responded that the right of first refusal "had not yet ripened because the sale of the underlying property had not closed." CP 324. BGP reiterated this position upon receipt of the Maldonado Agreement in May 2005, stating, "Battle Ground Plaza, LLC, believes that the right of first refusal is not ripe until the underlying sale is closed." CP 280. And, in objecting

to the first motion for approval of the sale to Maldonado, BGP again stated, “Battle Ground Plaza, LLC, contends that the right of first refusal arises after the closing occurs on the Battle Ground Plaza Shopping Center.” CP 330. However, when presented with the amendment to the Maldonado Agreement in October 2005, BGP inexplicably elected to exercise its right of first refusal, even though the sale of the shopping center still had not closed.

The trial court correctly recognized that, as BGP had initially acknowledged, BGP’s rights under the BGP Agreement are not ripe until the sale of the shopping center closes. Because that has not yet occurred, BGP is not presently entitled to a declaration regarding its potential rights to property it does not own. In fact, BGP has previously stated that it may never purchase the shopping center. During the course of litigation between Sellers and BGP regarding the sale of the shopping center, BGP consistently maintained that it had no obligation to close and that it might never do so; instead, it would wait until after remediation of property had been completed to decide whether to go ahead with the sale. CP 687.

Even if BGP wishes to purchase the shopping center property, it may be unable to do so. Sellers presented evidence in the trial court establishing that BGP is insolvent, that it owns no tangible property, and that its obligations exceed its assets. CP 1751–52. If BGP is unwilling or

unable to close on the sale of the shopping center property, the resolution of its seniority claim would be completely moot.

The Washington Supreme Court applied this reasoning in a case involving a similar factual scenario. In *Kahin v. Lewis*,<sup>50</sup> a lessor sought adjudication of the respective rights of the lessor, the lessee, and the lessee's assignees to a lease. The assignees then filed a cross claim against the lessee, seeking a determination of their rights under the assignment agreement. The trial court adjudicated the rights under the lease but declined to resolve the assignees' cross claims, dismissing them without prejudice. The assignees appealed from the dismissal of their cross claims.<sup>51</sup>

The supreme court affirmed, explaining that the cross complaint did not show the existence of a justiciable controversy. Specifically, the issue raised by the assignees—how to calculate the price of the lessor's option to retake possession of the premises—remained hypothetical unless and until the lessor exercised its option.<sup>52</sup> The court explained that, if the lessor did not elect to exercise its option, no controversy would ever arise between the lessee and its assignee regarding the option price. The

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<sup>50</sup> 42 Wn.2d 897, 259 P.2d 420 (1953).

<sup>51</sup> *Id.*, 42 Wn.2d at 897–98.

<sup>52</sup> *Id.* at 901.

assignees' cross claim, then, involved only a "possible or potential dispute."<sup>53</sup>

Similarly, in this case, BGP may choose not to purchase the shopping center property. And even if BGP desires to purchase the property, it appears likely that it does not have the financial resources to do so. If BGP does not purchase the property, then it necessarily has no rights in the property, let alone rights that may be superior to Maldonado's. Unless and until BGP closes on the sale of the shopping center, its seniority claim involves only a "possible or potential dispute."

In support of its assertion that its seniority claim is ripe, BGP relies on this Court's decision in *Arnold v. Dep't of Ret. Sys.*<sup>54</sup> In that case, plaintiff sought a declaratory judgment that a statute prohibiting divorced spouses from obtaining retirement death benefits was unconstitutional. The Court concluded that, even though plaintiff would not be entitled to such benefits unless she outlived her former husband, "her *entitlement* to benefits presents an existing dispute between parties with genuine and opposing interests."<sup>55</sup> As the trial court explained, plaintiff's potential loss of the right to benefits as a result of her divorce "has present aspects"<sup>56</sup>—

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<sup>53</sup> *Id.*

<sup>54</sup> 74 Wn. App. 654, 875 P.2d 665 (1994), *rev'd*, 128 Wn.2d 765, 912 P.2d 463 (1996).

<sup>55</sup> *Id.*, 74 Wn. App. at 660.

<sup>56</sup> *Id.* at 668.

i.e., the inability to accurately plan and prepare for financial security in the future. The Court further concluded the application of the statute violated the plaintiff's procedural due process rights.<sup>57</sup> BGP's seniority claim has no such "present aspects."

The trial court in this case reached the correct result—(1) BGP's seniority claim is not presently ripe, and (2) if and when it becomes so, BGP can assert the seniority claim in its lawsuit regarding the shopping center property.

**2. BGP is not entitled to seniority.**

Even if the Court considers BGP's seniority claim on the merits, that claim should be dismissed as a matter of law. First, as discussed above, 11 U.S.C. § 363 applies to prevent BGP from collaterally attacking the sale order. If BGP is allowed to obtain a declaratory judgment that its rights are "senior" to those of Maldonado, it likely will attempt to terminate or cancel the Reciprocal Easement Agreement, thereby depriving Maldonado of the benefits afforded by the Bankruptcy Court's sale order.

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<sup>57</sup> *Id.* The Washington Supreme Court reversed, concluding the statute did not violate the plaintiff's right to procedural due process. 128 Wn.2d at 767. In reaching this conclusion, the court questioned the determination that the dispute was justiciable. *Id.* at 771 n.7. However, because the court reversed on other grounds, it concluded that "judicial economy is better served by not compelling the parties to relitigate this issue." *Id.*

Second, the fact that BGP filed a *lis pendens* in connection with the dispute with Sellers over the sale of the shopping center does not serve to invalidate the Reciprocal Easement Agreement between Sellers and Maldonado. A *lis pendens* merely provides notice of pending litigation such that “anyone who subsequently deals with the property will be bound by the outcome of the action to the same extent as if he or she were a party to the action.”<sup>58</sup> A *lis pendens* does *not* create substantive rights.<sup>59</sup>

Here, then, the *lis pendens* simply provided notice of the ongoing litigation regarding the shopping center property in which BGP claimed that Sellers had breached the terms of the BGP Agreement. It did not grant BGP any substantive rights with respect to the half-acre parcel or the Reciprocal Easement Agreement.

Moreover, BGP has no legal right to prevent the execution of or object to the Reciprocal Easement Agreement. Nothing in the BGP Agreement limits Sellers’ right to encumber the shopping center property before closing. Instead, the agreement simply allows BGP to approve any encumbrances to the property. Paragraph 21(A)(4) of the BGP Agreement provides that the sale is “subject to and conditioned upon Purchaser’s obtaining title insurance insuring that title of Seller to the premises at

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<sup>58</sup> *United Savings & Loan Bank v. Pallis*, 107 Wn. App. 398, 405, 27 P.3d 629 (2001).

<sup>59</sup> *Beers v. Ross*, 137 Wn. App. 566 ¶ 25, 154 P.3d 277 (2007).

closing is free of encumbrances or defects, except those approved in writing by Purchaser.” CP 416. If BGP chooses not to approve the Reciprocal Easement Agreement, it does not have to close.

In sum, BGP’s seniority claim is dependent upon its purchase of the shopping center property. That sale has not closed, and it may never close. The trial court correctly recognized that, under these circumstances, BGP’s seniority claim is not yet ripe. Even if it were, BGP is not entitled to prevail on this claim. The lis pendens does not grant BGP any substantive rights. Instead, any rights BGP may have are governed by the terms of the BGP Agreement. That Agreement does not prohibit Sellers from executing the Reciprocal Easement Agreement with Maldonado. If BGP does not wish to be subject to that encumbrance, it may simply elect not to purchase the property. It is not, however, entitled to defeat Maldonado’s rights under the Reciprocal Easement Agreement.

**E. The trial court did not abuse its discretion with respect to the award of attorney fees to Sellers.**

As this Court recently explained, “A trial judge has broad discretion in determining the reasonableness of an attorney fee award and, in order to reverse that award, the opponent must show that the trial court

manifestly abused its discretion.”<sup>60</sup> An abuse of discretion will not be found unless the trial court’s decision is “manifestly unreasonable or based upon untenable grounds or reasons.”<sup>61</sup> BGP has not satisfied its heavy burden of establishing that the trial court abused its discretion with respect to the amount of fees awarded to Sellers, and that award should therefore be affirmed.

**1. The record adequately demonstrates the basis for the trial court award.**

BGP begins by asserting that the attorney fee award must be reversed and remanded because the trial court did not prepare formal findings of fact and conclusions of law setting forth the basis for the award. Appellant’s Brief at 38. However, such findings are not required if, as in this case, the record is otherwise adequate for appellate review.<sup>62</sup>

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<sup>60</sup> *Unifund CCR Partners v. Sunde*, 163 Wn. App. 473 ¶ 22, 260 P.3d 915 (2011); see also *In re Marriage of Bobbitt*, 135 Wn. App. 8 ¶ 47, 144 P.3d 306 (2006) (award of attorney fees pursuant to contract reviewed for abuse of discretion).

