

JAN 13 1992

**No. 292100
(Consolidated with No. 297462)**

**COURT OF APPEALS
DIVISION III
of the
STATE OF WASHINGTON**

**Bette Lyn Kelly,
Appellant**

v.

**Peter Moesslang,
Respondent**

BRIEF OF RESPONDENT

**Jane E. Brown, WSBA #25093
William C. Schroeder, WSBA # 41986
PAINE HAMBLEN LLP
717 West Sprague Avenue, Suite 1200
Spokane, Washington 99201
Telephone: (509) 455-6000
Facsimile: (509) 838-0007
Attorneys for Respondent**

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Facsimile: (509) 838-0007
Attorneys for Respondent**

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I. INTRODUCTION

[Appellant, Bette Lyn Kelly (“Kelly”)] was not candid with the court in regard to the underlying facts alleged in the case. She continues to re-allege the same facts long after the court had made findings rejecting those facts and in some instances finding them to be blatantly false . . . Throughout this litigation [Kelly] has alleged facts regarding her relationship with [Respondent, Peter Moesslang (“Moesslang”)] that are false, or in the least, contradicted by her own writings (the quality, nature and duration of the relationship; her superseding romantic relationships and engagement to another man during the time she claims to have had a meretricious relationship with [Moesslang].) These facts are pertinent to the existence or non-existence of a meretricious relationship cause of action. This court found [Kelly] not to be credible.

*Honorable Judge Tari S. Eitzen, Memorandum Decision and Order re: Attorneys’ Fees and Sanctions, February 2, 2011 (CP 1047).*¹

The trial court, based primarily upon uncontroverted written admissions of Kelly, uncontroverted travel records of Moesslang and his wife, Denise Cole (“Denise”), and *In re Pennington*, 142 Wn.2d 592, 14 P.3d 764 (2000), dismissed Kelly’s complaint on summary judgment. The trial court did not err in dismissing Kelly’s claims based upon her written admissions and the uncontroverted travel records, nor did it err in

¹ At the trial court, the term “meretricious relationship,” was used consistently, beginning with Kelly’s Complaint. (CP 3-7). Consistent with the Supreme Court’s direction, the term “committed intimate relationship” will be used in original writing in this brief, though terms used within quoted sources will be left unaltered.

sanctioning Kelly for misrepresentation and intransigence pursuant to CR 11 and *In re Cooke*, 93 Wn. App. 526, 969 P.2d 127 (Div. III 1999).

II. STATEMENT OF THE CASE

A. Factual Background

Moesslang, a resident of Liberty Lake, Washington, originally came to the United States in the mid-1970s, and through the early to mid-1980s divided his time between the United States and Greece. (6/9/2004 email of Kelly to Gordon Griffith, CP 47). Kelly, originally from Montana, married in the late 1970s, and has a son from that marriage. (6/9/2004 email of Kelly to Griffith, CP 46-47). Kelly was married until June 30, 1986, when her divorce became final. (CP 107-110).

Kelly and Moesslang met in 1983 or 1984, and at some point began dating. (*Complaint*, CP 3; 6/9/2004 email of Kelly to Griffith, CP 47). They engaged in a romantic relationship for the next few years, with their intimate relationship terminating in the early 1990s. (6/9/2004 email of Kelly to Griffith, CP 47-48; 3/6/2002 email of Kelly to Bill Gonder, CP 161). They lived together in Liberty Lake, Washington during that period of time. (6/9/2004 email of Kelly to Griffith, CP 46-47; *Complaint*, CP 3; 1/11/2010 Declaration of Kelly, CP 204; 5/6/2010 Declaration of Kelly, CP 369-70).

From the mid-1980s until approximately 1991, Kelly worked as a litigation assistant for a Spokane-area attorney. (6/9/2004 email of Kelly to Griffith, CP 46). In approximately 1992, Kelly became employed by one of Moesslang's companies. (6/9/2004 email of Kelly to Griffith, CP 47; Complaint, CP 5, 7; 5/6/2010 Decl. of Kelly, CP 370).

In 1990, Moesslang first met Denise, the woman who would ultimately become his wife, and they dated from 1990 to 1995. (12/22/2009 Declaration of Peter Moesslang, CP 62-79, 1287-1647;² 12/22/2009 Declaration of Denise Cole, CP 80-81).³ In the mid-1990s Moesslang also engaged in relationships with other women. (6/9/2004 email of Kelly to Griffith, CP 47; 11/8/2005 email of Kelly to Uta Menzel, CP 85, 272).⁴

Although there was no longer a relationship or intimacy, Moesslang and Kelly continued residing in Liberty Lake, Washington until 1998, when Moesslang moved to Coeur d'Alene, Idaho. (6/9/2004 email of Kelly to Griffith, CP 47-48; 11/28/2003 email of Kelly to Tim Murphy, CP 55-56; 4/26/2004 email from Kelly to Jeanne Rosenberger,

² The Declarations of Moesslang and Cole each appear twice in the court file. Compare CP 62-81 with CP 280-285. The exhibits to the 12/22/09 Declaration of Moesslang are located at CP 1287-1647.

³ See also January 19, 2011 Declaration of Denise Cole, CP 1111; January 31, 2011 Declaration of Denise Cole re: Sale of Home, CP 1138.

⁴ The Declaration of Uta Menzel appears twice in the record; at CP 82-90 and also at CP 269-275.

CP 331-332; 4/27/2004 email from Kelly to Denise Sheelar, CP 335; 4/30/2004 email from Kelly to Olson, CP 339-340; 5/25/2004 email from Kelly to "Connie," CP 344).

In approximately 2000, Moesslang and Denise resumed dating; from that time they have been in a committed intimate relationship which ultimately culminated in marriage. (12/22/2009 Decl. of Moesslang, CP 62-79, 1287-1647; 12/22/2009 Decl. of Cole, 80-81). During the 2000-2009 period, Moesslang and Denise spent the vast majority of their time together, either residing in Seattle or traveling, as is evidenced by their undisputed declarations and their extensive travel records, flight records, and credit card receipts. (12/22/2009 Decl. of Moesslang, CP 62-79; 1287-1647; Appendix 1⁵).

As described by Kelly, Moesslang and Denise were residing together in Seattle in the early to mid-2000s, with Moesslang returning to Spokane weekly for business reasons. (11/8/2005 email of Kelly to Menzel, CP 272; 4/1/2004 email of Kelly to "Dave," CP 471). Kelly was fully aware of the nature and extent of Moesslang and Denise's relationship, and contemporaneously wrote about it extensively. (11/8/2005 email of Kelly to Menzel, CP 272-275; 6/9/2004 email of Kelly

⁵ As the pagination on the trial court exhibit is different from the CP designation, Appendix 1 to this brief is a summary of the records indexed to the CP page numbers.

*to Griffith, CP 165-166;*⁶ *10/3/2004 email from Kelly to Menzel, CP 177; 5/16/2004 email from Kelly to Larry Heneggeler, CP 234 (“Peter and Denise’s relationship has become very serious[.]”); 10/10/2004 email from Kelly to Waunita Hobart, CP 243; 10/11/2004 email from Kelly to “Rhonda,” CP 247; 4/26/2004 email from Kelly to Rosenberger, CP 331-332; 4/27/2004 email from Kelly to Sheelar, CP 335; 4/30/2004 email from Kelly to Olson, CP 339-340; 1/19/2004 email from Kelly to “sister dorn,” CP 474-475; 4/12/2004 email of Kelly to Frederick, CP 513).*

In the late 1990s, Moesslang purchased property and constructed a house in Montana known as “Trail Creek.” (*4/19/2010 Declaration of Dave Frederick, CP 388-89*). In the 2000-2002 time period, Kelly would frequently stay at Trail Creek; she wrote that this property did not belong to her, was not hers, was not paid for by her or maintained by her, that Moesslang was the sole owner, and that all costs for ownership and maintenance of the property were Moesslang’s obligation. (*1/21/2004 email of Kelly to Olson, CP 501-502; 6/20/2004 email of Kelly to Griffith, CP 505; see also 5/6/2010 Decl. of Kelly, CP 373*).

From approximately 2001 to 2002, Kelly was engaged in a significant and serious relationship with another man, Mr. Gonder, in which there were discussions of cohabitation, pooling of resources,

⁶ Duplicate of CP 46-49.

intimacy, true love, and marriage. (2/12/2010 Declaration of Kevin H. Peden, EnCE, CP 26-31; 9/19/2001 email of Kelly to Gonder, CP 36; 6/7/2001 email of Kelly to Gonder, CP 37-38; 6/15/2001 email of Kelly to Gonder, CP 40-41; 9/6/2001 email of Kelly to Gonder, CP 42; 9/7/2001 email of Kelly to Gonder, CP 43-44; 11/26/2001 email of Kelly to Gonder, CP 156-57; 6/7/2001 email from Kelly to Gonder, CP 126-27; 6/27/2001 email of Kelly to Gonder, CP 133-135; 9/6/2001 email of Kelly to Gonder, CP 137-38; 9/6/2001 email of Kelly to Gonder (#2), CP 140; 9/19/2001 email of Kelly to Gonder (#2), CP 147; 9/20/2001 email of Kelly to Gonder, CP 149; 10/3/2001 email of Kelly to Gonder, 151-52; 11/28/2001 email of Kelly to Gonder, CP 154; 11/26/2001 email of Kelly to Gonder, CP 156-57; 3/6/2002 email of Kelly to Gonder, CP 160-62).

In late 2002, after the unraveling of Kelly's relationship with her fiancé in Montana, Kelly returned to live in Liberty Lake, although she and Moesslang maintained separate living spaces. (4/26/2004 email of Kelly to Rosenberger, CP 331-332; 4/27/2004 email of Kelly to Sheelar, CP 335; 4/30/2004 email of Kelly to Olson, CP 339-340; 5/25/2004 email of Kelly to "Connie," CP 344; 5/6/2010 Decl. of Kelly, CP 374).

In the years 2003-2005, after the Gonder relationship terminated, Kelly was involved in a series of other intimate, romantic relationships with several other persons. (2/12/2010 Decl. of Peden, CP 30-31;

12/14/2003 email of Kelly to Tim Murphy, CP 51-53; 11/28/2003 email of Kelly to Murphy, CP 55-58; 6/9/2004 email of Kelly to Griffith, CP 46-49; 6/18/2004 email of Kelly to Murphy, CP 509-511; 8/12/2004 email of Kelly to Harry Rang, CP 516).

In email exchanges in 2004, Kelly and her son describe Moesslang's relationship with Denise, as well as Kelly's relationships with other boyfriends. (*5/10/2010 Decl. of Peden, CP 445-446; 8/3/2004 email of Kelly to Ty Kelly, CP 450; 9/28/2004 email of Kelly to Ty Kelly, CP 453-456; 3/10/2003 email from Kelly to Yong Lee, CP 462; 12/22/2003 email of Kelly to Lee, CP 464*). Kelly also wrote that her relationship with Moesslang had been over for "eons," and described her engagement to her subsequent fiancé in Montana. (*1/27/2004 email of Kelly to Murphy, CP 478; 3/8/2004 email of Kelly to Sheelar, CP 466*).

In 2003 and 2004, Kelly wrote extensively and specifically about her belief that she had a "meretricious relationship" claim against Moesslang which had accrued in the 1990s.⁷ (*6/9/2004 email of Kelly to Griffith, CP 48; 5/16/2004 email of Kelly to Henggeler, CP 234; 6/7/2004 email of Kelly to Christeen McLain, CP 236; 10/1/2004 email of Kelly to Diana Palmer, CP 239; 10/9/2004 email of Kelly to Hobart, CP 241; 10/11/2004 email of Kelly to "Rhonda," CP 247*).

⁷ Kelly used the term "meretricious relationship" in her emails.

During that time period, Kelly had returned to live at Moesslang's Liberty Lake residence, albeit in different living quarters. She did this specifically on the advice of her attorney in order to "maintain a better legal position." (5/25/2004 email of Kelly to "Connie," CP 344-45).

