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**COURT OF APPEALS, STATE OF WASHINGTON
DIVISION III**

CASE NO. 286827

JACK KRYSTAL,

Appellant,

vs.

THOMAS R. DAVIS and STAT NETWORK SOLUTIONS, LLC,

Respondents

and

LANCE B. HAYNIE,

Defendant.

AMENDED BRIEF OF RESPONDENTS

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Attorneys for Respondents
Davis and Stat Network Solutions**

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A. Assignments of Error

Respondents Thomas R. Davis and Stat Network Solutions, LLC have no Assignments of Error.

B. Respondents' Statement of the Case

By and large, the facts relevant to this are set forth in the Findings of Fact, Conclusions of Law and Entry of Judgment in Favor of Defendants Davis and Stat Network Solutions, LLC (CP 423-429) entered by Judge Paul Bastine on November 18, 2009, following a four-day bench trial from October 12-15, 2009. The twenty-five Findings of Fact approved by Judge Bastine are as follows:

“1. Sometime in the spring of 2003, defendant Lance B. Haynie (hereinafter, "Haynie") and plaintiff Jack Krystal engaged in discussions regarding possible future business dealings between them. Exhibit P-1 is a copy of Haynie's handwritten notes relating to those discussions, which were unsigned prior to December 13, 2003.

2. Stat Network Solutions, L.L.C., (hereinafter “Stat Network”) was organized with the assistance of attorney Cynthia Schwartz on June 4, 2003 as a Washington limited liability company.

3. At the time the Stat Network was being organized, Ms. Schwartz was advised that defendant Lance B. Haynie was to be the sole Member, owning 100% of the shares.

4. Section 7, ¶ 7.2 of the original Limited Liability Company Agreement (hereinafter “LLC Agreement”) drafted by Ms. Schwartz and executed by Haynie on June 4, 2003 (Exhibit P-2) states, in pertinent part:

Transfer to a Third Party, Right of First Refusal: A Member may not withdraw and no Membership Interest may be transferred to a third person without first obtaining the written consent of all of the remaining Members.

5. The Stat Network LLC Agreement identifies Lance B. Haynie as the sole Member of the limited liability company at its inception, owning 100% of the shares.

6. On June 15, 2003, Diversified Realty Services, a California corporation controlled by Jack Krystal, loaned the sum of \$20,000.00 to LBH Communications, Inc., and to Lance B. Haynie, individually, as joint and several Makers. On this and on other promissory notes from Diversified Realty Services, Lance B. Haynie was

identified as the President of LBH Communications, Inc.

7. On August 19, 2003, Haynie transferred a 5% Membership Interest in Stat Network to Cory Colvin, and a 5% Membership Interest to Michael Funk, as part of the consideration for an Asset Purchase Agreement which was executed by Haynie, Colvin and Funk on that date.

8. As of August 19, 2003, immediately prior to the transfers of Membership Interests to Colvin and Funk, Haynie was still the only Member of Stat Network.

9. On August 19, 2003, Haynie also executed Company Minutes (Exhibit P-7), prepared by Ms. Schwartz, which acknowledged the admission of Colvin and Funk as Members of Stat Network.

10. On August 26, 2003, Diversified Realty Services loaned the sum of \$100,000.00 to LBH Communications, Inc., and to Lance B. Haynie, individually, as joint and several Makers.

11. On October 27, 2003, Diversified Realty Services loaned the sum of \$25,000.00 to LBH Communications, Inc., and Lance B. Haynie, individually, as joint and several Makers.

12. In approximately November of 2003, at the request of Haynie, Ms. Schwartz drafted two sets of proposed Company Minutes: the first (Exhibit P-5), purporting to admit Jack Krystal as a Member with a 30% interest as of an unspecified date in August of 2003; and the second (Exhibit P-10), identifying Lance B. Haynie, Jack Krystal, Cory Colvin and Michael Funk as Members in attendance, and referring to a meeting of the Members of Stat Network which was to have taken place on an unspecified date in November of 2003.

13. Both sets of proposed Company Minutes (Exhibits P-5 and P-10) were sent by Ms. Schwartz to Haynie as e-mail attachments, and both documents were received in that form by Jack Krystal.

14. Sometime prior to December 16, 2003, a typewritten document entitled "LBH Communications: Deal Points" (Exhibit P-12) was prepared by Michael Funk at the request of Lance Haynie, based upon Haynie's handwritten notes from the spring of 2003 (Exhibit P-1).

15. On December 16, 2003, Lance Haynie and Jack Krystal signed the handwritten notes (Exhibit P-1) and the typewritten "LBH

Communications: Deal Points” document (Exhibit P-12).

16. On January 7, 2004, Ms. Schwartz, who was at that time maintaining the Stat Network Minute Book, advised Haynie by letter (Exhibit D-108) that she had not received signed copies of the proposed Company Minutes.

17. The Court finds that neither of the proposed Company Minutes (Exhibits P-5 and P-10) was ever signed by Cory Colvin, Michael Funk, or Lance B. Haynie, and that neither the Meeting described in Exhibit P-5 nor the Meeting described in Exhibit P-10 ever took place.

