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No. 60923-8-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

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HUMPHREY INDUSTRIES, LTD.,

Plaintiffs-Appellant

v.

CLAY STREET ASSOCIATES LLC, et al.,

Defendant-Respondents

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ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Harry McCarthy)

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# APPELLANT'S REVISED OPENING BRIEF

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## ASSIGNMENTS OF ERROR

Defendant and Appellant Humphrey Industries Ltd. ("Humphrey") makes the following summary of assignments of error. (See Appendix E containing a list and the text of the challenged findings and related conclusions).

1. The trial court erred when it failed to grant Humphrey fees, costs, and expenses pursuant to RCW 25.15.480, which is entitled "Unsettled Demand for Payment—Proceeding—Parties—Appraisers," contained in the Dissenters' Rights article of the "Washington Limited Liability Company Act" ("the dissenters' statute").

2. The trial court erred when it granted Clay Street and Joseph and Ann Lee Rogel fees, costs, and expenses pursuant to RCW 25.15.480.

3. The trial court erred when it considered settlement offers and offers of judgment to shift fees, costs, and expenses in a special appraisal proceeding governed by the dissenters' rights statute.

4. The trial court erred, when it determined the fair value of the dissenters' interest in the company and the accrued interest, pursuant to RCW 25.15.480, and made related rulings.

5. The trial court erred, when it failed to alter or amend the oral ruling, entered judgment, and made related rulings.

6. The trial court erred, when it excluded the expert testimony of George Humphrey and made related rulings.

7. The trial court erred, when it failed to exclude expert opinions of Ken Barnes that were not disclosed in discovery and made related rulings.

8. The trial court erred, when it made findings that are not supported by substantial evidence or contain legal errors. (Findings 2, 5, 6, 11, 13, 16-19, 21, 23-24, 26-28, 35-44.)

9. The trial court erred, when it made erroneous conclusions of law and ones that were based on invalid findings.

## STATEMENT OF ISSUES

The following issues pertain to the assignments of error:

A. Did the trial court erroneously construe RCW 25.15.480 as a matter of law? The subissues, include, but are not limited to:

1. Does the failure to comply with the statutory time limit for payment of fair value amount to substantial compliance?

2. Did the failure to comply with the statutory time limit for payment of fair value amount to substantial compliance?

3. Did Clay Street act in an arbitrary, vexatious, or not in good faith manner with respect to statutory rights?

4. Did the trial court's consideration of settlement offer, and other evidence, and the equitable standard contravene the statutory requirements, the common law, and CR 68?

5. Did Clay Street forfeit any claim for fees?

6. Did Humphrey act arbitrarily, vexatiously or not in good faith with respect to the statutory rights of Clay Street and the Rogels?

B. Did the trial court erroneously construe and apply the statutory "fair value" standard including interest? The subissues include, but are not limited to,

1. Did the exclusion of opinion evidence result in prejudice to Humphrey?

2. Did Barnes' new opinions prejudice Humphrey?

3. Did the fair value ruling impose impermissible penalties against the dissenter that were not supported by the law and substantial evidence?

## I. SUMMARY INTRODUCTION

This appeal concerns the proper interpretation of one of the Washington statutes governing dissenters' rights, modeled on the 1984 Model Business Corporate Act (MBCA). CP 1940:25-1941:6, 1969-1973 (Appendix A, Comments to Washington Business Corporation Act). The relevant provisions of the statute have rarely been interpreted by

Washington courts, perhaps because the purpose and language are relatively clear and straightforward.

This appeal involves a judicial appraisal proceeding to determine the "fair value" of a company pursuant to the dissenters' rights article in the limited liability company statute. Chapter 25.15 RCW. Before this proceeding was filed, the respondent-company (hereafter, "Clay Street") knowingly committed multiple violations of the statute. In addition, eighteen months before trial, the original trial judge ruled that Clay Street violated the statute (which required an immediate payment to the dissenter). The original trial judge also appointed an independent appraiser. A year later, Clay Street replaced its counsel. It then simply rejected the reports of the first court-appointed appraiser and, later, the reports of his successor. The case was continued, through no fault of the appellant, and a new trial judge was assigned after the continuances.