In April 2004, Kelly wrote about her discussions with her attorney concerning her plans to commence a committed intimate relationship suit against Moesslang.⁸ Kelly also wrote that she and Moesslang had not had intimate relations since approximately 1990; that they had not continuously lived together; and that they had both moved on to relationships with other people. (4/23/2004 email of Kelly to Rosenberger, CP 329; 4/26/2004 email of Kelly to Rosenberger, CP 331-333; 4/27/2004 email of Kelly to Sheelar, CP 335-336); 4/30/2004 email of Kelly to Olson, CP 339-40; 3/11/2004 email of Kelly to "Connie," CP 347-48; 1/28/2004 email of Kelly to Olson, CP 481; 8/13/2004 email of Kelly to "onecpa@aol.com" CP 494). Kelly wrote that she neither liked Moesslang nor was nice to him, but that her attorney had convinced her to stay near him solely to improve her legal position. (5/25/2004 email of Kelly to "Connie," CP 344-345).

In 2005, Moesslang purchased a piece of undeveloped property in Spokane, Washington. (11/2/2009 Declaration of Peter Moesslang, CP

⁸ That attorney was from the same firm that represented Kelly at the trial court. Compare CP 331-332, 335, 339-340, and 344-45 with CP 3-7.

290; 10/29/2009 Declaration of Tim Murphy, CP 399). Moesslang built a house on that property, River Run, which was completed in 2006. (CP 290, and exhibits thereto). Kelly moved into Moesslang's River Run house, which was also the office for one of Moesslang's businesses, where she was employed. (*Id.*; 10/29/2009 Decl. of Murphy, CP 399; 4/19/2010 Declaration of Dave Largent, CP 396-97). Kelly admits that she never contributed financially to River Run. Kelly has not paid the mortgage, rent, property tax, insurance, or any other costs of ownership. (CP 287-88). Kelly resided in River Run from 2006 until she was ejected in 2010. (CP 800-803).

On October 9, 2009, Kelly commenced suit, alleging that from 1984 until 2006 she and Moesslang had been in a committed, intimate, sexually monogamous, marriage-like, family-like relationship. (*Complaint*, CP 3-7).⁹ She would subsequently declare that she believed she and Moesslang were a family from 1984 until 2006, that she believed they were sexually monogamous, and that if he had "affairs," he both denied them and hid them. (1/11/2010 Decl. of Kelly, CP 203-207; 368).¹⁰

⁹ Kelly verified the allegations of the Complaint under penalty of perjury. (See CP 199-201, 376).

¹⁰ The 5/6/2010 Decl. of Kelly also contains allegations concerning the termination of her employment and the proceedings in the other Superior Court cases. In response, Moesslang referred the trial court to the contents of these files, which speak for themselves. (CP 432, 434-37).

B. Procedural History

The trial court dismissed Kelly's Complaint on a series of orders that are the subject of this appeal:

- Order granting summary judgment on committed intimate relationship claim (CP 600-602; 603-623);
- Order granting summary judgment on ejectment claim (CP 800-805; 825-30);
- Order for damages on ejectment (CP 1044-45);
- Order on motion for sanctions (CP 1046-1049).

1. Summary judgment on statute of limitations on committed intimate relationship claim.

Kelly filed the "Complaint to Divide Property Acquired During Meretricious Relationship and For Other Relief" on October 9, 2009. (CP 3-7). Moesslang filed an Answer on February 9, 2010, and shortly thereafter moved for summary judgment on the statute of limitations. (*Answer of Defendant and Affirmative Defenses*, CP 8-14; *Memorandum of Defendant in Support of Summary Judgment re: Statute of Limitations*, CP 15-25).

The primary evidence in support of Moesslang's motion was a series of written admissions of Kelly, derived from email spanning the years 2000 to 2005. Moesslang first became aware of the emails when one was provided by its recipient, Uta Menzel. (*Declaration of Uta Menzel*,

CP 82-90, 269-275). Moesslang's computer forensics expert thereafter uncovered many additional emails Kelly had left on Moesslang's business computer, and presented to them court. (*Declaration of Kevin H. Peden, EnCE, ("Peden 1")*, CP 26-58; *Declaration of Kevin H. Peden re: Reconsideration, EnCE, ("Peden 2")* CP 116-178; *Supplemental Declaration of Kevin H. Peden, EnCE, ("Peden 3")* CP 230-249; *Second Supplemental Declaration of Kevin H. Peden, EnCE, ("Peden 4")* CP 325-353; and *Third Supplemental Declaration of Kevin H. Peden, EnCE, ("Peden 5")* 445-527).

Moesslang also submitted declarations from himself and his wife, Denise, concerning ten (10) years of records of their travels together, from 2000 to 2009. (*Declaration of Peter Moesslang*, CP 62-79, 1287-1647; *Declaration of Denise Cole*, CP 80-81). Summaries of the records were provided to the trial court. (CP 62-79).

Kelly responded to the motion by memorandum, arguing that no statute of limitations applies to committed intimate relationship claims. (*Memorandum of Plaintiff in Response to Motion for Summary Judgment*, CP 91-97). Kelly filed no declarations or other evidence at that point, instead relying upon the allegations in her Complaint. (3/22/2010 *Verbatim Report of Proceedings* (CP 1179-1181). Moesslang filed a reply, and a hearing was conducted on March 22, 2010. (*Declaration of Jane E.*

Brown, CP 98-114; *Peden 2*, CP 116-178; *3/22/2010 VRP*, CP 1148-1182).

At the hearing, the trial court found that the three (3) year statute of limitations applies to committed intimate relationship claims. (*3/22/2010 VRP*, CP 1176, 1178-1181). Kelly argued that she could present evidence that the committed intimate relationship existed until October 9, 2006. (*3/22/2010 VRP*, CP 1171, 1176, 1178-1181). The trial court entreated Kelly to file declarations or otherwise present evidence in support of her factual claims and scheduled a second hearing to determine whether a committed intimate relationship existed after October 9, 2006 (three years before the filing date of the Complaint). (*3/22/2010 VRP*, CP 1178-1181).

Shortly thereafter, the trial court sent a letter to the parties confirming its ruling that the three year statute of limitations, RCW 4.16.080(3), applies to committed intimate relationship claims. The trial court requested additional briefing on two issues: "1. Whether a meretricious relationship existed; and 2. if a meretricious relationship did exist, when did the relationship commence and when did it terminate?" (*Letter from Department 3*, CP 214).

Kelly submitted additional briefing, as well as a series of declarations of herself and others. (*Supplemental Memorandum of Plaintiff re: Motion for Summary Judgment*, CP 354-363; *5/6/2010 Declaration of*

Bette Lyn Kelly,” CP 366-77; 1/2/2010 Declaration of Ty Kelly, CP 379-80; 1/9/2010 Declaration of Peter Holtapples, CP 383-84; 4/19/2010 Declaration of Dave Largent, CP 396-397; 10/29/2009 Declaration of Tim Murphy, CP 398-99; 4/19/2010 Declaration of Dave Frederick, CP 388-89; 1/7/2010 Declaration of Tom Sanner, CP 391-92).

Moesslang also filed additional briefing and declarations. (*Supplemental Memorandum of Defendant*, CP 215-229; *Peden 3*, CP 230-249; *Addendum to Defendant’s Supplemental Memorandum*, CP 250-264; 11/2/2009 Declaration of Moesslang re: *Unlawful Detainer*, CP 290-324; *Peden 4*, CP 325-353; *Reply of Defendant re: Summary Judgment*, CP 422-444; *Peden 5*, CP 445-527).

The second hearing was conducted on May 12, 2010. (5/12/2010 *Verbatim Report of Proceedings*, CP 603-623). The trial court held that either the statute of limitations or the doctrine of laches barred Kelly’s committed intimate relationship cause of action. (*Order Granting Summary Judgment*, CP 600-602; 5/12/2010 *VRP*, CP 618-621).¹¹ The trial court also *sua sponte* gave Kelly leave to amend her Complaint. (5/12/2010 *VRP*, CP 620-621).¹²

¹¹ The trial court reserved ruling on whether a legally recognizable committed intimate relationship existed at any time before 1999. (CP 621, 801-02, 1046-47).

¹² See also *Memorandum Decision*, CP 802; *Memorandum Decision and Order re: Attorney’s Fees and Sanctions*, CP 1047.

The summary judgment order was entered on June 10, 2010.¹³ (*Order Granting Summary Judgment*, CP 600-602). That order, drafted by Kelly's counsel and hand-modified by the trial court, incorporated by reference the trial court's oral ruling on May 12, 2010. (CP 601).¹⁴

2. Summary judgment on ejectment.

Moesslang moved to eject Kelly from his River Run property on May 21, 2010. (*Amended Answer*, CP 528-530; *Motion of Defendant for Summary Judgment re: Ejectment*, CP 531-32; *Memorandum in Support of Motion for Summary Judgment re: Ejectment*, CP 534-37; *11/2/2009 Decl. of Moesslang re: Unlawful Detainer*, CP 543-577;¹⁵ *Declaration of Bette Lyn Kelly re: Unlawful Detainer*, CP 579-88).

Kelly responded by memorandum on June 9, 2010, (*Response of Plaintiff to Motion for Summary Judgment re: Ejectment*, CP 595-599), and Moesslang replied on June 17, 2010. (*Reply of Defendant re: Summary Judgment*, CP 624-639).

¹³ The trial court would later comment: "It is noted that there is substantial evidence in the file that Plaintiff purposefully delayed bringing her claim regarding a meretricious relationship, while trying to 'build her case,' after receiving legal advice as to what would make her claim viable. Ms. Kelly was well-aware she had a claim for meretricious relationship in 2002, within the three year statute of limitations." (CP 801, n. 3).

¹⁴ Fifteen months later, Kelly moved to settle the record on appeal, and substituted a modified order granting summary judgment. Kelly's substitution of a new order granting summary judgment renders moot her assignment of error no. 4.

¹⁵ The *Decl. of Moesslang re: Unlawful Detainer* appears twice in the record. Compare CP 290-324 with CP 543-577.

A hearing was conducted on June 18, 2010. The transcript does not appear to have been preserved for review, though the trial court later described the hearing as follows:

On June 18, 2010, the court heard oral argument on Defendant's motion for summary judgment on ejectment and again urged the Plaintiff to file any additional pleadings or briefings to support her position (as it related to an equitable argument regarding the River Run property). The court did not want to order ejectment of Plaintiff from River Run if she possessed a justiciable claim as to the River Run property which might later result in her retention of all or a share of that property.

(7/26/2010 *Memorandum Decision*, CP 802). The trial court thereafter requested additional briefing and evidence from the parties. (*Id.*).

On June 24, 2010, Kelly filed an "Amended Complaint to Divide Property Acquired During Meretricious Relationship and For Other Relief." (CP 640-643). Each side thereafter filed declarations and additional briefs: Kelly's declaration and brief (*Memorandum of Plaintiff re: Part Performance*, CP 652-661; 7/13/2010 *Declaration of Bette Lyn Kelly*, 662-666); Moesslang's declaration and brief (*Supplemental Reply Memorandum re: Partial Performance*, CP 667-669; 7/16/2010 *Declaration of Jane E. Brown re: Ejectment*, CP 786-789, 671-785);¹⁶ as well as Moesslang's Answer to the Amended Complaint (CP 790-799).

¹⁶ The *Declaration of Jane E. Brown re: Ejectment* appears at CP 786-789; the exhibits to that declaration appear at CP 671-785.

The trial court ruled by written opinion on July 22, 2010. (7/22/2010 *Memorandum Decision*, CP 800-805). The trial court ordered plaintiff ejected from Moesslang's River Run property, and reserved on the issue of damages. (CP 805). A second order confirming ejectment was entered after another hearing on October 1, 2010. (*Order Granting Summary Judgment re: Ejectment*, CP 825-829; 10/1/2010 *Verbatim Report of Proceedings*, CP 831-847). Kelly vacated the River Run property pursuant to a stipulated order. (*Stipulation and Order for Plaintiff to Vacate Premises*, CP 848-851).

3. Judgment on ejectment damages.

After Kelly vacated the River Run property, Moesslang moved for an award of damages for the period of the lock-out and occupancy from July 2009 to October 2010. (*Motion for Judgment re: Ejectment Damages*, CP 909-911; *Memorandum in Support of Defendant's Motion for Judgment re: Ejectment Damages*, CP 912-916).

Kelly filed a response, and a statement of improvements made to the River Run property. (*Memorandum of Plaintiff re: Damages on Ejectment*, CP 929-931; *Statement of Plaintiff's Improvements*, CP 922-928). Moesslang replied, and a hearing was conducted December 16, 2010. (*Reply Memorandum of Defendant re: Damages on Ejectment*, CP 1038-1043; 12/16/2010 *Verbatim Report of Proceedings*, CP 1202-1247).