18. The Court finds that Jack Krystal did not at any time directly contact attorney Cynthia Schwartz to ask for her assistance in procuring signatures on the proposed Company Minutes.

19. In late July, 2004, Lance Haynie and defendant Tom Davis executed a document entitled "Deal Points" (Exhibit P-14), whereby Haynie agreed, among other things, to transfer to Tom Davis a 50% Membership Interest in Stat Network, in consideration for payment of \$650,000.00.

20. In addition, the July 29, 2004 "Deal Points" agreement between Haynie and Davis contemplated that Jack Krystal would be paid in full for any amounts that he had loaned Stat Network, that the company would have no significant debts, and that Lance Haynie would own the remaining 50% Membership Interest.

21. As of July 29, 2004, Cory Colvin and Michael Funk had not given their consent, in writing, to the transfer of a Membership Interest in Stat Network from Lance Haynie to Jack Krystal.

22. On August 16, 2004, Lance B. Haynie satisfied the Diversified Realty Services promissory notes dated June 15, 2003, August 26, 2003 and October 27, 2003, respectively, by paying those promissory notes in full, with interest.

23. In December of 2004, Cory Colvin and Michael Funk gave written consent (Exhibit D-114) to the transfer of a 50% Membership Interest in Stat Network from Lance Haynie to Tom Davis, and ratified Mr. Davis' admission as a Member of Stat Network, effective August 1, 2004.

24. The Court finds that Jack Krystal has never made a capital contribution to Stat Network, LLC.

25. The Court further finds that, as of this date, Cory Colvin, Michael Funk and Thomas Davis have never given their consent, in writing, to the transfer of a Membership Interest in Stat Network from Lance Haynie to Jack Krystal, as described in Section 7, ¶ 7.2 of the Limited Liability Company Agreement.”

To the extent that it may be necessary to cite to the underlying record in order to respond to certain of Appellant's contentions, those citations will appear in the appropriate sections of the Argument.

C. Argument

I. AS TO FINDINGS OF FACT THAT ARE CHALLENGED IN ASSIGNMENTS OF ERROR AND SET FORTH VERBATIM IN THE BRIEF OF APPELLANT, THE STANDARD FOR REVIEW IS LIMITED TO DETERMINING WHETHER SUBSTANTIAL EVIDENCE SUPPORTS THE FINDINGS IN QUESTION.

In reviewing factual determinations by a trial court sitting without a jury, the role of an appellate court is limited to determining whether

substantial evidence supports the trial court's findings of fact. *Hegwine v. Longview Fibre Co., Inc.*, 132 Wn.App. 546, 555, 132 P.3d 789 (2006), *aff'd*, 162 Wn.2d 340, 172 P.3d 688 (2007). Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person that a finding is true. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). The appellate court will view the evidence in the light most favorable to the prevailing party, and defer to the trial court on issues regarding credibility of witnesses and resolution of conflicting testimony. *Weyerhaeuser v. Tacoma-Pierce County Health Department*, 123 Wn.App. 59, 65, 96 P.3d 460 (2004).

1. **Findings of Fact Which Are Not Identified Separately in Assignments of Error And Findings of Fact Which Are Not Set Forth Verbatim in the Brief of Appellant Are Treated As Verities on Appeal.**

As mentioned previously, Judge Bastine made twenty-five findings of fact, after four days of trial. CP 423-427. On appeal, no finding of fact is challenged or identified in any of Appellant's Assignments of Error,

and only two of Judge Bastine's Findings of Fact -- Nos. 17 and 18 -- are specifically referenced by number in the Brief of Appellant.

In order to challenge a finding of fact, an appellant must comply with both RAP 10.3(g) and RAP 10.4(c). RAP 10.3(g) requires a separate assignment of error for each finding of fact a party contends was improperly made, with reference to the challenged finding by number. RAP 10.4(c) further requires a party challenging a finding of fact to type the material portions of the text of the finding in question, or to include the text in an appendix to the brief. Although the latter rule speaks in terms of what a party should do, the word 'should' in RAP 10.4(c) "...is a word of command, not merely a suggestion." *Thomas v. French*, 99 Wn.2d 95, 99, 659 P.2d 1097 (1983)

As the Supreme Court noted in *Murphy v. Lint*, 135 Wn.2d 518, 531-32, 957 P.2d 755 (1988), these rules are not merely a technical nicety. Unchallenged findings are considered verities on appeal. *Nearing v. Golden State Foods Corp.*, 114 Wn.2d 817, 818, 792 P.2d 500 (1990). Moreover, findings which are not referenced in the assignments of error and set forth in the body of the brief as required by RAP 10.3(g) and RAP 10.4(c), respectively, are treated in the same

manner as unchallenged findings. *Matter of Estate of Pflagher*, 35 Wn.App. 844, 846, 670 P.2d 677, 679 (1983).