<sup>61</sup> *Zink v. City of Mesa*, 137 Wn. App. 271 ¶ 14, 152 P.3d 1044 (2007).

<sup>62</sup> See *In re Marriage of Obaidi*, 154 Wn. App. 609 ¶¶ 27–28, 226 P.3d 787 (2010) (trial court’s oral decision awarding attorney fees sufficient even though court’s method of calculating fees was not “completely transparent”); *Fawn Lake Maint. Comm’n v. Abers*, 149 Wn. App. 318 ¶¶ 34–35, 202 P.3d 1019 (2009) (trial court’s oral decision and documentation submitted by plaintiff’s counsel sufficient to enable appellate court to review and affirm attorney fee award); *Banuelos v. TSA Wash., Inc.*, 134 Wn. App. 607 ¶ 28, 141 P.3d 652 (2006) (letter opinion describing basis for trial court’s attorney fee award sufficient to permit review); *Johnson v. Jones*, 91 Wn. App. 127, 136, 955 P.2d 826 (1998) (oral decision describing basis for trial court’s attorney fee award sufficient for review).

Sellers sought attorney fees following the trial court's order dismissing BGP's claims on summary judgment.<sup>63</sup> Sellers initially requested attorney fees and costs totaling \$229,648.67 and submitted extensive documentation in support of this request. CP 789–855.

During the hearing on Sellers' motion, the trial court ruled:

- Sellers were not entitled to recover attorney fees pursuant to CR 11 or RCW 4.84.185;
- Sellers were entitled to recover fees incurred in the bankruptcy proceedings (including proceedings before the Second Bankruptcy Court, the BAP, and the Ninth Circuit) only to the extent those fees relate to the trial court's summary judgment order; and
- Sellers were not entitled to recover fees with respect to the seniority claim because that claim had not been resolved on the merits.

10/20/11 RP at 4–6. The court suggested that Sellers resubmit their fee request with these guidelines in mind. *Id.* at 39.

Accordingly, Sellers submitted an amended motion for attorney fees which (1) limited the request for fees incurred in the bankruptcy proceedings to those directly related to the state court summary judgment motion; (2) deleted the request for fees related to the seniority claim, and (3) reduced the request for costs to coincide with the trial court's

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<sup>63</sup> Sellers initially filed their motion for attorney fees on September 23, 2011. CP 838–55. Following receipt of BGP's response to the motion, Sellers determined it would be appropriate to supplement their motion. CP 1146–47. Accordingly, they withdrew the motion and filed a second motion on October 13. CP 1146–64.

limitations on recoverable fees. CP 1390–97. Sellers submitted additional documentation with their amended fee request specifying the precise basis for their fee and cost calculations. CP 1268–1389. The trial court then conducted a second hearing on the fee request on December 9, 2011, addressing Sellers’ amended request. 12/9/11 RP at 1–42.<sup>64</sup>

On February 14, 2012, the trial court issued a letter opinion explaining that it had considered all of the lodestar factors and awarding Sellers a total of \$93,557.50. CP 1461.

Thus, while the court did not enter specific findings of fact and conclusions of law with respect to attorney fees, the documentation presented by Sellers, the transcripts of the attorney fees hearings, and the trial court’s letter opinion provide a sufficient record to enable this Court to determine whether the trial court abused its discretion with respect to the amount of fees and costs awarded to Sellers.

**2. BGP is not entitled to an offset.**

BGP claims it is entitled to an offset because it ultimately prevailed on its assertion that the Second Bankruptcy Court did not have jurisdiction over this dispute. Appellant’s Brief at 45–46. As a rule, only one party—the prevailing party—is entitled to recover attorney fees and

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<sup>64</sup> After BGP argued in its opening brief that the trial court record was incomplete, Sellers ordered a transcript of the second hearing on attorney fees, which is attached hereto as Appendix A.

costs when such an award is authorized by contract.<sup>65</sup> The courts have made an exception to this rule, however, when “a party receives an affirmative judgment on only a few distinct and severable contract claims.”<sup>66</sup> When this occurs, the plaintiff may be awarded attorney fees for the claims it prevails on, the defendant may be awarded attorney fees for the claims it successfully defends, and the awards are then offset.<sup>67</sup>

In this case, BGP asserted two claims against Sellers—one for Sellers’ alleged breach of the right of first refusal provision in the BGP Agreement and one seeking a declaration that its rights to the half-acre parcel and under the Reciprocal Easement Agreement are superior to those of Maldonado. CP 3. BGP did not prevail on either of these claims. The trial court dismissed BGP’s first claim on summary judgment and dismissed its second claim as unripe. CP 1487–89. BGP has not prevailed on either of its claims, and there is no basis for an offset.

**3. The trial court did not abuse its discretion to the extent it awarded Sellers attorney fees for BGP’s subordination claim and Maldonado’s cross claim.**

The remainder of BGP’s brief consists of challenges to various amounts sought by Sellers. As Division One recently explained, while the

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<sup>65</sup> *Mike’s Painting, Inc. v. Carter Welsh, Inc.*, 95 Wn. App. 64, 68, 975 P.2d 532 (1999).

<sup>66</sup> *Id.*, 95 Wn. App. at 68 (citing *Marassi v. Lau*, 71 Wn. App. 912, 917, 859 P.2d 605 (1993)).

<sup>67</sup> *Id.* at 68–69.

opposing party may dispute certain specific time entries (as BGP does in this case), “the determination of the fee award should not become an unduly burdensome proceeding for the court or the parties.”<sup>68</sup> Thus, the trial court need not engage in “an explicit hour-by-hour analysis of each lawyer’s time sheets . . . as long as the award is made with a consideration of the relevant factors and reasons sufficient for review are given for the amount awarded.”<sup>69</sup>

BGP asserts that Sellers’ fee request includes over \$11,000 attributable to BGP’s subordination claim and Maldonado’s cross claim but does not explain how it arrived at this figure. Appellant’s Brief at 40. In fact, the declaration submitted by Sellers in support of their amended request expressly acknowledges that the trial court had ruled that Sellers were not presently entitled to recover fees incurred in connection with BGP’s seniority claim and explains the calculations made to ensure compliance with this ruling. CP 1269–70. For example, because Sellers’ summary judgment motion addressed both the right of first refusal claim and the seniority claim, Sellers’ counsel calculated the portion of the motion attributable to each argument and adjusted its fee request accordingly. CP 1270.

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<sup>68</sup> *Hulbert v. Port of Everett*, 159 Wn. App. 389 ¶ 37, 245 P.3d 779 (2011).

<sup>69</sup> *Id.*

**4. The trial court did not abuse its discretion to the extent it awarded fees for time spent on the companion case.**

BGP asserts, generally, that the trial court improperly awarded fees spent in the litigation between Sellers and BGP over the shopping center property, although it does not specify the amount of fees it challenges. Appellant's Brief at 40–41. BGP apparently complains that one of the time entries for which Sellers seek recovery (totaling \$275) also includes an unspecified amount of time spent on the companion case. As noted above, the trial court is not required to engage in an “hour-by-hour analysis” of each time sheet, and it cannot be said to have abused its discretion in declining to dissect each time entry in making its award.

**5. The trial court did not abuse its discretion in awarding fees incurred in the Bankruptcy Court proceedings.**

Sellers incurred approximately \$80,000 in fees and costs while litigating this case in the Second Bankruptcy Court. CP 1396. Sellers then sought recovery of those fees from the trial court. *Id.* During the October 20, 2011, hearing on Sellers' request for attorney fees, the trial court limited Sellers' right to recover such fees, explaining, “much of the award of fees in the bankruptcy proceedings is not appropriate for this Court to order.” 10/20/11 RP at 4–5. The court added that it would “only consider an award of fees that can be allocated to the support of the Court's order for summary judgment herein.” *Id.* at 5. Thus, in order to

recover fees incurred in federal court, Sellers would have to establish that those fees related to the state court summary judgment order. In accordance with the trial court's directive on this issue, Sellers submitted a revised request for fees, reducing the amount requested to \$17,676. CP 1396.

BGP asserts that Sellers should not be allowed to recover *any* fees incurred in the federal court litigation on the ground that the Ninth Circuit eventually concluded the Second Bankruptcy Court did not have jurisdiction. Appellant's Brief at 41. BGP ignores the fact that Sellers' motion for summary judgment in this action was based upon the same evidence and arguments presented to the Second Bankruptcy Court. As the trial court correctly recognized, the Sellers are therefore entitled to recover fees incurred in the Second Bankruptcy Court to the extent the work performed in that court benefited Sellers here. The trial court did not abuse its discretion in recognizing this fact.