The trial court awarded \$20,702.00 in damages to Moesslang. (12/16/2010 VRP, CP 1214-1217; *Judgment re: Ejectment Damages*, CP 1044-1045).

4. Order on sanctions

Moesslang, contemporaneously with the motion for summary judgment on the statute of limitations, initially moved for sanctions on March 23, 2010, alleging that Kelly had made material misrepresentations to the court. (*Memorandum of Defendant in Support of Motion for CR 11 Sanctions*, CP 208-213; *10/29/2009 Decl. of Kelly*, CP 199-201; *1/11/2010 Decl. of Kelly*, CP 203-206).

Kelly responded on May 6, 2010. (*Memorandum of Plaintiff in Opposition to Motion for Sanctions*, CP 364-365). At the May 12, 2010 hearing, the trial court deferred ruling on the issue. (*5/12/2010 VRP*, CP 620-621). On November 12, 2010 Moesslang renewed the motion. (*Request for Ruling on Motion for Sanctions*, CP 917-921). Kelly filed a response brief to the renewed motion, (*Memorandum of Plaintiff re: Imposition of Terms*, CP 932-938), Moesslang replied (*Reply of Defendant re: Request for Ruling on Sanctions*, CP 1028-1037), and the court conducted a hearing. (*12/16/2010 VRP*, CP 1217-1247). The trial court issued a memorandum decision on February 2, 2011, and a judgment was entered thereafter for \$10,619.48. (*Memorandum Decision*, CP 1046-1049; *Judgment re: Attorney's Fees and Sanctions*, CP 1073-1075).

III. ARGUMENT

A. The Trial Court should be affirmed: Kelly brought her claim outside of the three year statute of limitations.

1. Standard of review

The Court reviews summary judgment rulings *de novo*, engaging in the same inquiry as the trial court. RAP 9.12; *Harris v. Ski Park Farms, Inc.*, 120 Wn.2d 727, 737, 844 P.2d 1006 (1993); *Beaupre v. Pierce County*, 161 Wn.2d 568, 571, 166 P.3d 712 (2007).

A motion for summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that “there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” CR 56(c); *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995).

The moving party bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 1207 (1992). If the moving party meets this initial burden, the inquiry then shifts to the non-moving party to establish that they can meet each element of their claims to resist summary judgment. *Id.* When the moving party is a defendant, he may meet this burden by pointing out to the Court that there is a lack of evidence to

support the non-moving party's case. *Howell v. Spokane and Inland Empire Blood Bank*, 117 Wn.2d 619, 624, 818 P.2d 1056 (1991).

The nonmoving party may not rely on mere allegations, argumentative assertions, conclusive statements, and speculation to raise issues of material fact precluding summary judgment. *Greenhalgh v. Dep't of Corr.*, 160 Wn. App. 706, 714, 248 P.3d 150 (2011); *Hill v. Cox*, 110 Wn. App. 394, 403, 41 P.3d 495 (2002); *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988).

Once the moving party meets its burden to show there is no genuine issue of material fact, the nonmoving party must "set forth specific facts rebutting the moving party's contentions and disclose that a genuine issue as to a material fact exists." *Strong v. Terrell*, 147 Wn. App. 376, 384, 195 P.3d 977 (2008), *rev. denied*, 165 Wn.2d 1051 (2009)); *Baldwin v. Sisters of Providence, Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989). A conflict over a factual issue will not defeat summary judgment unless that factual issue is one on which the case will be determined. *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985). A party cannot create genuine issues of material fact by filing affidavits that contradict assertions made at an earlier time. *See Marshall v. AC & S, Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989).

2. RCW 4.16.080(3), the three-year statute of limitations, applies to committed intimate relationship claims.

Statutes of limitations apply to all claims, unless specifically excepted by statute. RCW 4.16.005. “Crucial to the analysis . . . is the characterization of the [plaintiff’s] causes of action. Once the nature of the claims is established, all that remains is application of the relevant statutes of limitation to the dates each claim accrued.” *Hudson v Condon*, 101 Wn. App. 866, 872, 6 P.3d 615 (2000), *rev. denied*, 143 Wn.2d 1006, 21 P.3d 615 (2001). Here, Kelly appears to have conceded that a statute of limitations applies to committed intimate relationship claims; the only issue is which statute applies. *See App. Brief at pp. 24-30.*

Washington law supports a strict application of the statute of limitations. *See Bennett v. Dalton*, 120 Wn. App. 74, 85-86, 84 P.3d 265 (2004)(citing *O’Neil v. Estate of Murtha*, 89 Wn. App. 67, 73-74, 947 P.2d 1252 (1997)). The court will not generally read an exception into statutes of limitation which has not been embodied in the statute, however reasonable such exception may seem. *O’Neil*, 89 Wn. App. at 73-74; *Huff v. Roach*, 125 Wn. App. 724, 732, 106 P.3d 268 (2005).

Which statute of limitations governs a committed intimate relationship claim is an issue of first impression.¹⁷ In Washington cases of

¹⁷ In jurisdictions that recognize common law marriage or implied marriage, statutes of limitations of between 1 and 3 years apply. *See, e.g., Shepherd v. Ledford*, 962 S.W.2d

record, the gap between the end of the relationship and the commencement of the action is three years or fewer.¹⁸

The statute of limitations for equitable causes of action like unjust enrichment, implied or unwritten contract, joint ventures, and implied partnership is three years. RCW 4.16.080(3); *see also Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co.*, 139 Wn.2d 824, 837-38, 991 P.2d 1126 (2000)(unjust enrichment); *Eckert v. Skagit Corp.*, 20 Wn. App. 849, 850, 583 P.2d 1239 (1978)(unwritten contract, unjust enrichment); *Hudson*, 101 Wn. App. at 872-74 (unwritten partnership); *Laue v. Elder*, 106 Wn.

28, 32 (Tex. 1998); *Humphries v. Humphries*, 349 S.W.3d 817, 823 (Tex. App. [12th] 2011); *Brody v. Brody*, 62 A.D.3d 928 (N.Y.App. 2009); *In re Marriage of Gonzalaz*, 2000 UT 28, 1 P.3d 1074, 1077 (2000); *Covington v. Walter*, 3 N.Y.3d 287, 819 N.E.2d 1025 (2004); *Taylor v. Rann*, 106 Mont. 588, 80 P.2d 376 (1938).

¹⁸ Of the cases of record which mention both the time of the termination of the relationship and the time of commencement of the suit, *see: Relationship of Long*, 158 Wn. App. 919, 924, 244 P.3d 26 (2010)(relationship ends July 2007, action filed March 2008); *In re Rhone*, 140 Wn. App. 600, 604, 166 P.3d 1230 (2007)(relationship ended November 2001, settlement entered in court May 2004); *Soltero v. Wimer*, 128 Wn. App. 364, 368-69, 115 P.3d 393 (2005), *rev'd*, 159 Wn.2d 428, 150 P.3d 552 (2007)(relationship ended 2001, dissolution filed "shortly thereafter."); *Gormley v. Robertson*, 120 Wn. App. 31, 34, 83 P.3d 1042 (2004)(separation in 1998, court proceedings commence by early 2000); *In re Cooke*, 93 Wn. App. 526, 527, 969 P.2d 127 (1999)(relationship ends October 1993, petition for dissolution filed June 1994); *Koher v. Morgan*, 93 Wn. App. 398, 400, 968 P.2d 920 (1998)(relationship ended May 1995, appeal May 1998); *In re Meretricious Relationship of Sutton*, 85 Wn. App. 487, 490, 933 P.2d 1069 (1997)(relationship ended August 1994, appeal from Superior Court March 1995); *Connell v. Francisco*, 74 Wn. App. 306, 310-11, 872 P.2d 1150 (1994), *rev'd in part* 127 Wn.2d 339, 898 P.2d 831 (1995)(relationship ended September 1990, judgment entered January 1992); *Pennington v. Pennington*, 93 Wn. App. 913, 971 P.2d 98 (1999)(relationship ended October 1995, suit commenced February 1996); *Chesterfield v. Nash*, 96 Wn. App. 103, 978 P.2d 551 (1999)(relationship ended October 1993, suit commenced January 1996). An example of the statute of limitations in a similar context is the (no longer viable) action for seduction of an unmarried woman, which was three years. *See Opitz v. Hayden*, 17 Wn.2d 347, 369, 135 P.2d 819 (1943).

App. 699, 710-11, 25 P.3d 1032 (2001)(implied partnership); *Malnar v. Carlson*, 128 Wn.2d 521, 529-30, 910 P.2d 455 (1996)(oral contract to form partnership).

A suit seeking to establish a committed intimate relationship is a claim in equity, to prevent unjust enrichment. *Vasquez v. Hawthorne*, 145 Wn.2d 103, 107-108, 33 P.3d 735 (2001); *Pennington*, 142 Wn.2d at 602; *Connell*, 127 Wn.2d at 349-50; *Soltero*, 159 Wn.2d at 433.

The first step in the analysis is the determination of whether a committed intimate relationship existed. *Pennington*, 142 Wn.2d at 602. This is analogous to the determination of whether an implied contract, oral contract, implied partnership, or other equitable right existed. *See, e.g., Seattle Prof'l Eng'g Employees Ass'n*, 139 Wn.2d at 837-38; *Eckert*, 20 Wn. App. at 851; *Hudson*, 101 Wn. App. at 873-74; *Laue*, 106 Wn. App. at 710-11; *Malnar*, 128 Wn.2d at 529-30.

As in other equitable theories, the legal right to recovery is subject to the statute of limitations, not the nature of the damages sought. As a committed intimate relationship claim sounds in equity, is designed to prevent unjust enrichment, and is analogous to theories of implied contract or partnership, the trial court did not err in holding the three year statute of limitations applies, with accrual being at the time the committed intimate

relationship terminated. (CP 618-20).¹⁹

3. Uncontroverted facts from Kelly's written admissions and Moesslang and Denise's travel records are deemed established.

“When a non-moving party fails to controvert relevant facts supporting a summary judgment motion, those facts are considered to have been established.” *Central Washington Bank v. Mendelsen Zeller, Inc.*, 113 Wn.2d 346, 354, 779 P.2d 697 (1989)(citing *Washington Osteopathic Medical Ass'n v. King County Medical Serv. Corp.*, 78 Wn.2d 577, 579, 478 P.2d 228 (1970)).

Here, the written admissions of Kelly, derived from her emails, were not discussed, addressed, or refuted by Kelly at the trial court. (See CP 422-24; compare *Peden 1*, CP 26-58, *Peden 2*, CP 116-178, *Peden 3*, CP 230-249, *Peden 4*, CP 325-53, and *Peden 5*, CP 445-527, with *5/6/2010 Decl. of Kelly*, CP 366-77). Likewise, on appeal Kelly has declined to discuss, address, or refute her written admissions. See App. Brief pp. 3-11. Kelly's un-refuted written admissions should be deemed established.

The declarations of Moesslang and Denise, and the records of their time and travels together, also were not discussed, addressed, or refuted by Kelly at the trial court. (See CP 422-424; compare *12/22/2009 Decl. of*

¹⁹ See also the trial court's subsequent description of its ruling in its later memorandum opinion. (CP 1046-47).

Moesslang, CP 62-79, 1287-1647, and 12/22/2009 *Decl. of Cole*, CP 80-81, with 5/6/2010 *Decl. of Kelly*, CP 366-77). Likewise, on appeal Kelly has declined to discuss, address, or refute these declarations and travel records. *See* App. Brief, pp. 3-11. This evidence substantiates Moesslang and Denise's relationship from 1990 to 1995, and from 2000 to the present, and should be deemed established.

4. Kelly failed to produce evidence in support of her committed intimate relationship claim.

A "common law" marriage is one without formal solemnization. However, there must be an actual and mutual agreement to enter into a matrimonial relation, between parties capable in law of making such a contract, consummated by their assumption openly of marital duties and obligations. Merely living together, even as husband and wife, does not make a common-law marriage.

Peffley-Warner v. Bowen, 113 Wn.2d 243, 249-50, 778 P.2d 1022 (1989)(citing *In re Estate of Gallagher*, 35 Wn.2d 512, 515, 213 P.2d 621 (1950)). Washington does not recognize common law marriage. *Peffley-Warner*, 113 Wn.2d at 249-50. Instead, Washington courts have developed the doctrine of "meretricious," or committed intimate relationships. *In Re Pennington*, 142 Wn.2d at 603.