2. **All Twenty-Five of the Findings of Fact Approved by Judge Bastine on November 18, 2009, Should Be Treated As Verities on Appeal.**

Consistent with the foregoing rules, inasmuch as Appellant failed to assign error to any of the twenty-five Findings of Fact approved by Judge Paul Bastine on November 18, 2009, and inasmuch as Appellant failed to set forth verbatim in his initial brief any of the aforementioned Findings of Fact, all of those findings of fact should be treated as verities for the purpose of this appeal.

3. **The Mere Mention of Findings of Fact Nos. 17 And 18 in the Brief of Appellant Is Insufficient to Comply With the Mandates of RAP 10.3(g) and RAP 10.4(c).**

Although Findings of Fact 17 and 18 were neither referenced in any assignment of error nor set forth verbatim in the Brief of Appellant, those two Findings of Fact -- unlike any others -- were at least identified by number in Appellant's brief. Counsel for Mr. Krystal has on appeal

suggested that these findings "... merely set up the remainder of the Court's decision." Brief of Appellant, p. 18.

The practical basis for counsel's concern about the findings in question -- that they reinforce other findings of fact which demonstrate that Jack Krystal never complied with the requirements of the Stat Network operating agreement to be admitted as a member of the limited liability company, and that he did little if anything to correct that omission after he became aware of it -- is apparent; however, the legal basis for counsel's criticism of the findings in question is not discernible. In light of Appellant's disregard of the separate mandates of RAP 10.3(g) and RAP 10.4(c), this Court should decline to consider any arguments on the merits relating to those two findings of fact. That being said, in the unlikely event that this Court should choose to review these findings as though they had been properly challenged, that review should be accomplished on a summary basis.

4. **It Is Beyond Reasonable Dispute That There Was Substantial Evidence Supporting Finding of Fact No. 17.**

Finding of Fact No. 17 indicates that neither of the proposed Stat Network Minutes prepared by attorney Cynthia Schwartz (Exhibits P-5 and P-10) was ever signed by Cory Colvin, Michael Funk, or Lance B. Haynie, and that neither the Meeting described in Exhibit P-5 nor the Meeting described in Exhibit P-10 ever took place. As demonstrated below, this finding by the trial court was supported by substantial evidence – indeed, overwhelming evidence -- introduced on this subject at trial.

Attorney Cynthia Schwartz testified to the effect that, some time after Mr. Colvin and Mr. Funk were admitted as Members, she drafted Minutes at the request of Lance Haynie for the purpose of admitting Jack Krystal as a Member of Stat Network. RP 199-200, 205-207, Exhibits P-5 and P-10. Ms. Schwartz further testified to the effect that she sent the draft Minutes to Mr. Haynie, and that she never received signed copies, despite several follow-up letters, one of which was Exhibit D-108. RP 200-202, 207-208.

Cory Colvin testified to the effect that, at the time he purchased his interest in the company, his understanding was that Jack Krystal's only involvement with Stat Network was as a lender. RP 218. Mr. Colvin further testified that he was never asked to give his consent to

admission of Jack Krystal as a Member of Stat Network, (*Id.*); that he never signed any document agreeing that Jack Krystal could become a Member (*Id.*); and that he never signed a document ratifying Jack Krystal as a Member (*Id.*).

Mike Funk, who testified to the effect that he assumed that Jack Krystal had an ownership interest in Stat Network, also admitted that he had never signed any document admitting Jack Krystal as a Member of the limited liability company. RP 131-132.

Lance Haynie acknowledged at trial his previous deposition testimony, given under oath, to the effect that no meeting had taken place in which Haynie, Cory Colvin and Mike Funk had discussed Mr. Krystal becoming a Member of Stat Network; that he had never signed meeting Minutes admitting Mr. Krystal as a Member; and that Jack Krystal had told him not to sign the meeting Minutes, because their deal had changed. RP 268-272.

Finally, Jack Krystal himself testified that he had never seen a signed copy of the Stat Network meeting Minutes in question. RP 330-332, Exhibits P-5 and P-10. Consistent with all of the foregoing testimony, Exhibits P-5 and P-10, offered by Mr. Krystal at the time of trial, were unsigned.

5. It Is beyond Reasonable Dispute That There
Was Substantial Evidence Supporting Finding of
Fact No. 18.

Finding of Fact 18 reflects that Jack Krystal did not at any time directly contact attorney Cynthia Schwartz to ask for her assistance in procuring signatures on the proposed Company Minutes. Once again, this finding by the trial court is based upon substantial evidence introduced at trial.

Attorney Cynthia Schwartz prepared the Limited Liability Company Agreement of Stat Network Solutions, LLC (hereinafter referred to as the "Stat Network Operating Agreement") at the request of Lance Haynie. RP 193-195, Exhibit P-2. Ms. Schwartz testified to the effect that, at the time she formed the limited liability company and prepared its operating agreement, she understood that Lance Haynie was the only Member of the LLC. RP 204. She also testified to the effect that, in face-to-face discussions with Mr. Krystal during face-to-face discussions prior to the admission of Cory Colvin and Mike Funk as Members of Stat Network, Mr. Krystal did not claim to be a Member (RP 205); and that Lance Haynie signed Minutes formally admitting Mr. Colvin and Mr. Funk as Members, as required in the Stat Network Operating Agreement (RP 207).