BGP further asserts that some of the fees incurred in the Second Bankruptcy Court and awarded by the trial court below are attributable to unrelated claims, such as the seniority claim or a motion for protective order filed by BGP. Appellant's Brief at 41–42. BGP does not specify the amount allegedly awarded on the seniority claim and, while it asserts that the trial court awarded \$3,565.50 related to the protective order, the only

evidence it cites for this assertion is its own brief in the trial court. *Id.* at 42.

As noted above, the trial court is not obligated to examine each billing entry to determine whether it might include work performed on unrelated claims. BGP's unsupported and unexplained assertions regarding the fees awarded by the trial court are insufficient to show an abuse of discretion.

**6. The trial court did not award fees for duplicative time.**

BGP argues that the trial court must have awarded fees for duplicative time simply because multiple attorneys worked on Sellers' summary judgment motion and spent more time on the motion than did BGP's attorneys. Appellant's Brief at 42. The trial court rejected this argument, correctly recognizing that a reasonable fee is not determined simply by counting the number of attorneys who worked on a particular motion or the total time spent by those attorneys. BGP has not established that the trial court abused its discretion with respect to this issue.

**7. The trial court did not abuse its discretion with respect to fees incurred after entry of summary judgment in favor of Sellers.**

BGP apparently asserts that Sellers should not be able to recover an unspecified portion of the fees incurred in bringing their initial motion for attorney fees because the trial court did not authorize recovery on all of

the theories asserted by Sellers. Appellant’s Brief at 42–44. Although BGP characterizes such fees as pertaining to “unsuccessful claims,” BGP again construes this term too broadly. Sellers sought and were awarded attorney fees. The fact that the trial court awarded such fees pursuant to the terms of the BGP Agreement and not pursuant to CR 11 or RCW 4.84.185 does not mean that Sellers’ attorney fees claim can be characterized as “unsuccessful.” The trial court considered and rejected BGP’s argument on this issue, and it did not abuse its discretion in doing so.

**8. The trial court did not err in awarding costs.**

BGP argues that the trial court abused its discretion in awarding various costs charged to Sellers. Appellant’s Brief at 44–45. BGP cites this Court’s decision in *Collins v. Clark County Fire District No. 5*<sup>70</sup> for the proposition that overhead costs may not be recovered because they are included in the attorneys’ hourly rates.<sup>71</sup>

In that case, the Court concluded the trial court did not abuse its discretion in determining that the costs sought by the plaintiff were already included in the hourly rate charged by her attorneys.<sup>72</sup> Here, the trial court reached the opposite result, rejecting BGP’s assertion that the

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<sup>70</sup> 155 Wn. App. 48, 231 P.3d 1211 (2010).

<sup>71</sup> *Id.*, ¶ 130.

<sup>72</sup> *Id.*

DATED this 15<sup>th</sup> day of April, 2013.

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costs charged to and paid by Sellers were included in their attorneys' hourly rates. *See* CP 1426–28. BGP has not shown that the trial court abused its discretion, and there is no basis to overturn the award of costs to Sellers.

**F. Sellers are entitled to recover attorney fees incurred on appeal.**

The BGP Agreement authorizes an award of reasonable attorney fees and costs to the prevailing party in the event of any litigation arising out of the contract. CP 420. In accordance with this provision, the trial court awarded Sellers \$93,557.50 in attorney fees and costs. As BGP acknowledges, the attorney fees provision in the BGP Agreement also authorizes an award of attorney fees on appeal.<sup>73</sup> In accordance with RAP 18.1(a), Sellers therefore request that they be awarded reasonable attorney fees and costs in the event they prevail on appeal.

**VI. CONCLUSION**

For the reasons set forth above, Sellers respectfully request that the trial court's judgment be AFFIRMED.

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<sup>73</sup> Appellant's Brief at 47 (citing *Reeves v. McClain*, 56 Wn. App. 301, 783 P.2d 606 (1989); *Bloor v. Fritz*, 143 Wn. App. 718, 753, 180 P.3d 805 (2008)).

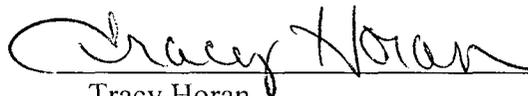
**CERTIFICATE OF SERVICE**

The undersigned certifies that on this 15<sup>th</sup> day of April, 2013, I caused the foregoing to be served to the following persons in the manner indicated below:

Ben Shafton  via hand delivery  
Caron, Colven, Robison & Shafton  via first class mail  
900 Washington St., Ste. 1000  via email.  
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*Attorneys for Battle Ground Plaza LLC*

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I declare under penalty of perjury under the laws of the state of Washington this 15<sup>th</sup> day of April, 2013, at Seattle, Washington.

  
Tracy Horan

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COURT OF APPEALS  
DIVISION II  
2013 APR 16 PM 1:18  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

## **Appendix**



APPEARANCES

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FOR THE DEFENDANTS:  
DOUGLAS RAY & The  
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JESSEN

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1 MR. MATSON: All right. Turning our attention  
2 to our restated and amended motion for attorney fees.  
3 Your Honor may notice that we added some time since we  
4 cut it off at the last point that added about \$28,000  
5 worth of additional time that was not before the Court  
6 at the very first motion.

7 And the Court would note, or I would like to  
8 point out that after you back that out, our motion for  
9 fees today is probably close to 30 percent of what we  
10 were originally asking for, so we have taken substantial  
11 cuts. This is our attempt to conform our motion to the  
12 Court's oral rulings on October 20th.

13 It's important to remember, I think, that our  
14 motion is based on a provision in a contract,  
15 particularly Paragraph 29(c) of the purchase and sale  
16 agreement. I just want to read it because it's only a  
17 sentence, and it says, "anything to the contrary herein  
18 notwithstanding in the event of any litigation arising  
19 out of this contract, the Court may award to the  
20 prevailing party all reasonable costs and expenses  
21 including attorneys' fees." That's out of the contract.  
22 It's undisputed. And the key language that I think is  
23 important to our clients is that it applies to, quote,  
24 any litigation arising out of this contract, the  
25 purchase and sale agreement. Excuse me.

1           And then the other thing that's important here  
2 is that it talks about reasonable fees, costs and  
3 expenses, so it's not just statutory costs, it's  
4 expenses as well. As I'll point out later, plaintiff  
5 itself recovered close to \$200,000 in expenses in the  
6 companion case. All right.

7           Most of the authority that plaintiff relies on  
8 starts with Bowers vs. Transamerica Title. There's  
9 another case that they rely on heavily, it's the  
10 Loeffelholz - if I'm pronouncing that correctly - case,  
11 and the Court will observe that those are cases based on  
12 statutes, they are not cases based on contract. I would  
13 respectfully submit that Battle Ground Plaza overstates  
14 the interpretation of those cases in a contract  
15 scenario.

16           For instance, and this is very subtle but it's  
17 very important, starting first on Page 2 of Battle  
18 Ground Plaza's response, Line 16, there's a sentence  
19 which reads, "finally, the party seeking an award of  
20 attorney's fees bears the burden of segregating the time  
21 spent on successful theories or claims from that time  
22 spent on unsuccessful theories or claims," and there's a  
23 cite to the Loeffelholz case there. When you go to that  
24 page, you will not see the words successful or  
25 unsuccessful theories. It's only successful or

1 unsuccessful claims that can be segregated.

2           If you move now to Page 3 of their response at  
3 Line 21, they state again, referring to a particular  
4 time they feel ought to be discounted, this amounts to  
5 time spent on unsuccessful claim or theories. So  
6 they're mixing claims and theories, and nowhere do those  
7 cases stand for discounting time based on unsuccessful  
8 theories, just claims.

9           Later in their response they get much bolder.  
10 Instead of using the theories language like on Page 15,  
11 they group big blocks of time into time that otherwise,  
12 quote, did not advance the cause. That's not a legal  
13 standard. Nowhere in the cases does it say you don't  
14 get your time if it didn't advance the cause.

15           And then finally by turning it to Page 26, they  
16 abandon the unsuccessful claims language altogether, and  
17 that's the only pertinent language. That's the only  
18 language in the rules, because at Line 16 between --

19           THE COURT: What page are you referring to?

20           MR. MATSON: On Page 26 between Line 16 and 17  
21 there's a sentence which reads, "all time spent before  
22 the hearing on October 20th, 2011, must be regarded as  
23 unproductive or based on an unsuccessful theory and  
24 should not be awarded," Here again, the unsuccessful  
25 theory language is nowhere to be found in the

1 controlling cases.