A meretricious relationship is not the same as a marriage . . . any other interpretation equates cohabitation with marriage; ignores the conscious decision by many couples not to marry; confers benefits when few, if any, economic risks or legal

obligations are assumed; and disregards the explicit intent of the Legislature that RCW 26.09.080 apply to property divisions following a marriage.

Connell v. Francisco, 127 Wn.2d at 348-50.²⁰

“[T]he use of the term ‘marital-like’ in prior meretricious relationship cases is a mere analogy because defining these relationships as related to marriage would create a *de facto* common-law marriage, which [Washington Courts have] refused to do.” *Vasquez v. Hawthorne*, 145 Wn.2d at 107-08. “[A] meretricious relationship can be quite transitory . . . because there is no legal tie between parties engaged in such a relationship, it can be broken off without obligation.” *Marriage of Tower*, 55 Wn. App. 697, 702, 780 P.2d 863 (1989) (internal citation omitted).

The question of whether a particular set of facts gives rise to a committed intimate relationship is one of law. *Pennington*, 142 Wn.2d at 602-03. The existence of a committed intimate relationship is evidenced by five non-exclusive factors: “continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties.” *Id.* at 601.

²⁰ As noted by the *Connell* court, Washington courts routinely reject invitations to extend RCW 26 or other “marital” statutes to committed intimate relationships. *See Connell*, 127 Wn.2d at 348-49 (collecting cases).

Pennington, which is the most recent Supreme Court case concerning the legal requirements to establish the existence of a committed intimate relationship, consolidated two appellate cases, *Chesterfield v. Nash*, 96 Wn. App. 103, 978 P.2d 551 (1999)(“*Chesterfield*”), and *Pennington v. Pennington*, 93 Wn. App. 913, 971 P.2d 98 (1999)(“*Van Pevenage*”).

In both *Chesterfield* and *Van Pevenage*, the trial courts found committed intimate relationships to exist and proceeded to both characterize and then divide property. The Supreme Court in *Pennington* ruled that no committed intimate relationship existed in either case. *Pennington*, 142 Wn.2d at 594. The *Pennington* court explained:

[There is] a three-prong analysis for disposing of property when a meretricious relationship terminates. First, the trial court must determine whether a meretricious relationship exists. Second, if such a relationship exists, the trial court then evaluates the interest each party has in the property acquired during the relationship. Third, the trial court then makes a just and equitable distribution of such property. . . We have never divorced the meretricious relationship doctrine from its equitable underpinnings. . .

Id.

a. Continuous Cohabitation

“Cohabitation” in the context of committed intimate relationship doctrine signifies more than simply sharing a residence. “To cohabit is

defined as to live together as husband and wife [usually] without a legal marriage having been performed . . . a man and a woman dwelling together in the manner of husband and wife.” *Marriage of Tower*, 55 Wn. App. at 703 (internal citations omitted).

In *Van Pevenage*, the parties began living together in 1985; one party remained married to another person until 1990; the other moved out in 1991 to live with another person; cohabitation resumed from late 1991 until 1993; both parties dated other people in 1993-1994. *Pennington*, 142 Wn.2d at 603. “These facts suggest that while Pennington and Van Pevenage did cohabit, their cohabitation was sporadic and not continuous enough to evidence a stable cohabiting relationship.” *Id.*

In *Chesterfield*, the parties moved in together in 1989; they ceased living together in 1993; they reconciled from 1994 to 1995; the relationship terminated in 1995. *Id.* at 605-06. “The trial court was correct in concluding the parties resided together continuously from July 1989 until October 1993. However, when taken as a whole, the parties’ cohabitation was not continuous from 1989 through 1995, but was marked by separation and failed reconciliation.” *Id.*

Here, the parties began dating in approximately 1984. (CP 3, 47, 204). Intimate relations existed between them until approximately 1990. (CP 47-48, 161). Kelly remained married to another person until June,

1986. (CP 107-110). The parties resided together from approximately 1986 until approximately 1998, and again from 2002 to 2006 (albeit in different living quarters). (CP 3, 46-48, 55-56, 204, 331-32, 335, 339-40, 344, 369-70).

Kelly was in an intimate relationship with Bill Gonder in 2001-02. (CP 36-38, 40-44, 126-27, 133-35, 137-38, 140, 147, 149, 151-52, 154, 156-57, 160-62). She subsequently dated a series of other people. (CP 30-31, 46-49, 51-53, 55-58, 509-511, 516). Further, in Kelly's written communications with third parties she was denying an intimate relationship with Moesslang, rather than holding them out as husband and wife. (CP 46-48, 161, 344-45, 466, 478).

Moesslang and Denise dated from 1990 to 1995, and from 2000 to present, ultimately marrying. (CP 62-79, 1287-1647, 80-81, 1111, 1138). Moesslang also dated other women, of whom Kelly was aware, in the 1990s. (CP 47, 85).

b. Duration

In *Van Pevenage*, "their relationship, while not continuous, spanned 12 years." *Pennington*, 142 Wn.2d at 603-04.

In *Chesterfield*, the relationship lasted four years and three months; the parties dated for three years prior to their exclusive relationship, "however, during the first three years of their relationship, Nash dated

other women.” *Id.* at 606. Chesterfield did not file for divorce from her prior husband until more than a year after her relationship with Nash commenced. *Id.*

Here, the parties commenced intimate relations in approximately 1984. (CP 3, 47, 204). Kelly remained married to another person until June, 1986. (CP 107-110). Intimate relations ceased in approximately 1990. (CP 47-48, 161). Throughout the relationship, Moesslang dated other women, and Kelly was fully aware of this. (CP 47, 85). Moesslang dated Denise from 1990 to 1995, and from 2000 to the present, ultimately marrying her. (CP 62-79, 1287-1647, 80-81, 1111, 1138). Kelly was in a committed intimate relationship with Bill Gonder in 2001. (CP 36-38, 40-44, 126-27, 133-35, 137-38, 140, 147, 149, 151-52, 154, 156-57, 160-62). Kelly subsequently had a series of other intimate relationships in the early to mid-2000s. (CP 30-31, 46-49, 51-53, 55-58, 509-511, 516).

c. Intent

In *Van Pevenage*, Van Pevenage desired to be married, although Pennington remained married to a different woman for the first five years of their relationship, and after Pennington divorced, he refused to marry Van Pevenage. *Pennington*, 142 Wn.2d at 604. Van Pevenage also was repeatedly absent from the home and had a relationship with another man.

“In this case, the evidence does not support concluding the parties had the mutual intent to form a meretricious relationship.” *Id.*

In *Chesterfield*, the Court found that the parties did not hold each other out as spouses, and that Chesterfield was married to another man during her relationship with Nash. *Id.* at 606. “These facts are too equivocal to conclusively establish the parties mutually intended to be in a meretricious relationship.” *Id.*

Moesslang has been with Denise for 15 of the past 20 years, and married her. (CP 62-79, 1287-1647, 80-81, 1111, 1138). Meanwhile, Kelly was in a series of other intimate relationships. (CP 30-31, 36-38, 40-44, 46-49, 51-53, 55-58, 126-27, 133-35, 137-38, 140, 147, 149, 151-52, 154, 156-57, 160-62, 509-511, 516).

In the early 2000s, Kelly wrote that her relationship with Moesslang ended “eons” ago, that it was long over, and that intimacy ceased around 1990. (CP 47-48, 161, 234, 236, 239, 241, 247, 329, 331-33, 335-36, 339-40, 344-45, 347-48, 466, 478, 481, 494). Kelly says Moesslang was never interested in a traditional relationship with her, having been with many other women over the same time period. (*Id.*)

Kelly claimed in a declaration that she was “shocked” to discover Moesslang was “having an affair” in approximately 2001. (CP 203-04). The trial court noted that this claim was materially contradicted by Kelly’s

contemporaneous and subsequent writings, and it formed one of the bases for sanctions. (CP 1047).

d. Pooling of Resources for Joint Projects

In *Van Pevenage*, Van Pevenage spent money on food, household furnishings, carpeting, and kitchen utensils. *Pennington*, 142 Wn.2d at 604-05. She also cooked, cleaned, and helped with interior decoration. *Id.* However, there was no evidence she “made constant or continuous payments jointly or substantially invested her time and effort into any specific assets so as to create any inequities.” *Id.*

As to *Chesterfield*, the court explained that the parties maintained separate bank accounts and did not purchase property jointly. *Id.* at 606-07. “When these facts are examined as a whole, the trial court’s findings do not fully establish the parties jointly pooled their time, effort, or financial resources enough to require an equitable distribution of property[.]” *Id.*

Here, the parties did not pool resources or share bank accounts. (CP 63). Kelly alleges paying for groceries and bills in the late 1980s.²¹ (CP 369). Kelly did not produce evidence of a contribution of her financial

²¹ “Domestic services” provided by one party do not constitute a “joint contribution to shared projects,” and do not confer any property rights. *See Soltero v. Wimer*, 159 Wn.2d 428, 434-35, 150 P.3d 552 (2007).

resources to any particular project.²² Kelly admitted she made no capital contribution to any property owned or acquired by Moesslang, including the Trail Creek and the River Run properties. (CP 63, 501-02, 505, 287-88). Kelly did write of pooling resources with her fiancé, Mr. Gonder, in 2001 and 2002, (CP 151-52, 154, 156-57), but never with Moesslang.

e. Purpose

In *Van Pevenage*, the trial court found the purpose of the relationship to be “companionship, love, sex, mutual support, and caring.” *Pennington*, 142 Wn.2d at 605. “The trial court made no findings as to the purpose of the relationship between Chesterfield and Nash.” *Id.* at 607. Likewise, the trial court here made no separate findings as to the purpose of Moesslang and Kelly’s relationship. (*See* CP 618-21).

f. Any relationship that did exist between these parties ended more than a decade ago; and likely did not constitute a legally recognizable relationship in any event.

As to *Van Pevenage*, the *Pennington* court held there was no committed intimate relationship as a matter of law, explaining that the sporadic cohabitation, instability of the relationship, one party’s refusal to marry, their relationships with other people, and the lack of constant or continuous copayments or investments into significant assets “neither evidence a meretricious relationship nor sufficiently justify the fair and

²² *See Howell*, 117 Wn.2d at 624.

equitable distribution of property acquired during the course of the relationship.” *Id.* at 605.

The *Pennington* court also found that no committed intimate relationship existed in *Chesterfield*, explaining that “the evidence supporting the mutual intent of the parties to be in such a relationship is too equivocal to support such a conclusion.” *Id.* The court continued:

[T]he parties maintained separate accounts, purchased no significant assets together, and did not significantly or substantially pool their time and effort to justify the equitable division of property acquired during the course of their relationship. Therefore, we conclude the relationship . . . did not constitute a meretricious relationship and the equitable principles . . . are not triggered by these facts.

Id. at 607.

Here, based upon uncontroverted facts and admissions, no committed intimate relationship could have existed at any time after the year 1999; further, based upon those same uncontroverted facts and admissions, it is unlikely that any legally recognizable committed intimate relationship ever existed between these parties. Moesslang and Kelly’s sporadic cohabitation, their respective relationships with others, their lack of intimacy, Moesslang’s ultimate marriage to another, Kelly’s engagement to and dating of others, and the absence of constant or continuous copayments or investments of time and effort in any significant

assets do not constitute a committed intimate relationship as a matter of law.

5. The trial court properly ruled Kelly failed to bring her claim within three years of accrual.

Actions can only be commenced within the time periods specified in chapter 4.16 RCW “after the cause of action has accrued.” RCW 4.16.005. A cause of action accrues when the plaintiff has a right to seek relief in the courts. *Janicki Logging & Constr. Co. v. Schwabe, Williamson & Wyatt, EC*, 109 Wn. App. 655, 659, 37 P.3d 309 (2001). “Accrual” is when the person knows or should in the exercise of due diligence know all the facts necessary to establish the elements of the claim; accrual of the cause is not dependent on the plaintiff’s discovery of the existence of a right to a legal remedy. *Gevaart v. Metco Construction*, 111 Wn.2d 499, 500-01, 760 P.2d 348 (1988); *Green v. A.P.C.*, 136 Wn.2d 87, 95-96, 960 P.2d 912 (1998).