Attorney Schwartz further testified that, after Mr. Colvin and Mr. Funk were admitted as members, she did not talk directly with Mr. Krystal -- her conversations were with Lance Haynie. RP 205-206. Moreover, Ms. Schwartz was not able to recall receiving any e-mail messages directly from Mr. Krystal, although she did recall seeing copies of e-mail messages between Mr. Krystal and Mr. Haynie. RP 203, 206. Mr. Krystal did not offer any documentary evidence at trial to contradict this testimony -- just a single e-mail message from Jack Krystal to Lance Haynie dated November 22, 2003, responding to a prior e-mail message from Ms. Schwartz to Mr. Haynie dated November 17, 2003 (P-11).

In short, there is ample evidence to support both of the findings of fact criticized by appellant's counsel. To the extent that the findings in question required consideration of any conflicting or less-than-certain testimony, resolution of those conflicts and uncertainties was a matter within the sound discretion of the trial court, sitting as finder of fact, and is not a proper matter for review by an appellate court.

6. **Appellant Has Failed to Establish Any Basis for
Appellate Review of Rejected Findings of Fact.**

Findings of fact need not be made concerning every contention made by parties to a case. *Daughtry v. Jet Aeration Co.* 91 Wn.2d 704, 707, 592 P.2d 631, 632 (1979); *State v. Bastinelli*, 81 Wn.2d 947, 949, 506 P.2d 854 (1973). *See also Miller v. Geranios*, 54 Wn.2d 917, 919, 338 P.2d 763 (1959); *Hering v. Department of Motor Vehicles*, 13 Wn.App. 190, 192, 534 P.2d 143 (1975). Although the trial court has a duty to enter findings of fact on all material issues in the case, *Federal Signal Corp. v. Safety Factors, Inc.*, 125 Wn.2d 413, 422, 886 P.2d 172 (1994), the court does not err by rejecting a party's proposed findings if substantial evidence supports findings that address the material issues. *Allen v. Seattle Police Officers' Guild*, 32 Wn.App. 56, 69, 645 P.2d 1113 (1982), *aff'd*, 100 Wn.2d 361, 670 P.2d 246 (1983).

In the case at bar, the twenty-five findings of fact entered by the trial court on November 18, 2009 address all of the material issues in the case. Because Appellant has not assigned error to any of these finding of facts, they are deemed to be supported by substantial evidence, as a matter of law. With respect to the proposed findings of fact that were rejected by Judge Bastine -- all of which could easily have been rejected

on grounds of immateriality, redundancy, resolution of disputed evidence, or argumentative editorial comment on the evidence -- appellant's "shotgun approach" to this issue (both at trial and on appeal), combined with his failure to assign error to the trial court's rejection of any particular finding of fact, has made it impossible to discern -- much less systematically address -- his concerns, other than to state that appellant has failed to set forth any legal authority to demonstrate that any particular finding of fact was improperly rejected.

As we have noted previously, findings which are not referenced in the assignments of error and set forth in the body of the brief as required by RAP 10.3(g) and RAP 10.4(c), respectively, are treated in the same manner as unchallenged findings. *Matter of Estate of Pflregar*, 35 Wn.App. 844, 846, 670 P.2d 677, 679 (1983). These rules apply equally to proposed findings of fact that are rejected by the trial court. *Stewart v. Hammond*, 78 Wn.2d 216, 220, 471 P.2d 90 (1970); *El Cerrito, Inc. v. Ryndak*, 60 Wn.2d 847, 376 P.2d 528 (1962). Consistent with that principle, all of the findings of fact rejected by the trial court should be deemed properly rejected.

II. AS TO CONCLUSIONS OF LAW THAT ARE CHALLENGED IN ASSIGNMENTS OF ERROR AND SET FORTH VERBATIM IN THE BRIEF OF APPELLANT, THE STANDARD FOR REVIEW IS LIMITED TO DETERMINING WHETHER THE CONCLUSIONS IN QUESTION ARE SUPPORTED BY THE FINDINGS.

Appellate review of a conclusion of law, based upon findings of fact, is limited to determining whether the findings are supported by substantial evidence, and if so, whether those findings support the conclusion.

American Nursery Prods., Inc. v. Indian Wells Orchards, 115 Wn.2d 217, 222, 797 P.2d 477 (1990); *Hegwine v. Longview Fibre Co., Inc.*, 132 Wn.App. 546, 555, 132 P.3d 789 (2006), *aff'd*, 162 Wn.2d 340, 172 P.3d 688 (2007); *Ellenburg v. Larson Fruit Co., Inc.*, 66 Wn.App. 246, 250, 835 P.2d 225, 228 (1992).

For the reasons discussed previously, the twenty-five findings of fact entered by Judge Bastine on November 18, 2009 are verities on appeal, and the only two findings of fact mentioned in the Brief of Appellant are clearly supported by substantial evidence. Accordingly, the only issue properly before this Court is whether these findings of fact support the conclusions of law identified in Appellant's assignments of error -- in this case, Conclusions 4 and 7.