At the trial's start, Clay Street openly admitted that its fair value calculation was not "particularly reasonable" because the value was lower than purchase offers that the company had rejected. The company further admitted it had proceeded down the "wrong path" and mistreated its statutory duties as "a negotiation type scenario, as opposed to just come up with the number and pay it." VRP 29:23-30:11. In an effort to extricate itself from these legally damning admissions, the company improperly offered inadmissible and misleading evidence about unfunded settlement offers. Unfortunately, the new trial judge (a) admitted the inadmissible evidence, (b) ignored the prescribed statutory method for determining fees, and (c) relied upon the dissolved company's illusory and inadmissible settlement offers to award Clay Street its fees and costs. Incredibly, the trial court ruled that Clay Street committed merely technical violations of the statute and that the dissenter suffered no financial injury from receiving a delinquent prepayment of $181,000 that was four months late.

In addition to these clear errors of law, the court erroneously construed the fair value provision to penalize the dissenter instead of compensating the dissenter, as the statute requires, for the taking of his property. Further, the trial court improperly relied upon a new, previously undisclosed opinion by Clay Street's appraiser, excluded other material expert testimony, and ignored a $100,000 mistake by Clay Street's expert.

In effect, the trial court's rulings converted Washington's dissenters' rights statute into something resembling its opposite, namely, a majority's rights protection statute. Rather than protecting the dissenter, whose rights were involuntarily "condemned," from a "wealth transfer" and thereby ensuring an investor's ability to "recaptur[e] their complete investment,"[1] the

[1] Swope v. Siegel-Robert, Inc., 243 F.3d 486, 493-94 (8th Cir.), cert. denied, 534 U.S. 887 (2001) quoted in Matthew G. Norton Co. v. Smyth, 112 Wn. App. 865, 51 P.3d 159 (2002).

trial court left the dissenter in a "twilight zone"[2] where he was effectively stripped of his rights under the statute. The company admitted that it never intended to comply with the statutory requirement of immediate payment to the dissenter. It reaped the benefits without the statutory burdens.

## II. STATEMENT OF THE CASE

George Humphrey is Humphrey Industries Ltd.'s owner. Humphrey was a member of Clay Street Associates L.L.C. ("Clay Street") until a merger became effective on December 7, 2004.

Humphrey was the company's co-managing member until he resigned in the fall of 2003. The other co-managing member was Scott Rogel who was also its property manager. Humphrey and Scott Rogel were co-managing members of seven companies. For each, Rogel was the paid property manager.

Starting in 2003, Scott Rogel was in a divorce proceeding with his wife. The divorce resulted in the sale of the properties owned by the seven companies—the sales occurred in roughly a year and caused substantial tax consequences.

Humphrey's resignation from Clay Street occurred after Scott used a $2.5 million value for Clay Street in his divorce—the value was

[2] CP 1644:13-1645:5 (quoting 2 Senate Journal, 51st Leg., App. A at 3086-87 (Wash. 1989)).

substantially lower than the values he and the company used on financial statements submitted to banks. Scott's client, Gerry Ostroff, then became the company's co-managing member.

In August 2004, Scott Rogel, his father (Joe Rogel) and Gerry Ostroff, formed a new company that was never capitalized and had no tax identification number. Clay Street was then merged into that company.

Humphrey dissented from the "sham" merger. He later brought this claim for an appraisal under the dissenter's rights statute. This claim was joined in one suit with claims concerning two of the other companies. The release of funds from the sale of defendant Clay Street II was arbitrated by former Judge Scott. The claims concerning defendant 615 Commerce were dismissed on summary Judgment by Judge Hayden.

Judge Hayden granted partial summary against Clay Street. He appointed two appraisers to evaluate the property. The first one died shortly before trial. After a continuance, Judge McCarthy took over the case and rendered a final judgment from which Humphrey appeals.