A committed intimate relationship is over when the factors evidencing it are no longer present. *See Tower*, 55 Wn. App. at 703; *Pennington*, 142 Wn.2d at 605, 607. Here, Kelly believed her relationship with Moesslang had ended in the 1990s. (CP 48, 234, 236, 239, 241, 247, 329, 331-33, 335-36, 339-40, 344-45, 347-48, 481, 494). She consulted an attorney in 2002, and again in 2004, and believed she had a claim against

Moesslang for a “meretricious relationship.”²³ (*Id.*; CP 618-620). Kelly deliberately attempted to improve her legal position vis-à-vis Moesslang, apparently so as to maximize her hoped-for recovery in her long-planned “meretricious relationship” suit. (*Id.*).

Since Kelly 1) specifically knew and believed her relationship with Moesslang had long since ended; 2) knew about Moesslang’s relationships in the 1990s and 2000s, including with his now-wife Denise; 3) commenced a series of intimate relationships with other men in the 2000s, one of which nearly resulted in marriage; and 4) consulted with an attorney and understood she had a cause of action in the early 2000s, the trial court did not err in holding that Kelly knew or should have known that her claim against Moesslang for a committed intimate relationship, if any, accrued long before October 9, 2006 (three years before the filing date of the complaint). (*See* CP 618-620).

6. Kelly’s tenancy theory fails on the merits; Kelly failed to bring her claim within the three-year statute of limitations.

Kelly appears to argue on appeal that at some point, a committed intimate relationship existed between her and Moesslang; and by virtue of this committed intimate relationship, Kelly has a one-half interest in all property acquired during that relationship. *See* App. Brief pp. 24-30. Kelly

²³ Kelly used the term “meretricious relationship” in her emails.

assumes the fact of a committed intimate relationship, and seems to argue that even though the committed intimate relationship ended, her interest in any property acquired during the relationship should continue with her as a tenant in common, and that her continuing interest in this property should be analogized to defunct marriage doctrine.²⁴ *Id.* Kelly argues that since she is a tenant in common, her cause of action did not accrue until Moesslang sought to terminate the tenancy. *Id.* Therefore, Kelly argues her cause of action for a committed intimate relationship did not accrue until 2009. *Id.*

This theory incorrectly presumes the applicable statute of limitations is determined by the damages sought rather than the theory of recovery. A committed intimate relationship claim sounds in equity, and is to prevent one party from being unjustly enriched at the expense of the other. *Vasquez v. Hawthorne*, 145 Wn.2d at 107-108; *Pennington*, 142

²⁴ “On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.” RAP 9.12. A legal theory not argued to the trial court in support of or in opposition to summary judgment may not be raised for the first time on appeal. *See, e.g., Van Dinter v. Orr*, 157 Wn.2d 329, 333-34, 138 P.3d 608 (2006); *Potter v. Wash. State Patrol*, 161 Wn.2d 335, 338 n.2, 166 P.3d 684 (2007); *State ex rel. P.D.C. v. W.E.A.*, 156 Wn.2d 543, 579, 130 P.3d 352 (2006) (Sanders, J. dissenting); *Rahman v. State*, 170 Wn.2d 810, 823-24, 246 P.3d 182 (2011); *Milligan v. Thompson*, 110 Wn. App. 628, 634, 42 P.3d 418 (2002). At the trial court, Kelly argued that committed intimate relationship had existed in the past, that no statute of limitations applies to committed intimate relationship claims, and that the alleged committed intimate relationship had existed until November, 2006. (CP 91-97, 354-63, 1169-70). On appeal, Kelly appears to have abandoned these theories. *See App. Brief*, pp. 24-30. As the theories argued by Kelly on appeal were not called to the attention of the trial court, they should not be raised for the first time here.

Wn.2d at 602; *Connell*, 127 Wn.2d at 349-50; *Soltero*, 159 Wn.2d at 433.

The first step in the analysis is the determination of whether a legally recognizable relationship existed. *Pennington*, 142 Wn.2d at 602; *Connell*, 127 Wn.2d at 349. Only after a legally recognizable relationship is determined to have existed does the court characterize or divide property. *Id.*

In analogous equitable claims the statute of limitations is determined by reference to the facts giving rise to the legal theory. *See Seattle Prof'l Eng'g Employees Ass'n*, 139 Wn.2d at 837-38; *Eckert*, 20 Wn. App. at 851; *Hudson*, 101 Wn. App. at 873-74; *Laue*, 106 Wn. App. at 710-11; *Malnar*, 128 Wn.2d at 529-30.

In her Complaint, Kelly requested conveyance of Moesslang's River Run property, and a division of all property acquired since 1984. (CP 7). Kelly does not allege making a significant capital contribution to any property or project; instead, she claims an interest in the property by virtue of her allegation of a committed intimate relationship itself. (*See* CP 199-201).

In order to establish that a committed intimate relationship conferred to her an interest in property, Kelly must establish that a committed intimate relationship existed. *Pennington*, 142 Wn.2d at 602; *Connell*, 127 Wn.2d at 349. Just as the claimants with other equitable

theories, the statute of limitations applies to the establishment of the relationship between the parties, and the trial court did not err in holding that Kelly failed to bring her claim within three years of when she knew that any committed intimate relationship she may have had with Moesslang was over. (CP 618-20).²⁵

Citing *Olver v. Fowler*, 161 Wn.2d 655, 168 P.3d 348 (2007), Kelly argues that her allegation of a committed intimate relationship confers upon her a one-half interest in Moesslang's property. Yet, such a property interest only arises if a legally recognizable relationship is first established to exist. *Pennington*, 142 Wn.2d at 602; *Connell*, 127 Wn.2d at 349. In *Olver*, "no party dispute[d] that [they] lived in a committed intimate relationship that would have been sufficient to justify equitable distribution of their jointly acquired property[.]" *Id.* at 669. There is no presumption of an interest in property prior to the establishment of the existence of a relationship, just as in partnership and contract theories the existence must be established before damages or distribution can be considered. *See Laue*, 106 Wn. App. at 710-11; *Hudson*, 101 Wn. App. at 872-74.

²⁵ Kelly, citing *Haslund v. Seattle*, 86 Wn.2d 607, 620-21, 547 P.2d 1221 (1976), argues that Moesslang has the burden of proof on both the statute of limitations and laches. Here, uncontroverted evidence for both was established through the written admissions of Kelly and the travel records of Moesslang and Denise.

Kelly also cites *Ambrose v. Moore*, 46 Wn. 463, 90 Pac. 588 (1907) for the proposition that her allegations entitle her to a one-half interest in Moesslang's property. In *Ambrose*, a married couple jointly owned a piece of property; during the marriage, the wife convinced the husband to deed the property to her relative, with the deed being held in escrow and not delivered. Against express instructions, the escrow agent both delivered the deed and recorded it. Shortly thereafter, the parties divorced, but the property was not mentioned in the decree. The plaintiff sued to invalidate the delivery of the deed and confirm his one-half interest in the property. *Id.* at 463-64. Here, there was neither a solemnized marriage, nor uncontested joint ownership of property during that marriage, nor a disputed transfer of title by a wayward escrow agent. Rather, Kelly's claim is a tautology: because she claims a relationship existed, she has an interest in property; because she claims to have an interest in property, a relationship existed. *Ambrose* is inapt.

Kelly also relies upon *Shull v. Shepard*, 63 Wn.2d 503, 387 P.2d 767 (1963). That case concerned dividing a property where both parties had made nearly equal capital contributions toward its purchase. *Id.* at 503-04. Kelly failed to produce evidence of any capital contribution toward a joint project, and, in fact, specifically stated that she made none. *Shull* is inapt.

In a similar vein, Kelly relies upon *Silver Surprise v. Sunshine Mines*, 88 Wn.2d 64, 67, 558 P.2d 186 (1977). In *Silver Surprise*, the plaintiff mining company conveyed by written contract a one-half interest in a certain vein of ore to defendant, another mining company. *Id.* at 67. Here, there has been no conveyance of property, just allegations of a relationship. *See Soltero*, 159 Wn.2d at 434-35. *Silver Surprise* is also inapt, as it concerns a property right established by written contract, rather than an unproven allegation of ownership by virtue of a committed intimate relationship with the titleholder.

Kelly asserts that RCW 7.28.050 and RCW 4.16.020 should govern the present action. These statutes concern actions to recover possession of real property. Again, this conflates the legal theory with the relief requested as a basis to determine the statute of limitations. The fact that Kelly prays for conveyance of real property in her Complaint does not alter the legal theory which she believes entitles her to that relief; and it is to the legal theory that the statute of limitations applies.

Finally, Kelly's assertion that her cause of action did not accrue until 2009, in light of her written admissions, is unsupportable. Kelly had been actively plotting her legal claim since the early 2000s. (*See 6/9/2004 email of Kelly to Griffith*, CP 48; *5/16/2004 email of Kelly to Henggeler*, CP 234; *6/7/2004 email of Kelly to McLain*, CP 236; *10/1/2004 email of*

Kelly to Palmer, CP 239; *10/9/2004 email of Kelly to Hobart*, CP 241; *10/11/2004 email of Kelly to "Rhonda,"* (CP 247).²⁶

7. The trial court properly barred Kelly's claim under the doctrine of laches.

Moesslang and Denise have been in a committed intimate relationship since 2000, and ultimately married. (CP 62-79, 1287-1647, 80-81, 1111, 1138). Kelly was engaged to be married to someone else in 2001, and has been in several other intimate relationships since. (CP 36-38, 40-44, 126-27, 133-35, 137-38, 140, 147, 149, 151-52, 154, 156-57, 160-62; 30-31, 46-49, 51-53, 55-58, 509-511, 516). Kelly knew her relationship with Moesslang was over, consulted with attorneys, and deliberately chose to refrain from filing her claim in the hopes of improving her legal position. (CP 48, 234, 236, 239, 241, 247).

As noted by the trial court, under Kelly's theory of recovery, a claimant may wait 25, 30, or even 40 years before filing suit. (CP 1160-62, 612). The trial court held:

[T]he three year statute of limitations applies, but in the alternative, even if it doesn't that there is in equity doctrine of laches that she sat on her rights too long now to bring that action . . . If they did have a

²⁶ Kelly cites two other cases: *Baumgartner v. Dept. of Corr.*, 124 Wn. App. 738, 742-43, 100 P.3d 827 (2004), and *Hurlbert v. Gordon*, 64 Wn. App. 386, 396 n. 7, 824 P.2d 1238 (1992). In *Baumgartner*, the court affirmed summary dismissal of a claim on grounds alternate to those ruled upon by the trial court. In *Hurlbert*, the court ascertained the trial court's meaning in its summary judgment ruling by reference to the transcript of the oral ruling. Here, the transcript is incorporated as part of the order. (CP 601).

meretricious relationship, it ended in 1999. That's based on noncontroverted facts, I believe. To the extent that she had any rights that arose out of that meretricious relationship, if it existed, she sat on those rights for 10 years.

(CP 618-19).²⁷

Kelly argues the burden was not met to show that laches applies, citing *Clark County PUD No. 1 v. Wilkinson*, 139 Wn.2d 840, 849, 991 P.2d 1161 (2000). In *Clark County*, the court explained that the two elements for laches are 1) inexcusable delay, and 2) prejudice to the other party from such delay. *Id.* at 848. By uncontroverted evidence, no committed intimate relationship could have existed at any time after 1999 at the latest; it is likely that no legally recognizable committed intimate relationship ever existed between these parties. Kelly believed she had a claim in the early 2000s, and purposefully delayed bringing it.

Even were a committed intimate relationship to be found to exist in the 1990s or earlier, the trial court properly recognized the prejudice inherent in such a theory, requiring a defendant to unroll and/or trace

²⁷ "It is noted that there is substantial evidence in the file that [Kelly] purposefully delayed bringing her claim regarding a meretricious relationship, while trying to 'build her case,' after receiving legal advice as to what would make her claim viable. Ms. Kelly was well-aware she had a claim for meretricious relationship in 2002, within the three year statute of limitations." (CP 801 n. 3). "There was uncontroverted evidence that in 2002 Ms. Kelly has been advised by counsel and believed that she had a cause of action for meretricious relationship, but made the decision to take actions to strengthen her case and to delay filing an action while she strengthened her case. Evidence included emails from Ms. Kelly setting forth advice she had received from an attorney and her intention to strengthen her case before filing an action, even though the relationship had ended." (CP 1070).

every transaction he has engaged in since the alleged relationship ended, even if it was 25 years ago. (CP 1160-62, 612). Under these facts, and as explained by in its oral ruling, the trial court did not err in holding that the doctrine of laches bars Kelly's committed intimate relationship claim.