1. **Conclusion of Law 4 Is Amply Supported by the Findings of the Trial Court.**

Conclusion of Law No. 4, approved by Judge Paul Bastine on November 18, 2009, reads as follows

"4. As of July 29, 2004, when Lance Haynie and Tom Davis executed their "Deal Points" agreement whereby Davis purchased a 50% Membership Interest in Stat Network from Haynie in consideration for payment of \$650,000.00, the only Members of Stat Network Solutions, LLC were Lance Haynie, Cory Colvin and Michael Funk."

This Conclusion of Law is amply supported by -- and in fact, follows inexorably from -- the twenty-five Findings of Fact approved by Judge Bastine. It is also fully consistent with and supported by the other Conclusions of Law proved by the trial court, which are based upon the same findings of fact.

For example, the trial court concluded that neither Lance B. Haynie's handwritten notes (Exhibit P-1) nor the "LBH Communications: Deal Points" document (Exhibit P-12) constituted a valid and enforceable contract for the transfer of a 30% Membership

Interest in Stat Network from Lance Haynie to Jack Krystal. Conclusion of Law No. 1. This Conclusion of Law was not challenged at trial, nor has it been challenged in any assignment of error on appeal.

Findings of Fact Nos. 2 through 5 establish that, at the time Stat Network was created as an entity, in June of 2003, the sole member of the limited liability company was Lance B. Haynie. Finding of Fact No. 4 recites the mandate set forth in Section 7, ¶ 7.2 of the Stat Network Operating Agreement, which states that "... no Membership Interest may be transferred to a third person without first obtaining the written consent of all of the remaining Members." Finding of Fact No. 8 confirms that, as of August 19, 2003, immediately prior to the transfers of Membership Interests to Cory Colvin and Michael Funk, Lance Haynie was still the only Member of Stat Network.

Consistent with the mandate of Section 7, ¶ 7.2 of the Stat Network Operating Agreement, Finding of Fact No. 7 notes that, on August 19, 2003, Lance Haynie transferred a 5% Membership Interest in Stat Network to Cory Colvin, and a 5% Membership Interest to Michael Funk, as part of the consideration for an Asset Purchase Agreement. As of this date, there were three members of Stat Network -- Mr. Haynie, Mr. Colvin and Mr. Funk -- whose written consent was necessary in

order to transfer a Membership Interest to a third party (such as Jack Krystal).

In recognition of this requirement, an abortive attempt was made by Mr. Haynie and Mr. Krystal in November of 2003 to admit Jack Krystal as a Member with a 30% interest. Findings of Fact Nos. 12, 13. A draft of Company Minutes to that effect (Exhibits P-5 and P-10) were prepared by Stat Network's attorney, Cynthia Schwartz, sent to Lance Haynie, and ultimately received by Jack Krystal. *Id.* However, the trial court found that neither Exhibit P-5 nor Exhibit P-10 was ever signed by Cory Colvin, Michael Funk, or Lance B. Haynie, and that neither the Meeting described in Exhibit P-5 nor the Meeting described in Exhibit P-10 ever took place. Finding of Fact No. 17.

Moreover, the trial court found as a matter of fact that, as of July 29, 2004 -- the date on which Lance Haynie and Tom Davis entered into an agreement to transfer to Mr. Davis a 50% Membership Interest in Stat Network -- Cory Colvin and Michael Funk had not given their consent, in writing, to the transfer of a Membership Interest in Stat Network from Lance Haynie to Jack Krystal. Finding of Fact No. 21.

The foregoing facts amply support the trial court's conclusion that the only Members of Stat Network as of July 29, 2004 were Lance

Haynie, Cory Colvin and Mike Funk. However, in order to eliminate any possible uncertainty about Jack Krystal's status, the trial court made one additional finding -- Finding of Fact No. 25 -- that is pertinent to this issue:

"25. The Court further finds that, as of this date [November 18, 2009], Cory Colvin, Michael Funk and Thomas Davis have never given their consent, in writing, to the transfer of a Membership Interest in Stat Network from Lance Haynie to Jack Krystal, as described in Section 7, ¶ 7.2 of the Limited Liability Company Agreement."

(Bracketed material added). Although Appellant has assigned error to the entry of Conclusion of Law No. 4, Appellant has failed to demonstrate -- indeed, he cannot demonstrate -- that this Conclusion of Law is unsupported by the Findings of Fact which are verities on appeal. Accordingly, all Assignments of Error attempting to challenge this Conclusion of Law should be summarily rejected.

2. Conclusion of Law 7 Is Amply Supported by the Findings of the Trial Court.

Conclusion of Law No. 7, approved by Judge Paul Bastine on November 18, 2009, reads as follows

“7. Plaintiff Jack Krystal has failed to meet his burden of proving that he has any legal or equitable right to be declared the owner of any Membership Interest in Stat Network Solutions, LLC.”