2           So we would respectfully submit that the  
3 controlling language starts with the contract. And to  
4 the extent that there is language from other cases based  
5 on statutes which is at odds with the language in the  
6 contract, they must give way to the contract language,  
7 because that's what the parties bargained for.

8           So with that background in mind, I want to  
9 address some major areas. Battle Ground Plaza claims  
10 that time spent in bankruptcy court which is not related  
11 to our motion for summary judgment in state court ought  
12 not to be recoverable. And that's a fair position for  
13 them to take and was based on the Court's language from  
14 the ruling on October 30th.

15           And the particular language that they're  
16 relying on is where the Court said this Court will only  
17 consider and award fees that can be allocated to the  
18 support of the Court's order for summary judgment  
19 herein. And as far as it goes, we have no objection to  
20 that language, but we contend that it doesn't go far  
21 enough and it's unfairly limiting.

22           And it's -- first of all, the Court will recall  
23 we did not file the motion that caused the case to be  
24 moved to bankruptcy court. We did join it. But I would  
25 respectfully submit that even had we not joined it, it

1 probably would have ended up in bankruptcy court. Even  
2 if we objected to it, it might have ended up in  
3 bankruptcy court. So we ended up there because another  
4 party in this case, the Maldonado defendants, filed a  
5 motion.

6 Second -- and that was very early in the case  
7 and that's important. The case was filed in, like, July  
8 of '06, and by January of '07, we're in bankruptcy court  
9 pursuant to the Court's remand, this Court's remand.

10 And many of the activities that you would expect to see  
11 in any case regardless of court discovery and other  
12 document review analysis, it's all going on and it  
13 doesn't matter what court it's in, it's all work  
14 necessary to advance the case. And we have -- we  
15 respectfully submit that that work is properly  
16 recoverable here despite which -- and regardless of  
17 which court had supervision of the file at that time or  
18 was asserting jurisdiction.

19 And it's work - and it's all highlighted in our  
20 exhibits - it's work involved with the investigation and  
21 factual discovery and factual gathering. It's document  
22 review and analysis. It's legal research. It's  
23 document discovery. Depositions were taken. Motions  
24 for protective orders were filed by the plaintiff. They  
25 were filed by the Maldonado defendants. We have to deal

1 with those. We were responding to tender and  
2 cross-claim issues.

3 The Court will see in our exhibits that we did  
4 not include time spent in bankruptcy court on briefing  
5 the motion for summary judgment for the right of first  
6 refusal. We did not include any of that time spent  
7 briefing. We did not include time for matters uniquely  
8 related to the bankruptcy court, bankruptcy law,  
9 bankruptcy procedure. We tried to look for that and I  
10 tried not to highlight that. And then we did not  
11 include the matters related to the various appeals, the  
12 appeals to the Bankruptcy Appellate Panel, the 9th  
13 Circuit or the United States District Court. We tried  
14 to avoid highlighting any of that time.

15 We did include most of the legal research that  
16 incurred in preparation for the motion for summary  
17 judgment on the right of first refusal between the  
18 bankruptcy court, and we did that because we didn't have  
19 similar time entries in the state court matter and that  
20 was necessary and relevant. This goes to your rulings  
21 on the 20th, Your Honor. So to limit the defendants to  
22 the time spent in bankruptcy court only to that time  
23 supporting the motion for summary judgment here, we  
24 would contend is unfairly limiting to my clients.

25 I understand the Court's ruling on the

1 seniority claim and we did try to back out all of the  
2 time, for instance, responding to plaintiff's motion for  
3 summary judgment on the seniority claim, we did not  
4 include any of that time. And we believe we gave the  
5 Court a principled way in which to allocate time from  
6 which it might be clear, not clear, which claim it  
7 applied to, for instance, the briefing in our motion  
8 that had to do with both the seniority claim and the  
9 right of first refusal claim. And I'll talk a little  
10 bit more in detail about that in a second, but we tried  
11 to give the Court a way to do that that we thought was  
12 fair.

13           So but notwithstanding the Court's ruling, we  
14 do feel that the time spent responding to the  
15 Maldonado's cross-claims and their tender is recoverable  
16 even though they were sued only on the seniority claim,  
17 and it's because of the language I read to you out of  
18 the purchase and sale agreement. It goes to any  
19 litigation arising out of the contract. And had it not  
20 been for this contract which gave the Battle Ground  
21 Plaza, LLC, those rights, we would not be defending  
22 those claims. So there is time in there which has been  
23 highlighted in which we do contend is recoverable which  
24 has to do with responding to the cross-claims and  
25 defending the tender.

1           I want to address Battle Ground Plaza's attack  
2 on time spent on our motion for summary judgment on the  
3 right of first refusal claim here in state court this  
4 past Spring. I want to remind the Court again that we  
5 did not include any legal research time because that was  
6 all incurred in bankruptcy court and it's included there  
7 and we did not incur any separate briefing time here.  
8 We did not apply for it.

9           Furthermore, an analysis of the motions filed  
10 in both courts, the motions for summary judgment on the  
11 right of first refusal claim, we'll show that there was  
12 significant differences between those motions in each of  
13 the different courts. Meaning no disrespect to this  
14 Court, the bankruptcy court is obviously more familiar  
15 with bankruptcy law and bankruptcy procedures, and we  
16 felt that more time needed to be spent briefing and  
17 vetting those issues in the motion at play here.

18           The full faith in credit issue was not an issue  
19 in bankruptcy court, it didn't need to be. It was a big  
20 issue here. It was a huge issue and, in fact, it  
21 appears that the Court's decision may have largely  
22 hinged on the workup of the full faith in credit  
23 argument, the research that was done in support of that.

24           The issue of the bankruptcy court's sale order  
25 trumping state court contract rights was also a big

1 issue, and we felt it had to be more fully vetted and  
2 did more fully vet it in the state court file and the  
3 facts had to be more fully briefed here than they had to  
4 be briefed elsewhere.

5 For instance, the plaintiff says I think in  
6 someplace all we had to do was borrow the facts or cut  
7 and paste the facts out of the 9th Circuit opinion.  
8 Well, that's not accurate, Your Honor. The 9th Circuit  
9 opinion only had to do with a jurisdictional argument.  
10 It didn't have to do with analyzing all of the  
11 background and all of the factual history leading up to  
12 the right of first refusal claim.

13 Battle Ground Plaza attacked the fact that  
14 Scott Anders did some of the briefing and Russ Garrett  
15 did some of the editing and organizing. That was not an  
16 accident. Using Scott Anders was intended because we  
17 wanted the perspective of a former state court judge  
18 who's not familiar with bankruptcy to work those issues  
19 up to try to decide what we felt was important to the  
20 court, and at the same time, we wanted to use Russ  
21 Garrett's expertise in bankruptcy court on the  
22 bankruptcy issues, so that was an intentional team  
23 approach to that for those very important reasons.

24 Battle Ground Plaza appears to be arguing in  
25 several places that we can't claim the time spent in

1 federal court and their time spent in state court is  
2 excessive because we had all the time to work those up  
3 in federal court. That's a double whammy. That's not  
4 fair. It's internally inconsistent and it's just not  
5 realistic or fair.

6 The plaintiff's argument for an offset is  
7 absolutely unsupported by any relevant authority and it  
8 is, in fact, contrary to law. Only a prevailing party  
9 is entitled to fees. The prevailing party is the party  
10 entitled to judgment. Battle Ground Plaza is not  
11 entitled to judgment in this case. And Battle Ground  
12 Plaza cannot be a prevailing party in this case;  
13 therefore, it cannot recover fees in this case.

14 Neither should the defendants' fees or costs be  
15 reduced based on the unsuccessful theories or claims  
16 argument. And I told you why the unsuccessful theories  
17 part of that doesn't apply. It's nowhere in the cases.  
18 The cases only talk about unsuccessful claims. I  
19 mentioned this a lot last time because it's important.

20 Their sole reliance is on a couple of cases  
21 Marassi and Mike's Painting. Now, if you look at those  
22 cases, the fact patterns are these. There were multiple  
23 claims on which attorney fees were recoverable.  
24 Plaintiff prevailed on some; defendants successfully  
25 defended others.

1           And the Court said we have to do -- there is no  
2 prevailing party, but there is a substantially  
3 prevailing party and we have to do a -- I think they  
4 called it a proportional analysis, and it is only in  
5 those cases where you have multiple claims upon which  
6 fees are recoverable and it is only in those cases where  
7 the plaintiff prevails on some and the defendant  
8 prevails in successfully defending others that the  
9 plaintiff has to offset its fees by the fees incurred by  
10 the defendants for successfully defending claims. Those  
11 facts don't apply here. We, defendants, successfully  
12 defended every claim against them.