B. The Trial Court Properly Ejected Kelly and Awarded Damages.

Kelly's assignment of error to the trial court's order ejecting her from Moesslang's River Run property is premised upon Kelly's assignment of error to the summary dismissal of her committed intimate relationship claim. *See* App. Brief pp. 38-39. Implicitly, the reverse is also true: if the trial court did not err in dismissing Kelly's committed intimate relationship claim, it likewise did not err in ejecting Kelly or awarding damages. On appeal, Kelly has abandoned the theories on promissory estoppel and oral promise to convey real estate that she relied upon at the trial court. The trial court discussed, and rejected these theories in its memorandum opinion. (CP 803-805).

C. The Trial Court should be Affirmed on the Basis of Unclean Hands Doctrine.

The Appellate Court "may affirm the trial court on any grounds established by the pleadings and supported by the record." *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 766, 58 P.3d 276 (2002).

Moesslang requested that the trial court find Kelly lacked credibility, had unclean hands, and therefore could not seek a remedy in equity; and as a consequence, that her committed intimate relationship claim be dismissed with prejudice. (CP 620-21). The trial court ultimately found Kelly “not to be credible;” she was “not candid” with the court, and certain of her assertions and allegations were “blatantly false.” (CP 1047).

“Courts of equity go still further and refuse relief, even in cases of equitable right, if the applicant has been guilty of fraud or misconduct in or about the matter in respect to which he seeks relief.” *Cooper & Co. v. Anchor Securities Co.*, 9 Wn.2d 45, 113 P.2d 845 (1941).

Based upon nearly 600 pages of uncontroverted evidence, the trial court did not abuse its discretion in making this finding. The trial court may be affirmed on alternate grounds: having made material misrepresentations about the matter in respect to which Kelly seeks relief, and having been found to have no credibility, Kelly is not entitled to relief in equity, and her Complaint should be dismissed on the basis of unclean hands.

D. The Trial Court properly sanctioned Kelly for material misrepresentations and for intransigence; Moesslang should be awarded costs and fees on appeal.

Kelly was sanctioned \$10,619.48 for making material misrepresentations to the trial court and for intransigence; the trial court

ruled by written memorandum opinion, dated February 2, 2011. (CP 1046-1049). The legal bases presented to the trial court were CR 11 and *In re Cooke*, 93 Wn. App. 526, 969 P.2d 127 (1999).²⁸

A trial court's decision to impose CR 11 sanctions is reviewed for abuse of discretion. *Brin v. Stutzman*, 89 Wn. App. 809, 827, 951 P.2d 291 (1998). An abuse of discretion occurs when no reasonable person would take the view that the trial court adopted. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

The purpose of CR 11 is to deter baseless filings and curb abuses of the judicial system. *Skimming v. Boxer*, 119 Wn. App. 748, 754, 82 P.3d 707 (2004)(citing *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994)); *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219, 829 P.2d 1099 (1992). A filing is baseless if it is not well grounded in fact or not warranted by existing law or a good faith argument for altering existing law. *Skimming*, 119 Wn. App. at 754.

In deciding whether to impose sanctions, the Court should evaluate a party's pre-filing investigation by inquiring what was reasonable for the party to believe at the time she filed the Complaint. *See, e.g., Manteufel v. Safeco Ins. Co.*, 117 Wn. App. 168, 176-77, 68 P.3d 1093 (2003). Reasonableness is evaluated by an objective standard; the Court should

²⁸ See CP 208-213; 917-921; 1028-1037.

ask whether a reasonable person under similar circumstances could believe his or her actions were factually and legally justified. *See, e.g., Bryant*, 119 Wn.2d at 220.

This Court has previously affirmed a trial court's award of \$20,000 in attorney's fees under similar circumstances, where a party "signed and filed an unsupported, and unsupportable, statement of issues" alleging a committed intimate relationship and demanding distribution of property. *In Re Cooke*, 93 Wn. App. 526, 969 P.2d 127 (1999).

In *Cooke*, after the dismissal of the plaintiff's committed intimate relationship claim, the trial court granted the defendant's motion for sanctions and attorney's fees, finding that:

[N]one of the issues raised in [plaintiff's] Statement of Issues were capable of proof. [The trial court] further found that [plaintiff] filed the Statement of Issues for improper purposes and that the cost of the proceeding was increased due to [plaintiff's] intransigence and vexatious conduct. [The trial court] then awarded \$20,000 in fees and expenses to [defendant] . . . the [trial court] found that [plaintiff], individually, had violated CR 11 by filing a Statement of Issues.

Id. at 528.

On appeal, the *Cooke* court affirmed, finding no abuse of discretion. *Id.* at 529. The Court also affirmed that attorney's fees should be awarded because 1) plaintiff failed to produce evidence to support his

assertions, and 2) because plaintiff was intransigent in pursuing his claims, forcing defendant to incur substantial unnecessary legal costs. *Id.* at 529.

Here, Moesslang moved for sanctions on the same basis as the respondent in *Cooke*, provided the trial court with briefing on the issue, and supported these briefs with email admissions of Kelly, juxtaposed with her contradictory allegations. (CP 210-11, 918, 1030-1034). The trial court granted the motion, as described in the trial court's February 2, 2011 *Memorandum Decision and Order re: Sanctions*. (CP 1046-1049).

Kelly assigns error to the trial court because "no evidence supports the award," and that the it "did not identify any intransigence." *See* App. Brief at pp. 39-40. On the contrary, the trial court extensively discussed the basis for its ruling, and substantial evidence supports it.

The trial court dismissed Kelly's complaint on summary judgment, finding that the uncontroverted emails of Kelly show that whatever relationship had existed between the parties it had ended at the latest by 1999. (CP 1046-47).²⁹ The trial court ultimately found Kelly "not to be credible;" she was "not candid" with the court, and certain of her assertions and allegations were "blatantly false." (CP 1047).

²⁹ The trial court refers to its 7/26/2010 *Memorandum Opinion*, "which sets forth the history of this case as well as two companion cases." (CP 1046 n. 2, referring to CP 800-803).

The trial court found that Kelly and her counsel were intransigent, unnecessarily delaying proceedings by several months and taking untenable positions to avoid enforcement of the court's order on ejectment. (CP 1047). The court further found unjust delay, pleadings filed for improper purposes, and intransigence in Kelly's filing of a *lis pendens* against Moesslang's property several months after Kelly's claims had already been dismissed, and without informing either the court or Moesslang. (CP 1048).

Based upon the preceding, the trial court ruled that sanctions, in the form of attorney's fees payable to Moesslang, were the appropriate remedy, given the intransigence and lack of candor exhibited by Kelly. (CP 1048).

As in *Cooke*, Kelly failed to produce material evidence to support her allegations, and not only were Kelly's allegations unsupported by evidence, they were also directly contradicted by her own written admissions. After Kelly's admissions were presented to the trial court and went un-refuted by Kelly, she was intransigent in re-alleging and continuing to pursue claims contradicted by those admissions, unnecessarily increasing costs, delay, and the use of court time. The trial court properly sanctioned Kelly, substantiated its opinion appropriately, and should be affirmed.

If attorney's fees are allowable at the trial court, the prevailing party may recover fees on appeal. *Landberg v. Carlson*, 108 Wn. App. 749, 758, 33 P.3d 406 (2001)(citing RAP 18.1). RAP 18.9(a) authorizes the appellate court to order a party who files a frivolous appeal "to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court."

"Appropriate sanctions may include, as compensatory damages, an award of attorney fees and costs to the opposing party." *Yurtis v. Phipps*, 143 Wn. App. 680, 696, 181 P.3d 849 (2008).

On appeal, and contrary to RAP 10.3(a)(5), Kelly fails to acknowledge, address, or discuss the extensive and uncontroverted travel records, as well as her own emails. *See* App. Brief, pp. 3-13. Further, in arguing that the trial court erred in sanctioning her, Kelly affirmatively misrepresents the record to this Court, asserting that certain pieces of uncontroverted evidence that the trial court relied upon in sanctioning Kelly simply do not exist. *See id.* at 39-40.

Kelly has raised no debatable issue on appeal. The trial court's sanctions ruling should be affirmed, and Moesslang should also be awarded his reasonable attorney's fees on appeal. Finally, should Moesslang be deemed the substantially prevailing party, he requests an award of his costs on appeal, pursuant to RAP 14.2.

IV. CONCLUSION

For the foregoing reasons, the trial court should be affirmed.

RESPECTFULLY SUBMITTED this 13th day of January, 2012.

PAINE HAMBLEN LLP

By: Jane E. Brown
Jane E. Brown, WSBA #25093
William C. Schroeder, WSBA #41986
Attorneys for Respondent Moesslang

CERTIFICATE OF SERVICE

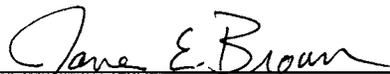
I hereby certify that on this 13th day of January, 2012, I caused to be served a true and correct copy of the foregoing **BRIEF OF RESPONDENT**, by the method indicated below and addressed to the following:

Allen M. Gauper
Salina, Sanger & Gauper
422 West Riverside Avenue, #824
Spokane, WA 99201

<u> </u>	U.S. MAIL
<u>X</u>	DELIVERED
<u> </u>	OVERNIGHT MAIL
<u> </u>	FACSIMILE

George M. Ahrend
Ahrend Law Firm PLLC
100 East Broadway Avenue
Moses Lake, WA 98837

<u>X</u>	U.S. MAIL
<u> </u>	DELIVERED
<u> </u>	OVERNIGHT MAIL
<u> </u>	FACSIMILE



Jane E. Brown

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APPENDIX 1 to Brief of Respondent

TRIPS TO SEATTLE IN 2000		
	Dates	CP
1.	3/17-3/18, Friday-Saturday	1288, 1297, 1298
2.	3/28-3/30, Tuesday-Thursday	1288, 1297, 1298
3.	4/8-4/9, Saturday-Sunday	1288
4.	5/6-5/7, Saturday-Sunday	1288, 1299, 1357
5.	5/27-5/29, Saturday-Monday	1288, 1299, 1300
6.	6/10-6/11, Saturday-Sunday	1288, 1300
7.	6/17-6/20, Saturday-Tuesday	1288, 1355, 1300
8.	6/22-6/24, Thursday-Saturday	1288, 1301, 1355
9.	6/30-7/1, Friday-Saturday	1288, 1301, 1356
10.	7/8-7/9, Saturday-Sunday	1288, 1301
11.	7/23-7/24, Sunday-Monday (Seattle, Portland)	1288, 1302
12.	7/28-8/4, Friday-Friday (Seattle, Newport, OR)	1288, 1302, 1354, 1352
13.	8/11-8/12, Friday-Saturday	1288, 1302, 1303
14.	8/15-8/17, Tuesday-Thursday	1288, 1303
15.	8/26-8/27, Saturday-Sunday	1288, 1352
16.	8/31-9/1, Thursday-Friday	1288, 1303, 1353
17.	9/3-9/5, Sunday-Tuesday	1288, 1353
18.	9/7-9/8, Thursday-Friday	1288, 1303, 1350
19.	9/15-9/17, Friday-Sunday	1288, 1350
20.	9/30-10/1, Saturday-Sunday (Denise in CDA)	1288, 1351
21.	10/7-10/8, Saturday-Sunday	1288, 1303
22.	11/3-11/5, Friday-Sunday	1288, 1304, 1349
23.	11/11-11/13, Saturday-Monday	1288, 1304, 1347
24.	11/25-11/27, Saturday-Monday	1288, 1304
25.	12/2-12/3, Saturday-Sunday	1288, 1304
26.	12/8-12/9, Friday-Saturday	1288, 1304