Appellant appears to be conceding that he had no legal right to be declared the owner of a Membership Interest in Stat Network -- at least, he has presented no argument to the contrary. However, Mr. Krystal appears to be asserting on appeal that this Conclusion of Law is in error, insofar as it constitutes a determination that he failed to establish at trial that he had an equitable right of some sort to be declared the owner of a Membership Interest in the limited liability company. As will be demonstrated below, the trial court's Conclusion of Law No. 7, like Conclusion of Law No. 4, is amply supported by the twenty-five Findings of Fact approved by Judge Bastine.

3. Appellant Has Failed to Establish That Reformation of the Stat Network Operating Agreement Was Even Appropriate, Much Less Required.

The only equitable remedy mentioned by Appellant in his Brief is that of reformation of the Stat Network Operating Agreement. Brief of

Appellant, p. 26. However, Appellant does not specify on appeal what portion of the operating agreement should be reformed, nor did he do so at the time of trial.

In fact, nowhere in Mr. Krystal's Amended Complaint for Accounting; Damages; Breach of Contract And Declaratory Relief (CP 1-11) did he give the defendants notice of an intention to seek reformation of this or any other legal instrument. Moreover, there is no mention of an intention to seek reformation -- or any other form of equitable relief, for that matter -- in Mr. Krystal's Trial Brief (CP 412-418). It was not until after the evidence closed and the parties rested -- after it was apparent that Mr. Krystal had failed to establish a legal right to declaratory relief -- that counsel first introduced the theory that his client was entitled as a matter of equity to reformation of the limited liability company operating agreement.

Even in Plaintiff's Objections to Defendants' Proposed Findings of Fact, Conclusions of Law and Judgment (CP 419-422), counsel did not identify with any specificity the nature of the reformation that he desired. Counsel is equally vague in the Brief of Appellant. Accordingly, we are left to speculate with respect to the relief requested, even on appeal. The first maxim in equity is: He who seeks equity must

do equity. *Proctor v. Huntington*, 169 Wn.2d 491, 511, 238 P.3d 1117, 1127 (2010). Mr. Krystal and his counsel would do well to keep that in mind.

Apart from the inequity of Appellant's attempt to blindside opposing counsel by raising an entirely new theory after the evidence was closed and both sides had rested, Appellant's belated request for reformation of the Stat Network Operating Agreement is irreconcilably inconsistent with the unchallenged findings of fact and conclusions of law that were accepted and adopted by the trial court.

If Appellant is contending that he is entitled to reformation of that portion of the Stat Network Operating Agreement which identifies Lance B. Haynie as the sole Member at the inception of the limited liability company, then the legal basis for his argument is not only unclear, but inconsistent with other findings and conclusions. For example, Conclusion of Law No. 2, which has never been challenged at trial or in any assignment of error on appeal, holds that Lance Haynie was the only Member of Stat Network as of the date on which it was created; and Conclusion of Law No. 1 clearly states:

1. As a preliminary matter, the Court believes that neither Lance B. Haynie's handwritten notes (Exhibit P-1) nor the "LBH

Communications: Deal Points" document (Exhibit P-12) constitutes a valid and enforceable contract for the transfer of a 30% Membership Interest in Stat Network from Lance Haynie to Jack Krystal. Moreover, even assuming that a contract of some sort existed between Lance Haynie and Jack Krystal, it would not be enforceable against non-parties, including but not limited to Cory Colvin, Michael Funk and Thomas R. Davis.

This latter conclusion of law, which was not challenged at trial, nor has it been challenged in any assignment of error, is consistent with the principle that courts are not at liberty, under the guise of reformation, to rewrite the parties' agreement and make a new agreement between the parties, nor are the courts permitted to create an agreement that did not exist in order to relieve one party of the hard or oppressive bargain.

Seattle Professional Engineering Employees Ass'n v. Boeing Co., 139 Wn.2d 824, 991 P.2d 1126 (2000), *opinion corrected on denial of reconsideration*, 1 P.3d 578; *St. Regis Paper Co. v. Wicklund*, 93 Wn.2d 497, 610 P.2d 903 (1980).

In further support of this conclusion of law, the trial court determined as a matter of fact that the attorney who prepared the operating agreement was advised that Mr. Haynie was to be the sole

Member, owning 100% of the shares (Finding of Fact No. 3); that the Stat Network LLC Agreement identified Lance B. Haynie as the sole Member of the limited liability company at its inception, owning 100% of the shares (Finding of Fact No. 5); and that as of August 19, 2003, immediately prior to the transfers of Membership Interests to Mr. Colvin and Mr. Funk, Lance Haynie was still the only Member of Stat Network (Finding of Fact No. 8).¹

The trial court also determined as a matter of fact that Mr. Krystal's company, Diversified Realty Services, loaned money on several occasions to Lance B. Haynie and LBH Communications, one of the companies mentioned in Exhibits P-1 and P-2 (Findings of Fact Nos. 6, 10, 11); that all three of these promissory notes were satisfied in full, with interest, on August 16, 2004 (Finding of Fact No. 22); and that Jack Krystal never made a capital contribution to Stat Network, LLC (Finding of Fact No. 24).² The foregoing is consistent with the testimony of Cory Colvin (RP 214, 218), Tom Davis (RP 18, 21) and attorney Cynthia Schwartz (RP 205) to the effect that each of them

¹ Findings of Fact Nos. 3, 5 and 8 were not challenged at trial, nor have they been challenged in any assignment of error on appeal.