13           There are cases that I mentioned where the time  
14 spent by looking at the entries, it's not -- it's  
15 difficult or impossible to allocate between the right of  
16 first refusal claim or the seniority claim. Battle  
17 Ground Plaza proposes just dividing those 50 percent  
18 each way. That's not realistic.

19           We did propose what we believe is a principled  
20 way allocating 10 percent to the seniority. That was  
21 based on the amount of briefing and the amount of time  
22 incurred in briefing the original summary judgment on  
23 that issue. The seniority claim was not a complex  
24 issue; the right of first refusal claim was. And, I  
25 mean, the seniority claim was almost flawed on its face

1 and, you know, every court that looked at it concluded  
2 that.

3           Finally, I want to -- there's a lot of time  
4 spent attacking what I'll characterize as minutia in the  
5 costs, copies, other things. There's a lot of time  
6 spent attacking Bullivant's multiple use of attorneys on  
7 file. I'd like to point something out to the Court.  
8 I'm really reluctant to add more paper to the Court's  
9 file, but I just happened to be looking at this in  
10 connection with preparing for this, and this is Battle  
11 Ground Plaza's motion for attorneys' fees and costs  
12 submitted in the companion case in September of 2007.

13           Now, there's a very short one-page motion and  
14 then it's supported by affidavits from a number of  
15 attorneys, including Mr. Shafton. If you'll take the  
16 time - and I don't expect you to, but if you'd like -  
17 you'll find there are 13 different timekeepers involved  
18 for which they are requesting fees. The total amount  
19 sought here, including supplemental affidavits submitted  
20 by Mr. Shafton for time that was incurred after this  
21 original motion was submitted but before when the Court  
22 ruled, that total fee claim came to over three-quarters  
23 of a million dollars.

24           Now, the Court was astonished to see our fee  
25 claim here two months ago. This fee claim was over

1 three times higher. It was \$757,000. And if you'll  
2 look, for instance, I've tried to highlight these and  
3 tab these so you can get through this really quickly and  
4 there's --

5 MR. SHAFTON: (Inaudible) page?

6 MR. MATSON: Yeah, the affidavit of Don Lloyd.

7 MR. SHAFTON: Okay. That's fine.

8 MR. MATSON: Mr. Lloyd is an attorney with  
9 Cable Huston Benedict, a downtown Portland firm. Today  
10 they have about 30 lawyers according to their website,  
11 I'm not sure what they had in 2007, but there are ten  
12 timekeepers supported by this affidavit. There's a  
13 total of 278,000 in fees and costs associated with this  
14 affidavit alone. I'm sorry.

15 If the Court will take a look at Page 18 of  
16 Mr. Lloyd's affidavit, he begins to detail -- and this  
17 is just an example, I mean, this is not the only  
18 example, I just want to point out a few so we don't  
19 waste a lot of time on this.

20 MR. SHAFTON: 18 is Don's?

21 MR. MATSON: Yeah.

22 MR. SHAFTON: All right.

23 MR. MATSON: Here he's accounting for the time  
24 of Susan T. Felstiner. She's apparently an associate  
25 attorney in his office, and immediately the first

1 response or the first time entry conference with Don  
2 Lloyd. So here's an associate conferring with a senior  
3 partner.

4 You go to the next page, there are one, two,  
5 three, four, five, six, seven or eight entries,  
6 conference with Don Lloyd. You go to the next page,  
7 there are a half a dozen or more conferences. So Battle  
8 Ground Plaza is objecting to us because we are billing  
9 such entries, yet they themselves submitted entries like  
10 this in the underlying claim in support of their  
11 three-quarters of a million dollar fee petition.

12 Organize exhibits to affidavit. Remember they  
13 objected to three or four attempts that Candice Jackson  
14 had to organize exhibits to a mediation, yet on 2/11/04,  
15 Ms. Felstiner logs 5.5 hours, some of which was to  
16 organize exhibits to affidavit. And then finally toward  
17 the end, Page 32 of the affidavit --

18 MR. SHAFTON: Is this in Lloyd's?

19 MR. MATSON: Yeah, Lloyd's affidavit. -- he  
20 asks for in-house photocopying costs, \$3,400.80. He  
21 asks for computer research, \$3,279.09, and yet they  
22 object to our fee petitions because those costs are  
23 included on our motion here.

24 The reason they're included on our motion here,  
25 Your Honor, is two-fold: Number one, they're

1 recoverable pursuant to the fee agreement we have with  
2 our client; and number two, the contract language that I  
3 read to you earlier allows for it because it allows for  
4 expenses in addition to statutory costs, so they're  
5 absolutely recoverable here.

6 I want to just conclude by saying that, again,  
7 it's important to understand that many of plaintiff's  
8 arguments - I suspect probably 80 percent of his  
9 arguments - are based on an overstated and expanded and  
10 unsupported interpretation of the attorney fee cases  
11 from Bowers and Loeffelholz and the others that are all  
12 based on statutory language, not on the contract  
13 language at issue here.

14 As we pointed out previously, this was a high  
15 stakes piece of litigation, not so much for plaintiff,  
16 it was all upside for them. All they had to do was file  
17 suit and maybe, maybe, just maybe, they'd come up with a  
18 winner. All that was at risk for them was their  
19 attorney fees.

20 What was at risk for the defendants was not  
21 only its attorney fees, but the potential loss of  
22 millions of dollars because, as the Court recalls,  
23 Maldonado developed the property, and as I pointed out  
24 when I was here two months ago or a month ago, that just  
25 the assessed value from the County records today shows

1 the amount of improvements on that property of \$2  
2 million. If they had prevailed on the right of first  
3 refusal claim or the seniority claim, the implications  
4 to the defendants were staggering.

5 Once again, at the end of the day, the  
6 defendants prevailed on all of the claims against them,  
7 certainly all of the claims upon which attorney fees are  
8 recoverable, and we respectfully request that we should  
9 be awarded the amounts applied for. Thank you.

10 THE COURT: All right. Thank you, Mr. Matson.  
11 And, Mr. Shafton.

12 MR. SHAFTON: Your Honor, I wrote you a  
13 response that is probably too long and I'm not going to  
14 sit here and regurgitate that. I'm going to spend a  
15 little bit of time responding to some of the arguments  
16 that Mr. Matson made, I'm going to primarily devote my  
17 time to that. And in a couple of areas, I'm going to  
18 point you to places where you can find information that  
19 might be helpful in evaluating his arguments.

20 The first point that I want to make you'll find  
21 on Page 7.

22 THE COURT: Could I interrupt just for a  
23 minute, Mr. Shafton?

24 (Pause in proceedings.)

25 THE COURT: All right. Go ahead, Mr. Shafton.

1           MR. SHAFTON: As I indicated, I wanted to point  
2 you to places where you might want to look for things.  
3 I tried to do a lot of that in my brief, but there are a  
4 couple of things that I didn't cover because I covered  
5 it earlier.

6           If you look at Page 7 of my response to motion  
7 for attorney's fees that was filed on September 28 of  
8 2011, that's the first response (inaudible).

9           If you look at that and you look at Page 7,  
10 you're going to find the citation to Singleton vs. Frost  
11 and Crest, Inc., v. Costco Wholesale Corporation to the  
12 effect that the lodestar methodology of computing  
13 attorneys' fees applies to contract clause. So to  
14 suggest that ours is based on a statute does not apply.

15           Basically what the Court said in Bowers, and  
16 this is quoted on Page 8, "the Court must limit the  
17 lodestar to hours reasonably expended and, therefore,  
18 should discount hours spent on unsuccessful claims,  
19 duplicated effort or otherwise unproductive time."  
20 That's on Page 8.

21           Now, the other issue, the other place where you  
22 might want to look, if you go to the companion case and  
23 if you look on August 14th of 2006, there's a letter  
24 ruling for Judge Nichols as to what he awarded for  
25 attorneys' fees and costs. You will see that he was not

1 kind to the Cable Huston Benedict firm in their claim.  
2 You will see that a very significant amount of that was  
3 chopped off. So that's really all I want to say about  
4 that.

5 In the response that I wrote you, I wanted to  
6 try to be true to your preliminary order and address the  
7 issues as you saw them. I also wanted to try to do  
8 something sensible and, unfortunately, what I had to do  
9 was to look at individual time entries, because that's  
10 really all that I have to go on. I wanted to make sure  
11 what was productive and what was nonproductive in both  
12 federal and state court. This is basically a  
13 segregation problem, as I pointed out in the brief.

14 Your Honor will recall that one of the  
15 attorneys' fee motions that was made was that this  
16 matter, this claim and my client's suit was so obviously  
17 flawed that the sellers believed that they were entitled  
18 to relief under CR 11 4.84.185.