APPENDIX 1 to Brief of Respondent

TRIPS TO SEATTLE IN 2001		
	Dates	CP
1.	1/1-1/9 (Peter in Germany)	1289
2.	1/12-1/14 (Peter in CDA)	1289
3.	1/19-1/21, Friday-Sunday	1289
4.	1/26-1/29?	1289
5.	2/2-2/4, Saturday-Sunday (Denise in CDA)	1289
6.	2/7-2/8, Wednesday-Thursday	1289, 1305, 1321, 1322
7.	2/12-2/13, Monday-Tuesday	1289, 1305, 1321, 1322
8.	3/9-3/11, Friday-Sunday	1289, 1305
9.	3/17-3/18, Saturday-Sunday	1289, 1305
10.	4/12-4/13, Thursday-Friday	1289, 1306, 1338, 1327
11.	4/21-4/22, Saturday-Sunday	1289, 1306, 1338, 1322, 1325
12.	4/28-4/29, Saturday-Sunday	1289, 1306, 1338
13.	5/2-5/3, Wednesday-Thursday	1289, 1306, 1337, 1322
14.	5/13-5/14, Sunday-Monday	1289, 1306, 1337, 1322
15.	5/18-5/20, Friday-Sunday	1289, 1306, 1307
16.	6/2-6/3, Saturday-Sunday	1289, 1307, 1337, 1327
17.	6/8-6/10, Friday-Sunday	1289, 1307, 1335, 1322, 1323
18.	6/18-6/20, Monday-Wednesday	1289, 1335, 1321, 1323, 1327
19.	7/7-7/8, Saturday-Sunday	1289, 1333, 1323, 1360
20.	7/12-7/15, Thursday-Sunday (Lake Chelan family camping trip)	1289, 1333, 1321
21.	7/27-7/29, Friday-Sunday	1289, 1307, 1334, 1323
22.	7/30-8/1, Monday-Wednesday	1289, 1308
23.	9/6, Thursday	1289, 1308, 1332, 1321
24.	9/14-9/16, Friday-Sunday (met in Lake Chelan)	1289, 1332, 1321, 1324
25.	10/15-10/16, Monday-Tuesday	1289, 1308, 1331, 1324, 1327
26.	10/18, Thursday	1289, 1308
27.	10/19-10/23, Friday-Tuesday	1289, 1308, 1331, 1321, 1324
28.	11/13, Tuesday	1289, 1325, 1321, 1361
29.	11/16-11/18, Friday-Sunday	1289, 1324, 1325
30.	11/30-12/2, Friday-Sunday	1289, 1330, 1321, 1325, 1362

APPENDIX 1 to Brief of Respondent

TRIPS TO SEATTLE IN 2002		
	Dates	CP
1.	1/5-1/6, Saturday-Sunday (Denise CDA)	1290
2.	1/12-1/13, Saturday-Sunday (Denise CDA)	1290
3.	1/19-1/21, Saturday-Monday (Stehikan)	1290
4.	1/26-1/27, Saturday-Sunday (Denise CDA)	1290
5.	2/5-2/10, Tuesday-Sunday (Phoenix, AZ)	1290
6.	2/23-2/24, Saturday-Sunday	1290
7.	3/9-3/10, Saturday-Sunday	1290, 1363
8.	3/13, Wednesday	1290
9.	3/16-3/17, Friday-Saturday	1290
10.	3/27, Wednesday	1290
11.	4/12-4/14, Friday-Sunday	1290
12.	4/23-4/24, Tuesday-Wednesday	1290
13.	4/26-4/28, Friday-Sunday	1290
14.	5/12-5/13, Sunday-Monday	1290, 1309
15.	5/17-5/19, Friday-Sunday	1290
16.	5/23-5/25, Thursday-Saturday	1290
17.	5/31-6/2, Friday-Sunday	1290, 1316
Kelly spends summer in Montana with boyfriend.		
18.	6/7-6/10, Friday-Monday	1290, 1309, 1318
19.	6/19-6/20, Wednesday-Thursday	1290, 1309
20.	6/21-6/23, Friday-Sunday	1290, 1310
21.	7/4-7/7, Thursday-Sunday (drove)	1290
22.	7/14-7/17, Saturday-Wednesday (Lake Chelan family camping trip)	1290
23.	7/19-7/21, Friday-Saturday	1290, 1365
24.	8/2-8/2 (should this be 8/4?), Tuesday-Thursday	1290, 1310
25.	8/23-8/26, Friday-Monday (Vancouver, Canada)	1290, 1310
26.	9/6-9/12, Friday-Thursday (Roche Harbor)	1290, 1311
27.	9/14-9/16, Saturday-Monday	1290, 1311
28.	9/20-9/22, Friday-Sunday	1290, 1311, 1316, 1317
29.	9/27-9/29, Friday-Sunday	1290, 1311
30.	10/4-10/6, Friday-Sunday	1290, 1311, 1312
31.	10/11-10/13, Friday-Sunday	1290, 1312
32.	10/19-10/21, Saturday-Monday	1290, 1312
Kelly returns to Liberty Lake. Montana house for sale.		
33.	10/25-10/27, Friday-Sunday	1290, 1312
34.	11/1-11/3, Friday-Sunday	1290, 1312
35.	11/8-11/10, Friday-Sunday (Portland)	1290, 1368, 1369
36.	11/15-11/17, Friday-Sunday	1290, 1312

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37.	12/6-12/8, Friday-Sunday	1290
38.	12/1801-1/1/02, Wednesday-Wednesday (CHRISTMAS TRIP MUNICH, GERMANY)	

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TRIPS TO SEATTLE IN 2003		
	Dates	CP
1.	1/10-1/12, Friday-Sunday	1291
2.	1/22-1/26, Wednesday-Sunday	1291, 1370
3.	1/31-2/2, Friday-Sunday	1291, 1371
4.	2/14-2/16, Friday-Sunday	1291
5.	3/7-3/9, Friday-Sunday	1291, 1372
6.	3/20-3/23, Thursday-Sunday (drove)	1291
7.	4/4-4/7, Friday-Monday, (Joshua Tree)	1291, 1374
8.	4/12-4/13, Saturday-Sunday	1291
9.	4/19-4/22, Saturday-Tuesday (Nevada - Zion)	1291, 1375
10.	5/2-5/5, Friday-Monday (Vancouver)	1291
11.	5/9-5/11, Friday-Sunday	1291
12.	5/16-5/18, Friday-Saturday (drove)	1291
13.	5/23-5/26, Friday-Monday	1291, 1313
14.	6/6-6/8, Friday-Sunday (Denise Spokane)	1291
15.	6/13-6/15, Friday-Sunday	1291
16.	6/26-6/28, Thursday-Friday	1291
17.	7/3-7/6, Thursday-Friday	1291
18.	7/12-7/16, Saturday-Wednesday (Lake Chelan family camping trip)	1291
19.	7/26-7/26, Saturday-Sunday	1291, 1313
20.	8/7-8/10, Thursday-Sunday	1291
21.	8/13, Tuesday	1291, 1313
22.	8/15-8/17, Friday-Sunday	1291, 1376
23.	8/22-8/24, Friday-Sunday (Pt. Ludlow)	1291
24.	8/29-9/1, Friday-Monday (Portland)	1291, 1377, 1313
25.	9/3-9/7, Wednesday-Sunday	1291
26.	9/12-9/14, Friday-Sunday (drove)	1291
27.	9/19-9/21, Friday-Sunday	1291, 1378
28.	10/3-10/5, Friday-Sunday (drove)	1291
29.	10/10-10/12, Friday-Sunday	1291, 1379
30.	10/17-10/20, Friday-Sunday	1291
31.	10/31-11/2, Friday-Sunday	1291
32.	11/7-11/9, Friday-Sunday (drove)	1291
33.	11/14-11/16, Friday-Sunday	1291
34.	11/18-11/27, Wednesday-Sunday (drove)	1291
35.	12/11-1/1, Thursday-Thursday (CHRISTMAS TRIP TO NEW MEXICO, HIKING)	1291

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TRIPS TO SEATTLE IN 2004		
	Dates	CP
1.	1/9-1/22, Friday-Monday	1292, 1382
2.	1/16-1/18?	1292
3.	1/23-1/25?	1292, 1383
4.	1/30-2/2, Friday-Monday	1292, 1384
5.	2/6-2/8, Friday-Monday	1292, 1387
6.	2/13-2/17, Friday-Tuesday (Winthrop)	1292
7.	2/20-2/22?	1292
8.	3/5-3/6?	1292
9.	3/12-3/14, Friday-Sunday	1292
10.	3/19-3/22, Friday-Sunday	1292, 1388
11.	3/26-3/28, Friday-Sunday	1292
12.	4/2-4/4, Friday-Sunday (Denise Spokane)	1292
13.	4/9-4/11, Friday-Sunday	1292, 1313
14.	4/16-4/18, Friday-Sunday	1292
15.	4/23-4/25, Friday-Sunday (drove)	1292
16.	5/5-5/9, Wednesday-Sunday	1292
17.	5/14-5/24 (Denise Costa Rica)	1292
18.	5/28-5/30?	1292
19.	6/4-6/6?	1292
20.	6/11-6/14, Friday-Monday	1292
21.	6/18-6/20, Friday-Monday	1292
22.	6/24-6/27, Friday-Monday (Snoqualmie Lodge)	1292, 1390
23.	6/29-7/5, Tuesday-Monday	1292, 1391
24.	7/10-7/14, Saturday-Wednesday (Lake Chelan family camping trip)	1292
25.	7/16-7/18, Friday-Monday	1292
26.	7/23-7/25?	1292
27.	7/29-7/30, Thursday-Friday	1292
28.	8/5-8/8, Thursday-Sunday	1292
29.	8/13-8/16, Friday-Sunday (Portland)	1292
30.	8/24-8/26, Tuesday-Thursday	1292, 1394
31.	8/27-8/29, Friday-Sunday	1292
32.	9/3-9/6, Friday-Monday (drove)	1292
33.	9/10-9/12, Friday-Sunday (drove)	1292
34.	9/17-9/19, Friday-Sunday	1292
35.	9/23-9/26, Thursday-Sunday	1292
36.	10/1-10/3, Friday-Sunday	1292, 1396
37.	10/8-10/10, Friday-Sunday	1292, 1397
38.	10/15-10/17, Friday-Sunday	1292

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	(Denise Spokane/Nelson, Canada)	
39.	10/29-10/31, Friday-Sunday	1292, 1398, 1399
40.	11/5-11/7, Friday-Sunday	1292
41.	11/12-11/14, Friday-Monday (Seattle, Portland)	1292, 1647
42.	11/19-11/22, Friday-Monday (Seattle, San Francisco)	1292, 1400
43.	11/25, Peter in Spokane	1292
44.	12/3-12/5, Friday-Sunday	1292, 1401
45.	12/10-12/12, Friday-Sunday	1292
46.	12/22-1/8, Wednesday-Saturday (CHRISTMAS TRIP TO MUNICH, GERMANY AND CYPRUS, HIKING)	1292

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TRIPS TO SEATTLE IN 2005		
	Dates	CP
1.	1/8-1/10, Saturday-Monday	1293
2.	1/15-1/17?	1293, 1402
3.	1/21-1/24, Friday-Monday	1293
4.	1/28-1/31, Friday-Monday	1293
5.	2/4-2/7, Friday-Monday	1293
6.	2/11-2/14, Friday-Monday	1293
7.	2/15-2/16, Tuesday, Wednesday	1293
8.	2/20-2/21, Sunday, Monday	1293
9.	2/25-2/27, Friday-Monday	1293
10.	3/4-3/7, Friday-Monday (Seattle, Portland)	1293, 1635
11.	3/11-3/14 (Peter in Spokane)	1293
12.	3/15-3/30 (Peter Europe)	1293
13.	4/1-4/4, Friday-Monday (drove)	1293
14.	4/8-4/10 (Denise Whidbey Island)	1293
15.	4/15-4/18, Friday-Monday (Seattle, Portland)	1293, 1404, 1633
16.	4/22-4/24, Friday-Monday	1293, 1405
17.	4/29-5/2, Friday-Monday	1293
18.	5/6-5/9, Friday-Monday	1293, 1406
19.	5/13-5/16, Friday-Monday	1293
20.	5/20-5/23, Friday-Monday (Seattle, Portland)	1293, 1630
21.	5/27-5/30, Friday-Monday	1293
22.	6/3-6/7 - Friday-Tuesday	1293, 1407
23.	6/8-6/12 (Denise New Orleans)	1293
24.	6/17-6/20, Friday-Monday	1293, 1408
25.	6/24-6/27, Friday-Monday (Pt. Townsend)	1293, 1410, 1411, 1412, 1626
26.	7/1-7/5, Friday-Tuesday (drove)	1293
27.	7/8-7/11, Friday-Monday	1293
28.	7/15-7/17, Friday-Sunday (San Diego)	1293, 1413
29.	7/22-7/27, Friday-Wednesday (Lake Chelan family camping trip)	1293
30.	7/29-8/1, Friday-Monday	1293
31.	8/5-8/8, Friday-Monday (Seattle, Marblemount)	1293, 1415
32.	8/12-8/15, Friday-Monday (Seattle, Mt. Rainer)	1293
33.	8/19-8/22, Friday-Monday (drove)	1293
34.	8/26-8/29, Friday-Monday (Seattle, Vancouver)	1293, 1622
35.	9/2-9/6, Friday-Tuesday	1293
36.	9/9-9/12, Friday-Monday	1293
37.	9/16-9/19, Friday-Monday	1293
38.	9/22-10/3, Peter Munich	1293