² Findings of Fact Nos. 6, 10, 11, 22 and 24 were not challenged at trial, nor have they been challenged in any assignment of error on appeal.

understood the nature of Mr. Krystal's relationship vis-à-vis Stat Network to be that of a lender, rather than an owner.

The court also concluded that, even assuming that a contract of some sort existed between Lance Haynie and Jack Krystal, that contract would not be enforceable against non-parties, including but not limited to Cory Colvin, Michael Funk and Thomas R. Davis. Conclusion of Law No. 1. As mentioned previously, this conclusion of law -- which was not challenged at trial, nor has it been challenged in any assignment of error on appeal -- is amply supported by the trial court's finding that Lance B. Haynie was the sole Member of Stat Network when he transferred a 5% Membership Interest in Stat Network to Corey Colvin, and a 5% Membership Interest to Michael Funk on August 19, 2003, as part of the consideration for an Asset Purchase Agreement that was executed by Haynie, Colvin and Funk on that date (see Findings of Fact Nos. 7, 8, 9).

Conclusion of Law No. 1 is also supported by the trial court's finding that Lance Haynie's July, 2004 "Deal Points" agreement with Tom Davis (Exhibit P-14) provided that Jack Krystal would be paid in full for any amounts that he had loaned Stat Network, that the company would have no significant debts, that Tom Davis would own a 50%

Membership Interest in Stat Network, in consideration for payment of \$650,000.00, and that Lance Haynie would own the remaining 50% Membership Interest when the transaction was completed (Findings of Fact Nos. 19, 20).³

If appellant is taking the position that he is entitled to reformation of in Section 7, ¶ 7.2 of the Stat Network Operating Agreement, which requires the written consent of all remaining Members for any transfer of a Membership Interest to a third party, any such reformation would clearly have been unwarranted and improper. To repeat the point of law set forth earlier in this brief, courts are not at liberty, under the guise of reformation, to rewrite the parties' agreement and make a new agreement between the parties, nor are the courts permitted to create an agreement that did not exist in order to relieve one party of the hard or oppressive bargain. *Seattle Professional Engineering Employees Ass'n v. Boeing Co.*, 139 Wn.2d 824, 991 P.2d 1126 (2000), *opinion corrected on denial of reconsideration*, 1 P.3d 578; *St. Regis Paper Co. v. Wicklund*, 93 Wn.2d 497, 610 P.2d 903 (1980).

³ Findings of Fact Nos. 7, 8, 9, 19 and 20 were not challenged at trial, nor have they been challenged in any assignment of error on appeal.

The evidence clearly shows that the provision in question has governed the admission of all new Members since the inception of Stat Network in June of 2003. For example, the provision was followed without deviation when Cory Colvin and Michael Funk were granted 5% Membership Interests by Lance Haynie in August of 2003. At that point in time, the evidence is equally clear that Jack Krystal was aware of this provision, and that he permitted the Asset Purchase Agreement transaction to go forward without first demanding that he participate in the transaction as an owner of Stat Network.⁴ Finally, after Tom Davis purchased a 50% Membership Interest in Stat Network from Lance Haynie in July of 2004, Mr. Davis honored the provision by obtaining written ratification of the transfer from Mr. Colvin and Mr. Funk in December of 2004 (Finding of Fact 23, Conclusion of Law 5, Exhibit D-118).⁵

⁴ Although Mr. Krystal claimed that he had discussed this discrepancy with attorney Cynthia Schwartz prior to consummation of the transaction (RP 294), Ms. Schwartz directly contradicted this testimony, stating that she would have put him on the transaction documents if she had been told that he had an ownership interest (RP 205).

⁵ Findings of Fact No. 24 and Conclusion of Law 5 were not challenged at trial, nor have they been challenged in any assignment of error on appeal.

By contrast, the trial court found that Cory Colvin, Michael Funk and Thomas Davis have never given their consent, in writing, to the transfer of the Membership to interest in Stat Network from Lance Haynie to Jack Krystal, and that Mr. Krystal was never the owner of any Membership Interest in Stat Network solutions, LLC (Finding of Fact No. 25, Conclusion of Law No. 8).⁶ There is no evidence whatsoever of any agreement or intention to modify or waive this provision of the Stat Network operating agreement, and there is no lawful basis for equitable reformation of that agreement.

4. **Appellant Has Neither Asserted nor Established Any Other Equitable Basis for Declaratory Relief.**

Other than reformation, which is inappropriate and improper for the reasons described above, Appellant has identified no other form of equitable basis for declaratory relief, and it would be unfair to expect Respondents to set up a speculative "straw man" in this regard, simply in order to demolish it. That being said, it should be recognized that the underlying premises of Appellant's argument on appeal are

⁶ Finding of Fact No. 25 and Conclusion of Law 8 were not challenged at trial, nor have they been challenged in any assignment of error on appeal.

irreconcilably inconsistent with the unchallenged findings of fact and conclusions of law that were entered by the trial court, after a four-day bench trial, on November 18, 2009.