19 If it was so obvious, one would have expected  
20 them to have made a summary judgment motion to you very  
21 early on. Your Honor could have expected that I would  
22 have come in and said, wait a minute, I need to do some  
23 discovery. Your Honor would likely have granted me that  
24 time and we would have then done the discovery that we  
25 would have had to do and Your Honor would have made the

1 ruling that Your Honor was going to make at that time.  
2 That's one of the themes that must be considered.

3 They started out with \$250,000 claim. They  
4 went to a \$278,000 claim. And, Your Honor, there's  
5 another contrast between this and the companion case, in  
6 the companion case we went through trial, an eight-day  
7 hotly contested trial. This is a summary judgment  
8 motion which is entirely different. They came up with  
9 \$278,000 if you include the last submission; now they're  
10 down to \$100,000. But approximately \$42,000 of that,  
11 Your Honor, is for the attorneys' fees claim.

12 Now, I want to talk about concepts and I want  
13 to talk about the concepts that I used in the response  
14 that I made. First of all, I believe that it's  
15 appropriate for an attorney to talk to a client and  
16 communicate with a client. I also believe that it is  
17 appropriate in this case to have awarded their responses  
18 to our discovery; in other words, production of  
19 documents primarily came from Mr. Higgins. There's also  
20 time in the Bullivant Houser Bailey records for that.  
21 Time spent sitting at depositions that I conducted.  
22 Obviously, filing an answer to a complaint.

23 Mr. Jessen passed in 2006 and we had to deal  
24 with substituting his estate for him, and both Mr. Dack  
25 and Mr. Higgins spent time in that and that's perfectly

1 appropriate. But there was a cross-claim that was made  
2 by the Maldonado entities and we don't believe that that  
3 time should be awarded because it's related to the  
4 seniority claim.

5 If we had chosen just to file the seniority  
6 claim and not the right of refusal claim, there would  
7 have been the same cross-claim or third-party claim at  
8 that point that would have been the same matters  
9 addressed to the sellers. There were issues concerning  
10 indemnity that were hotly -- well, if you look at the  
11 time entries, there was a lot of discussion about this.  
12 This is based upon the seniority claim and it's based on  
13 their cross-claim, the cross-claim of the Maldonados.

14 Now, there was time that was spent in getting  
15 this case to bankruptcy court and there was some time  
16 that's being claimed by both Mr. Dack and Mr. Higgins  
17 for that. They didn't have to join the motion,  
18 Your Honor. They didn't have to incur that time. That  
19 time was unproductive as the 9th Circuit told us in re:  
20 Ray.

21 Now, we get to the bankruptcy court. Well,  
22 there's time spent responding to our discovery and we've  
23 conceded that that should be awarded. There's basically  
24 the issue, the one issue that they move for summary  
25 judgment on, the only issue that they move for summary

1 judgment on was the preclusive effect of the  
2 November 2005 order of sale. That was it. That's the  
3 only thing that they made.

4 So what is not appropriate would be in  
5 September of 2007 through January of 2008 dealing with  
6 the tender of defense that the Maldonado entities made,  
7 time spent to talking with the clients about the  
8 companion case, which, frankly, in the fall of '87, I  
9 would submit was a very significant matter for the  
10 sellers. They had received an adverse preliminary  
11 ruling from Judge Nichols. They didn't like it. I  
12 understand they didn't like it and that was a major  
13 thrust of their concern at that time.

14 There's, I've noted, some time too for research  
15 on whether Mr. Ray's debts are dischargeable. I don't  
16 understand how that is related. I stand by the fact  
17 that Ms. Jackson's brief amount of time for organizing  
18 files for a mediation was unsuccessful should not be  
19 awarded, and Judge Nichols would probably concur with  
20 that.

21 There was some time that I've discussed that we  
22 don't even know what was going on because the time  
23 entries had some initial redactions. I've provided you  
24 with those redactions in the declaration that I filed  
25 from the affidavit that Mr. Mitchell filed in bankruptcy

1 court. We don't know what was going on and how that  
2 advanced the cause. I've used the term advance the  
3 cause because that's my paraphrase of what Your Honor's  
4 preliminary ruling was.

5 Reply to protective order motions. Your Honor,  
6 Mr. Feldman had already been deposed in the companion  
7 case telephonically. That's all we wanted. Yet we have  
8 thousands of dollars spent on responding to that and  
9 Judge Snyder agreed with us, we were not -- Mr. Feldman  
10 never was deposed in this case.

11 So now we get to where I think we should have  
12 started, that's my position, which is the summary  
13 judgment time that was spent beginning in, it appears,  
14 January of 2011 where we come back from bankruptcy court  
15 and we start working on the summary judgment.

16 Now, the total that is being claimed is  
17 \$19,900, approximately. I've set this out specifically  
18 in the response. Then we have -- and a good comparison  
19 is me. I'm -- well, I'm just one guy. I don't have a  
20 lot of people working with me on the case. Other than  
21 Mr. Higgins' deposition, I spent slightly more than 26  
22 hours on this. If we want to talk about how much, how  
23 many pages were spent, well, Your Honor, I wrote a very  
24 lengthy response, about three times the summary judgment  
25 motion.

1           Now, I spent about 26 hours and that includes  
2 time on the seniority claim, and we have 70.4 hours from  
3 this that they spent, about 50 hours with Russell  
4 Garrett. Now, they had already received decisions that  
5 talked about full faith in credit, that talked about the  
6 applicable bankruptcy statute. We have got they have  
7 received opinions both from the bankruptcy court and  
8 from the Bankruptcy Appellate Panel. What more do you  
9 need? What new cases were cited? What new research was  
10 done?

11           Then we get into the work that Mr. Anders does,  
12 and I have a great deal of respect for Mr. Anders and  
13 his abilities, but then I see that Mr. Garrett has to  
14 tell Mr. Anders what to do after Mr. Anders is already  
15 starting on working the brief, working on the brief, and  
16 then he has to spend 3.4 hours revising exactly what  
17 Mr. Anders is doing. This is the problem when you have  
18 multiple attorneys working on a matter.

19           This is the problem. The one attorney doesn't  
20 like the work that the other attorney has done. Both  
21 attorneys say that they're working on it, although we're  
22 not sure precisely what each of them was doing. But in  
23 the final analysis, this should have been easy. This  
24 should have been simple. This should have been a  
25 cut-and-paste.

1           Now, there are a couple of Mr. Garrett's  
2 entries that caused me some concern. And I consider  
3 Mr. Garrett a professional friend - I hope he feels the  
4 same way - and it was more concern for Mr. Garrett than  
5 anything else. He put in 2.6 hours to review a 54-page  
6 deposition. That's 54 pages of questions and answers.  
7 Now, I can read that in five minutes. I can review it  
8 carefully in about a half an hour, and, Your Honor,  
9 Mr. Garrett was at that deposition. He knows exactly  
10 what Mr. Higgins said or can remember it.

11           And then I saw on June 1st that he has an entry  
12 about how he has to get the transcript from the court  
13 reporter and then that's an issue of frustration for  
14 him, if you look at that entry, but then, isn't that the  
15 deposition that he reviewed two weeks earlier? It's  
16 hard to understand.

17           They spent 12 hours, 12.5 hours, as near as I  
18 can tell, on a response to a motion to strike. The  
19 motion to strike was, Your Honor will recall, they put  
20 in a bunch of court opinions, and I said let's consider  
21 those only for what the course of proceedings was,  
22 simple, simple evidentiary issue. 12.5 hours to respond  
23 to that. I would submit that that is unproductive and  
24 should not be an excessive.

25           Now, we have post-decision time, and on the

1 post-decision time both Mr. Matson and Mr. Garrett are  
2 involved, both of them review the opinion, both of them  
3 talk to each other. Mr. Garrett spends 1.8 hours to  
4 read the decision and consider going for a motion to  
5 attorneys' fees that would have, first of all, would  
6 have been obvious that you're going to go for a motion  
7 for attorneys' fees once you win, and I question whether  
8 it would take 1.8 hours to read Your Honor's decision.  
9 Both Mr. Matson and Mr. Garrett prepared memos  
10 concerning the decisions and they sent them to each  
11 other.

12 Now, on Page 24 I have suggested that the sum  
13 of \$9900 is reasonable, and this is based upon the  
14 amount of time that I spent. And, Your Honor, I'm not a  
15 bankruptcy expert, I don't pretend to be a bankruptcy  
16 expert, but I'm doing the best I can, and if I can get  
17 everything that I did done in approximately 26 hours,  
18 it's hard for me to see how anyone, how it would take a  
19 bankruptcy expert like Mr. Garrett any more time than  
20 that. Now, I've also conceded certain time there and  
21 I've spelled this out in my brief, but the time that was  
22 spent on this is simply excessive.