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39.	10/7-10/10, Friday-Monday	1293
40.	10/14-10/17, Friday-Monday	1293, 1620, 1621
41.	10/21-10/24, Friday-Monday (Seattle, Portland)	1293, 1617
42.	10/28-10/31, Friday-Monday	1293
43.	11/4-11/7, Friday-Monday	1293, 1621
44.	11/11-11/13, Friday-Monday	1293, 1617
45.	11/15-11/29, US Consulate Visa Renewal Peter Germany	1293
46.	11/29-11/30, Tuesday-Wednesday	1293
47.	12/2 - Peter in Spokane	1293
48.	12/9-12/12, Friday-Monday (Seattle, Portland)	1293, 1418, 1614
49.	12/17-1/1, Sunday-Sunday (CHRISTMAS TRIP TO LA PAZ, MEXICO, SAILING)	1293, 1420, 1421, 1422, 1423, 1611, 1615

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TRIPS TO SEATTLE IN 2006		
	Dates	CP
1.	1/6-1/9, Friday-Monday	1294, 1424, 1611
2.	1/13-1/17, Friday-Monday	1294, 1425, 1611
3.	1/20-1/23, Friday-Monday	1294, 1612
4.	1/27-1/30, Friday-Monday	1294, 1611
5.	2/3-2/6, Friday-Monday	1294, 1611
6.	2/10-2/13, Friday-Monday	1294, 1611
7.	2/17-2/21, Monday-Tuesday	1294, 1426, 1612
8.	2/24-2/27, Friday-Monday (Seattle, Portland)	1294, 1608
9.	3/3-3/5, Friday -Sunday	1294, 1605, 1608
10.	3/6-3/20, Peter in Germany	1294
11.	3/24-3/27, Friday- Monday	1294, 1605
12.	3/31-4/3, Friday-Monday	1294
13.	4/7-4/10, Friday-Monday (Seattle, Mt. Rainer)	1294, 1605
14.	4/14-4/17, Friday-Monday	1294, 1427, 1602, 1603
15.	4/21-4/24, Friday-Monday (drove)	1294
16.	4/28-5/1, Friday-Monday (Denise Las Vegas, Peter NY)	1294, 1603
17.	5/5-5/8. Friday-Monday	1294, 1603
18.	5/12-5/15, Friday-Monday	1294, 1599
19.	5/19-5/21, Friday-Sunday (Manhattan Beach, CA)	1294, 1428, 1600, 1603
20.	5/26-5/30, Friday-Monday	1294, 1603
21.	6/2-6/5, Friday-Monday	1294, 1596
22.	6/9-6/12, Friday-Monday	1294, 1596
23.	6/16-6/19, Friday-Monday	1294, 1597
24.	6/22-6/26, Thursday-Monday (Seattle, Yosemite)	1294, 1429, 1593, 1600
25.	6/30-7/5, Friday-Wednesday	1294, 1596
26.	7/7-7/10, Friday-Monday	1294
27.	7/11-7/16, Monday-Sunday (Lake Chelan family camping trip)	1294
28.	7/21-7/24, Friday-Monday	1294, 1593
29.	7/28-7/31, Friday-Monday	1294, 1593
30.	8/4-8/7, Denise Blake Island	1294, 1593
31.	8/11-8/14, Friday-Monday	1294, 1590
32.	8/18-8/21?	1294, 1590
33.	8/25-8/28, Friday-Monday	1294, 1590
34.	9/1-9/5, Friday-Tuesday	1294
35.	9/8-9/11, Peter in Spokane	1294
36.	9/15-10/1 (SAILING IN GREECE, MUNICH	1294, 1597

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	OCTOBERFEST)	
37.	10/6-10/9, Friday-Monday	1294, 1584
38.	10/13-10/16, Friday-Monday	1294, 1430, 1584
		Kelly moves to River Run
39.	10/20-10/30, Peter moves Bette Lyn	
40.	11/3-11/6, Friday-Monday	1294
41.	11/10-11/13, Friday-Monday	1294
42.	11/17-11/20, Friday-Monday (Seattle, Portland)	1294, 1582
43.	11/23-11/27, Denise in Las Vegas	1294
44.	12/1-12/4, Friday-Monday	1294
45.	12/8-12/11, Friday-Sunday (Newport Beach, CA)	1294, 1431, 1579
46.	12/15-12/18, Friday-Monday	1294, 1433
47.	12/21-1/1, Thursday-Sunday (CHRISTMAS TRIP TO ARIZONA, HIKING)	1294, 1434, 1580, 1581

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TRIPS TO SEATTLE IN 2007		
	Dates	CP
1.	1/5-1/8, Friday-Monday	1295, 1435, 1577
2.	1/12-1/16, Friday-Monday	1295, 1436
3.	1/19-1/22, Friday-Monday (Newport Beach, CA)	1295, 1437, 1578
4.	1/26-1/29, Friday-Monday	1295, 1577
5.	2/2-2/5, Friday-Monday	1295
6.	2/9-2/12, Friday-Monday	1295, 1578
7.	2/23-2/23, Friday-Monday (should this be 2/20-2/23?)	1295, 1573, 1575
8.	3/2-3/12 (Peter in Munich)	1295
9.	3/16-3/19, Friday-Monday	1295, 1438, 1573, 1574
10.	3/23-3/26 (Denise in California)	1295
11.	3/29-4/2, Friday-Monday (drove)	1295, 1570
12.	4/6-4/9, Friday-Monday	1295, 1574
13.	4/13-4/16, Friday-Monday	1295, 1570
14.	4/20-4/24, Friday-Tuesday (Seattle, San Francisco)	1295, 1439, 1568
15.	4/27-4/30 (Denise in California)	1295
16.	5/4-5/7, Friday-Monday	1295
17.	5/11-5/14, Friday-Monday	1295, 1568
18.	5/16-5/21, Wednesday-Monday (Seattle, New York)	1295, 1568
19.	5/25-5/29, Friday-Tuesday	1295, 1568
20.	6/1-6/4, Friday-Monday	1295, 1566
21.	6/8-6/11, Friday-Monday	1295
22.	6/15-6/18, Friday-Monday	1295, 1566
23.	6/22-6/25, Friday-Monday	1295
24.	6/29-7/1, Friday-Saturday	1295
25.	7/2-7/5, Sunday-Tuesday (Denise in Spokane)	1295
26.	7/6-7/9, Friday-Monday	1295
27.	7/13-7/16, Friday-Monday	1295
Kelly claims meretricious relationship		
28.	7/20-7/25, Wednesday-Monday (Lake Chelan family camping trip)	1295
29.	7/27-7/29, Friday-Sunday (Denise in Spokane)	1295, 1562, 1564
30.	8/3-8/6, Friday-Monday (Denise in Coos Bay)	1295
31.	8/10-8/13, Friday-Monday (Denise in Spokane)	1295, 1562
32.	8/17-8/20, Friday-Monday	1295, 1441, 1562
33.	8/24-8/27, Friday-Monday	1295, 1442, 1562
34.	8/31-9/3, Friday-Monday (Denise in Spokane)	1295
35.	9/7-9/30 (SAILING IN GREECE, OCTOBERFEST MUNICH)	1295, 1443, 1444, 1562

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36.	10/5-10/8, Friday-Monday	1295
37.	10/12-10/15, Friday-Sunday (Denise in Spokane)	1295, 1558
38.	10/19-10/22, Friday-Monday	1295, 1446, 1558
39.	10/26-10/28, Friday-Sunday (Denise in Spokane)	1295, 1559
40.	11/2-11/5, Friday-Monday	1295, 1447, 1558, 1559
41.	11/9-11/12, Friday-Monday	1295, 1556, 1558
42.	11/16-11/19, Friday-Monday	1295, 1448, 1449, 1558
43.	11/22-11/27, Thursday-Tuesday (Seattle, Leavenworth)	1295, 1554, 1556
44.	11/30-12/2, Friday-Sunday (Denise in Spokane)	1295, 1559
45.	12/7-12/10, Friday-Monday	1295, 1450, 1557
46.	12/14-12/17, Friday-Monday	1295, 1451, 1554, 1559
47.	12/19-1/1/2008 (CHRISTMAS TRIP TO NEW MEXICO, HIKING)	1295, 1452, 1453, 1454, 1558
48.	12/13/08-1/4/09, Saturday-Saturday (CHRSTMAS TRIP TO CRETE AND MUNICH, HIKING)	1295

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E-Ticket Information for Southwest Airlines 1/4/08-6/21/09		
	Dates	CP
1.	01/4-1/7/08 GEG SEA	1455
2.	1/11-1/14/08 GEG SEA	1456
3.	1/25-1/28/08 GEG SEA	1457, 1550, 1555
4.	2/1-2/04/08 GEG SEA	1458, 1550, 1555
5.	2/8-2/11/08 GEG SEA	1459, 1554
6.	3/21-3/24/08 GEG SEA	1460, 1551
7.	3/28-3/31/08 GEG SEA	1461, 1551
8.	4/4-4/7/08 GEG SEA	1462, 1551
9.	4/18-4/21/08 GEG SEA	1463, 1549
10.	5/2-5/5/08 GEG SEA	1464, 1549
11.	5/9/08 GEG PDX	1465, 1544, 1548
12.	5/14-5/15/08 GEG PDX	1466, 1544
13.	5/16-5/19/08 GEG SEA	1467, 1549
14.	5/30-6/2/08 GEG SEA	1468, 1548
15.	6/13-6/16/08 GEG SEA	1469, 1546
16.	6/20-6/23/08 GEG SEA	1470, 1546
17.	7/9/08 GEG SEA	1471
18.	7/1/08 GEG PDX	1472, 1540
19.	7/9/08 GEG SEA	1473, 1540
20.	7/18-7/21/08 GEG SEA	1474, 1546
21.	7/28/08 GEG PDX	1475
22.	8/22-8/25/08 GEG SEA	1476, 1477, 1480, 1481
23.	8/8-8/12/08 GEG SEA	1478, 1542
24.	8/13-8/14/08 GEG PDX	1479, 1542
25.	8/22-8/25/08 GEG SEA	1476, 1477, 1480, 1481, 1542
26.	9/4-9/8/08 GEG SEA	1482, 1540
27.	9/11/08 GEG PDX	1483
28.	9/13-9/18-08 SEA MDW / MDW PVD / PVD LAS / LAS SEA	1484, 1536, 1539
29.	9/22/08 SEA GEG	1485
30.	9/24-9/25/08 GEG PDX	1486, 1539
31.	10/3-10/6/08 GEG SEA	1487
32.	10/10-10/13/08 GEG SEA	1488
33.	10/17-10/20/08 GEG SEA	1489, 1539
34.	10/30-11/03/08 GEG SEA	1490
35.	10/31-11/2/08 SEA MDW / MDW RSW / RSW MCO / MCO SEA	1491, 1492, 1532
36.	11/26-12/01/08 GEG SEA	1493, 1494, 1530

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37.	12/5-12/8/08 GEG SEA	1495
38.	12/12/08-1/5/09 GEG SEA	1497, 1496, 1530
39.	1/9-1/12/09 GEG SEA	1498, 1530
40.	1/30-2/2/09 GEG SEA	1499, 1526
41.	2/3-2/4/09 GEG PDX	1500, 1526
42.	2/6-2/9/09 GEG SEA	1501
43.	3/8-3/9/09 GEG PDX	1502, 1503, 1504, 1505, 1524, 1526
44.	4/9/09 GEG PDX	1506, 1507, 1520, 1522
45.	4/17-4/20/09 GEG SEA	1508
46.	5/1-5/4/09 GEG SEA	1509, 1520
47.	5/7-5/8/09 GEG PDX	1510, 1511, 1520, 1521, 1525
48.	5/15-5/18/09 GEG SEA	1512
49.	6/5-6/8/09 GEG SEA	1513, 1514
50.	6/9/09 GEG PDX	1515
51.	6/19-6/21/09 GEG SEA	1516, 1517
52.	7/15/09 Universal Credit Card Charge Form	1518

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