In the first place, the assertion in Appellant's first assignment of error to the effect that the Trial Court "...completely ignored substantial evidence proving Appellant Jack Krystal's equitable claim of ownership of a 30% interest in STAT Network Solutions, LLC" is without any discernible basis. It does not follow from the mere fact that a trial court has refused to grant equitable relief that the court "ignored" evidence of any kind, and that is particularly true where, as in the case at bar, the evidence is either controverted or not supportive of equitable relief.

Secondly, the assertion that Jack Krystal had a 30% ownership interest in Stat Network that somehow "magically vanished," or was stolen is simply inconsistent with the evidence and the law. As expressly found by the trial court, Mr. Krystal never had an ownership interest in Stat Network, nor did he have an enforceable contract with Lance Haynie that required Mr. Haynie to transfer a Membership Interest in Stat Network Solutions, LLC without the written consent of the other Members of that limited liability company.

Mr. Cory Colvin's testimony establishes that he was admitted as a Member of Stat Network by Lance Haynie alone, without any knowledge of an ownership interest on the part of Mr. Krystal, and that he never gave written consent to Mr. Krystal's admission thereafter. Mr. Krystal's testimony (examined in the context of the testimony of Cynthia Schwartz and Cory Colvin) establishes that Krystal knowingly permitted the admission of Mr. Colvin and Mr. Funk as Members, without first insisting or demanding that he himself be admitted as a Member or that his alleged ownership interest be acknowledged.

Although Mr. Krystal loaned money on several occasions to Lance Haynie and LBH Communications -- the latter, a company owned by Lance Haynie which was expressly identified in Lance B. Haynie's handwritten notes (Exhibit P-1) and the "LBH Communications: Deal Points" document (Exhibit P-12) -- it is undisputed that those loans were repaid in full, with interest, and it is likewise undisputed that Mr. Krystal made no capital contribution to Stat Network. By contrast, Mr. Davis paid \$650,000.00 for a 50% share in the company, personally guaranteed a \$100,000 Stat Network promissory note to Cory Colvin and Michael Funk, and advanced another \$85,000 to pay off Stat Network's obligation to Summit Leasing (RP 80-81); and his purchase of that 50%

interest in the limited liability company was ratified by all of the properly admitted Members of Stat Network.

It is also worth noting that Mr. Krystal's disingenuous attempt to bootstrap his claim to an ownership interest in Stat Network by utilizing the Forms K-1 that were initially issued in connection with certain Stat Network federal income tax returns -- returns that were based upon self-serving and ultimately erroneous information regarding his ownership interest that Mr. Krystal himself provided to Sheila Selder,⁷ and which were later amended after the truth came to light -- does nothing to enhance his prospects for equitable relief.

In essence, Appellant's objective in this litigation, and perhaps, for some time prior to commencement of his Superior Court lawsuit, has been to obtain something for nothing. While it is sometimes possible to accomplish such an objective through an action at law to enforce the clear provisions of a contract, Mr. Krystal should not be surprised to find that it is difficult if not impossible to accomplish such an objective if one is relying solely upon equitable arguments.

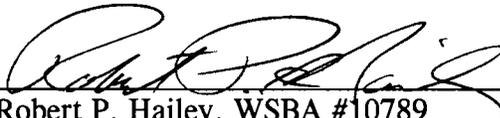
⁷ RP 167-170.

D. Conclusion

For the reasons stated in Section C, the findings, conclusions and judgment of the trial court should be affirmed. Moreover, for the reasons stated in Respondents' separate Motion for Disposition on the Merits, Appellant's appeal should be summarily dismissed, and the judgment of the trial court affirmed, pursuant to the procedure set forth in RAP 18.14.

RESPECTFULLY SUBMITTED, this 2nd day of
December, 2010.

RANDALL | DANSKIN, P.S.

By: 
Robert P. Hailey, WSBA #10789
Attorneys for Respondents Davis and Stat
Network Solutions, LLC

CERTIFICATE OF SERVICE

Pursuant to RAP 18.5, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 2nd day of December, 2010, the foregoing was delivered to the following persons in the manner indicated:

Patrick M. Risken
Evans, Craven & Lackie, P.S.
818 W. Riverside Avenue, Suite 250
Spokane, WA 99201

<input checked="" type="checkbox"/>	Hand Delivered
<input type="checkbox"/>	U.S. Mail
<input type="checkbox"/>	Overnight Mail
<input type="checkbox"/>	Fax Transmission

Lance Haynie
1176 Snow Canyon Road
Coeur d'Alene, ID 83814

<input type="checkbox"/>	Hand Delivered
<input checked="" type="checkbox"/>	U.S. Mail
<input type="checkbox"/>	Overnight Mail
<input type="checkbox"/>	Fax Transmission


Robert P. Hailey