23 Now we come to the attorneys' fees question.  
24 Now, according to my calculator - and my calculator lies  
25 to me sometimes, Your Honor, so, you know, if somebody

1 has a different number, that's fine - but I get  
2 \$42,407.50 in attorney time devoted to the attorneys'  
3 fees question. They prepared and struck one motion for  
4 attorneys' fees. They came with another and they spent  
5 time talking about CR 11 4.84.185.

6 You made a preliminary ruling that I would  
7 submit and that I think that the sellers concede would  
8 require exclusion of most of what the sellers were  
9 claiming. It's now down to about a quarter of what they  
10 were claiming on substantive issues or about 57,000.  
11 They want all of that time. I can't imagine a better  
12 definition of unproductive time.

13 This should have been segregation done with a  
14 scalpel by an experienced attorney. Now, that's finally  
15 what happened, and I applaud Mr. Matson for taking up  
16 the cudgel and doing exactly that, which according to  
17 his time entries he did on November 30 of 2011.  
18 Basically what he did was that he went through all the  
19 time entries and he figured out really what should be  
20 awarded.

21 He didn't involve Mr. Boyer, the younger lawyer  
22 who was initially involved in the task. He didn't see  
23 the need to talk to Todd Mitchell about it or anybody  
24 else for that matter. But what he had to do is that he  
25 had to construct a timeline of everything that had

1 occurred in this case.

2 And as he told you the last time that we were  
3 here, and I understand this point, that's because he was  
4 not the guy who was involved in the trenches doing the  
5 work at that time. Now, I don't fault him for that, not  
6 at all. The point is that he had to get himself  
7 up-to-speed on that issue because of certain problems  
8 within his firm. Battle Ground Plaza, LLC, should not  
9 have to pay for that.

10 Now, I suggested that about four hours at his  
11 rate should be allowed. Your Honor, I've done complex  
12 fee applications that require significant segregation.  
13 I can do it in less, much less. The point being that I  
14 believe four hours under the circumstances is more than  
15 fair. Now, there are certain things that are claimed  
16 within the time, the more recent time.

17 I think it's Exhibit 15, right, 15?

18 MR. MATSON: Uh-huh. I think so.

19 MR. SHAFTON: All right. There's certain time  
20 for dealing with the claim for attorneys' fees that's  
21 being made by the Maldonado entities. And, frankly, for  
22 the claim made by the Maldonado entities for  
23 indemnification, we don't think that that should be  
24 awarded.

25 They made a motion for reconsideration.

1 Your Honor can consider my response because it was  
2 asking you to reconsider your ruling on the basis that  
3 you hadn't ruled and to refute an argument that we  
4 hadn't made. The motion for reconsideration was denied.  
5 I can't imagine a better example of time that was  
6 unproductive.

7 Now, I want to turn to costs. There are - and  
8 I will stand on my brief with that - we have a couple of  
9 different problems. We have things for overhead,  
10 copies, fax, legal research, stuff like that that are  
11 office overhead. We have things for that were incurred  
12 specifically with bankruptcy court proceedings. There  
13 are a couple of entries for travel and hotel bills.  
14 That's Mr. Garrett going to argue in Seattle for the BAP  
15 and the 9th Circuit. There are other issues, we're not  
16 told what they're for, we just don't know. Well, we're  
17 not given any invoices, we're not told when they were  
18 incurred, you know, we're not told anything about them.

19 I want to turn to computerized research because  
20 I'm obliged to advise you of the following thing.  
21 There's a case called Absher Construction vs. The Kent  
22 School District, I believe it's in 79 Washington  
23 Appeals, I could be wrong about the book. Absher is  
24 spelled A-b-s-h-e-r. This is a 1995 case from Division  
25 I in which computerized legal research was approved, and

1 I, in looking through it for another case, I found that  
2 and I'm obliged to advise the Court of that.

3 This was something -- this was a decision in  
4 1995, and I don't think that this decision should be  
5 controlling at this time because there have been a lot  
6 of changes since 1995. In our office, we don't have the  
7 Washington Reports or the Washington Appellate Reports  
8 anymore. The reason is that we'd rather have West Law  
9 to look at these. Computerized legal research is what  
10 everybody does, and we don't charge our clients for it  
11 and we don't think that anybody else should.

12 Now, I want to turn to the issue of offset.  
13 I've discussed that in my brief. Now, the only person,  
14 the only entity that came out of bankruptcy court with a  
15 judgment in its favor is Battle Ground Plaza, LLC. Now,  
16 it's not going to be a judgment as such. It's going to  
17 be an order allowing restitution. But we came out of  
18 there with something positive, that the sellers have to  
19 give us 87-odd-thousand dollars back for what we paid  
20 them in attorneys' fees together with some munificent  
21 amount of interest that the federal statute allows. We  
22 prevailed. There's about \$5200, you can see that in my  
23 declaration and that should be an offset. We shouldn't  
24 have been in bankruptcy court in the first place. We  
25 just shouldn't have been there and we shouldn't have had

1 to appeal the jurisdiction issue, and it's fair for us  
2 to receive an offset for that.

3 Now, I've tried to give Your Honor a very  
4 detailed, a detail-oriented presentation in my response.  
5 If you have any questions about it, I'm happy to answer  
6 them, but I've tried to lay this out in as much detail  
7 in my papers as I've put, and I stand on that. That's  
8 all I have.

9 THE COURT: All right. Thank you, Mr. Shafton.

10 And Mr. Shafton may have taken a couple of  
11 minutes over, if you had just a very brief response.

12 MR. MATSON: I'll try to be brief, Your Honor.

13 MR. SHAFTON: And I apologize.

14 THE COURT: Oh, no. I'm just saying it may  
15 have been like five minutes or something, anyway.

16 MR. MATSON: I want to go back to Bowers,  
17 Your Honor. We are not saying that the lodestar  
18 methodology applied in the contract case is wrong.  
19 That's not what we're saying. What we are saying is you  
20 could look at Bowers, that was a Consumer Protection Act  
21 claim.

22 The attorney fees in that case were decided on  
23 the language based on the Consumer Protection Act. The  
24 Loeffelholz case, that was decided on another set of  
25 statutes, so that the pronouncements and the nuances

1 that come out of those cases are constrained to the  
2 statutes they're interpreted and they cannot overcome  
3 contract language to the contrary. That's what I'm  
4 saying. They have to be harmonized.

5 Just because defendants did prevail on some  
6 obscure argument somewhere doesn't mean that time was  
7 unproductive. The motion to dismiss coming out of this  
8 court which led to the remand to the bankruptcy court  
9 back in 2006 is a perfect example. Yes, eventually that  
10 was proved to be the wrong legal decision.

11 But every step along the way, the parties, all  
12 but the plaintiff, agreed that it was the right place to  
13 be. This court agreed that it was right and reasonable  
14 to remand it. The bankruptcy judge commented that it  
15 was reasonable for that reaction to have occurred. And  
16 when it got to the 9th Circuit, the very first line of  
17 their opinion was this is a case of first impression.

18 And in their opinion they don't quibble or  
19 quarrel with the underlying results on the merits, they  
20 just deal with the jurisdictional issue and they say  
21 it's a case of first impression. So that wasn't  
22 unproductive time. It was time well thought by  
23 litigants on a very unique matter and it had to be  
24 resolved somewhere, somehow. It's not unproductive  
25 time.

1           They take they claim that their fee petition  
2 was so high in the companion case because they went  
3 through an eight-day trial, we did everything but that  
4 here and yet their claim was three times as high. We  
5 had five and a half years of litigation. We had  
6 discovery. We had depositions. We had numerous trips  
7 to court in who knows how many different venues and we  
8 had sophisticated dispositive motion briefing. We did  
9 everything here but go to trial.

10           I talked about why I thought the cross-claims  
11 were recoverable and I stand on that. It's based on the  
12 language of the PSA, the purchase and sale agreement.  
13 Again, that is not unproductive time. That is  
14 litigation we were drawn into because of the contract  
15 and we had to fight that off. And the only reason we're  
16 there is because of the contract that existed between us  
17 and Battle Ground Plaza.

18           They comment that the time spent analyzing  
19 whether Ray's debts were dischargeable should not be  
20 recoverable. That's a very important underlying issue  
21 and threshold issue that had to be addressed. We had to  
22 address whether or not his claims or claims against Ray  
23 had been discharged right off the bat. He was a  
24 defendant. He had been in bankruptcy court. We had to  
25 look at that issue.

1           They continue to hammer on the time spent on  
2 the motion for summary judgment on the right of first  
3 refusal claim here in state court. I've done this math,  
4 and you'll have to take my word for it or do it  
5 yourself, but I wondered whether we spent more, not  
6 counting the legal research but counting the briefing  
7 from the day we stopped researching and the day we  
8 started putting that motion together, and we spent more  
9 money in bankruptcy court on that issue than we spent in  
10 state court.

11           So this is, I mean -- and that involved other  
12 attorneys -- well, it involved Mr. Garrett, but I don't  
13 think Mr. Anders was even with the firm at that time, so  
14 it involved different people. And the point is we spent  
15 less on that motion here notwithstanding plaintiff's  
16 criticism of how the time was spent.

17           The Court -- he spent, he complained about 12  
18 hours in our response to motion to strike. That's in  
19 the record. You can look at that. As I recall, I had  
20 to look at that because either Mr. Garrett was out of  
21 town or Mr. Mitchell was gone or something, I don't  
22 remember, but it wound up on my desk. And as I recall,  
23 that was a fairly well briefed response. I think we  
24 went into detail, you know, we don't know what they're  
25 being offered for, but, you know, we looked at each

1 issue. We looked at each evidentiary rule that might be  
2 implicated and we wanted to make our record, and I don't  
3 think we'll back off from that.

4 I became involved -- and Mr. Shafton criticized  
5 time because Russ Garrett and I were involved on about  
6 the timing issue when he came in. The reason that  
7 occurred is because at that point Mr. Mitchell had left  
8 the firm and the clients had decided that they wanted me  
9 to supervise not just this file but both files, and it's  
10 important to understand what's going on in this case and  
11 at the same time you understand what's going on in the  
12 other case.

13 These are very closely related cases involving,  
14 you know, the same plaintiff in both cases and most of  
15 the same, you know -- certainly our clients are deeply  
16 involved in both sides. They involve the same piece of  
17 property. And from a strategy and case management  
18 standpoint, I think that time was absolutely justified.

19 Let's see. What else. Talking about the  
20 attorney fees, we did prepare a motion and strike it.  
21 We struck it so that we could brief a whole host of new  
22 arguments. I don't mean to criticize the civil  
23 procedures over here, but they don't lend themselves  
24 well to doing -- to litigating complex issues like this  
25 because they don't allow for reply, and so often lots of

1 new issues come up in a response that you don't plan on  
2 it. You don't expect them for legitimate reasons and  
3 they have to be dealt with. So it's not like we threw  
4 that one in the garbage can. We withdrew it and then we  
5 supplemented it based on new argument that came out of  
6 Battle Ground Plaza's response to the initial motion.

7 The timeline, yes, it is a complicated case,  
8 five and a half years through various courts. It's  
9 important to understand that things are going on  
10 simultaneously in each court at different times, not at  
11 all times certainly, but at different times.

12 There's, you know, Mr. Shafton's filing his  
13 motion for summary judgment on seniority claim here  
14 after the case went to bankruptcy court. So you got to  
15 understand what's going on in what case, and I did that  
16 as much for my benefit as much for the Court's benefit,  
17 because certainly the Court needed the same framework to  
18 hang this thing on that I did to be able to consider the  
19 issues being raised.

20 And finally I want to - I wasn't there but I've  
21 been told by either Garrett, or not Garrett, probably  
22 Mitchell - that in the context of litigating the  
23 plaintiff's motion for attorney fees in the companion  
24 case before Judge Nichols, at the end in granting the  
25 motion that plaintiff had, he used a basketball analogy

1 - and Mr. Shafton can correct me if I'm wrong - but this  
2 is the way it's been told to me. He says, you know, at  
3 halftime, the visiting team was ahead and at the end of  
4 the game the home team was ahead and at the end of the  
5 game the home team prevailed.

6 And just like in this case, at the time the  
7 case came out of bankruptcy court, BGP was ahead, but at  
8 the end of the day, Ray and Jessen were the prevailing  
9 parties and they are entitled to recover for their  
10 efforts in this very hotly contested and challenging  
11 case. Thank you.

12 THE COURT: And it is challenged.

13 MR. SHAFTON: I have --

14 THE COURT: Go ahead.

15 MR. SHAFTON: -- three sentences. It's an  
16 interesting analogy about basketball and we can go to  
17 the record, but I don't remember saying that.

18 MR. MATSON: No, I think Judge Nichols -- it  
19 was told to me Judge Nichols said it.

20 MR. SHAFTON: Oh, okay. All right.

21 MR. MATSON: I didn't attribute it -- if I  
22 attributed it to you, I apologize.

23 MR. SHAFTON: Yeah. All right.

24 Anyway, one point, at the time where they were  
25 discussing, at the time that they were researching

1 whether Ray's obligation was discharged in bankruptcy,  
2 Mr. Ray was represented by Mr. Higgins, he was not  
3 represented by the Bullivant Houser Bailey firm. The  
4 next point, and this is a theme, you shouldn't get  
5 attorneys' fees on matters where you lose. That's all I  
6 have.

7 THE COURT: Well, that was only two.

8 MR. SHAFTON: The third one --

9 THE COURT: The third was the basketball.

10 Okay.

11 MR. SHAFTON: -- was the basketball thing.

12 THE COURT: The one thing I've learned in the  
13 process of this that I don't think I've commented on  
14 earlier is that I'm advised that the clerks in federal  
15 court, law clerks, are trained that the first thing they  
16 look at and focus on is whether the court has  
17 jurisdiction or not. So we don't really even have that  
18 as an issue for the most time, except I did --

19 MR. MATSON: Or staff to do it.

20 THE COURT: Well, that's true, too. We don't  
21 have staff to do it. But I recently decided that we do  
22 not have jurisdiction in Superior Court initial  
23 jurisdiction, we probably don't have initial  
24 jurisdiction as to an infraction.

25 MR. SHAFTON: I think you're right.

1 THE COURT: At least we don't have any rules or  
2 anything --

3 MR. SHAFTON: Did somebody try to bring a --

4 THE COURT: A prosecutor tried to -- well, they  
5 tried to amend a felony drug case --

6 MR. SHAFTON: Oh.

7 THE COURT: -- to --

8 MR. SHAFTON: To what?

9 THE COURT: -- dismiss it but to file it, amend  
10 it as to an infraction and they wanted Superior Court to  
11 go ahead and hear the infraction.

12 MR. SHAFTON: Which infraction was that?

13 THE COURT: Oh, it's something -- apparently  
14 it's very popular in District Court now. I have the RCW  
15 on it somewhere, but it's something about exchanging  
16 something in a public park or something like that. I  
17 don't know.

18 MR. SHAFTON: If you go to Article 7 and you  
19 talk about the infraction procedure, it's pretty clear.

20 THE COURT: It's all statutorily designed for  
21 District Court and Municipal Court, limited jurisdiction  
22 courts, but that's about the only time we get to say  
23 that.

24 MR. MATSON: Your Honor, can I trouble you to  
25 sign a dismissal order in another matter?

1 THE COURT: Certainly. Certainly. And I'll  
2 advise counsel on my ruling. I have, unfortunately  
3 including this one now, two very complex attorney fees  
4 issues which I need to rule on, so I thought it might be  
5 beneficial to review both and the case law and so on  
6 which seem to be something of a trend of being sometimes  
7 more substantial than the issues in the case, that's not  
8 really the issue here, but I signed the order of  
9 dismissal brought by the plaintiff.

10 MR. MATSON: Thank you. Appreciate that.

11 THE COURT: And I will take under advisement  
12 and advise counsel.

13 MR. MATSON: Thank you, Your Honor.

14 MR. SHAFTON: Thank you, Your Honor.

15 THE COURT: Thank you.

16 MR. SHAFTON: Have a good weekend.

17 THE COURT: Thank you.

18 (At 11:46 a.m. taped proceedings concluded.)

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CERTIFICATE

STATE OF WASHINGTON )  
 ) ss.  
COUNTY OF CLARK )

I, Cindy J. Holley, a Certified Court Reporter for Washington, hereby certify that pursuant to the Washington Administrative Code 308-14-135, I reported in stenotype from a CD all testimony adduced and other oral proceedings had in the foregoing matter; that thereafter my notes were reduced to typewriting under my direction; and the foregoing transcript, Pages 1 to 42, both inclusive, constitutes a full, true and correct record of such testimony adduced and oral proceedings had and of the whole thereof.

I do further declare and certify that I am in no way related to or employed by any party in this matter, nor to any counsel, nor do I have any interest in this matter.

I further advise you that as a matter of firm policy, the Stenographic notes of this transcript will be destroyed three years from the date appearing on this Certificate unless notice is received otherwise from any party or counsel hereto on or before said date.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Washington State CCR Seal this 11th day of April, 2013.

*Cindy J. Holley*  
\_\_\_\_\_  
Certified Court Reporter No. 2416  
in and for the State of Washington,  
residing at Vancouver, WA.  
My CCR certification expires 10/25/13