## III. STANDARD OF REVIEW

Whether a particular statutory provision authorizes an award of attorney fees is a legal question that this Court must review de novo.[3] In

[3] Wachovia SBA Lending v. Kraft, 138 Wn. App. 854, 859, 158 P.3d 1271 (2007); Tradewell Group, Inc. v. Mavis, 71 Wn. App. 120, 126, 857 P.2d 1053 (1993).

conducting this review, this Court need not defer to the trial court's factual findings since those findings were based upon documentary evidence. "[A] court of appeals is not bound by a superior court's findings of fact that are based on documentary, nontestimonial evidence. In such a situation the Court of Appeals is as competent as the Superior Court to weigh and consider the evidence."[4]

## IV. ARGUMENT

### A. This Court Must Properly Construe a Statute and Not Rewrite Its Clear Terms.

The construction of a statute presents a question of law.[5] The court must construe the present language of the statute and may not rewrite an explicit and unequivocal statute.[6] In construing a statute, the court's primary goal is to determine and give effect to the legislature's intent and purpose in creating the statute.[7] A statute must be construed to further and not to frustrate its intended purpose.[8]

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[4] Danielson v. City of Seattle, 45 Wn. App. 235, 240, 724 P.2d 1115 (1986) (citing In re Estate of Reilly, 78 Wn.2d 623, 654, 479 P.2d 1 (1970)); see also Smith v. Skagit County, 75 Wn.2d 715, 718-19, 453 P.2d 832 (1969).

[5] Thurston County ex rel. Bd. Of County Com'rs v. City of Olympia, 151 Wn.2d 171, 175, 86 P.3d 151 (2004).

[6] In re Estate of Black, 153 Wn.2d 152, 156, 102 P.3d 796 (2004).

[7] Pacific Northwest Shooting Park Ass'n v. City of Sequim, 158 Wn.2d 342, 354, 144 P.3d 276 (2006).

[8] Bostain v. Food Exp., Inc., 159 Wn.2d 700, 712, 153 P.3d 846 (2007).

B. The Statute's Remedial Purpose Is To Protect a Dissenter From the Involuntary Conversion of Property, Ensure Recapture of the Full Investment, and Remove the Dissenter From a Twilight Zone In Which He Has Lost Former Rights.

"An appraisal is the method of *paying* a shareholder *for taking his property*; it is the statutory means whereby a shareholder can avoid the conversion of his property into other property not of his own choosing and is given to a shareholder as compensation."[9] The clear purpose of such statutes "is to protect the property rights of dissenting shareholders from actions by majority shareholders which alter the character of their investment."[10] "[T]he purpose of the appraisal right . . . provides dissenting shareholders with a forum for recapturing their complete investment in the corporation after they are unwillingly subjected to substantial corporate changes beyond their control."[11] As remedial legislation, the statutory appraisal remedy in the dissenters' rights statute must be construed liberally to accomplish its stated purpose.[12]

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[9] China Products N. Amer., Inc. v. Manewal, 69 Wn. App. 767, 773, 850 P.2d 565 (1993) (omitting citation, changing tense from plural to singular in quotation (emphasis added).

[10] Id.

[11] Swope v. Siegel-Robert, Inc., 243 F.3d 486, 493-94 (8th Cir.), cert. denied, 534 U.S. 887 (2001) quoted in Matthew G. Norton Co. v. Smyth, 112 Wn. App. 865, 51 P.3d 159 (2002).

[12] State v. Douty, 92 Wn.2d 930, 936, 603 P.2d 373 (1979) (remedial legislation is construed liberally; Bowen v. Statewide City Employment Retirement Sys., 72 Wn.2d 397, 433 P.2d 150 (1967); 19 C.J.S. Corporations § 800 at 460 (1990)("Appraisal of Dissenter's Stock") ("Such a statute should be liberally construed in favor of the nonconsenting minority shareholder, . . .").

The Washington dissenters' rights statute creates remedies for the dissenters which ensure that: (1) the timing of the merger does not cause a "wealth transfer"[13] from the dissenter to the majority, and (2) the dissenter "recaptures" the complete investment before the character of the investment is altered through the condemnation/merger.

C. The Trial Court Erroneously Construed the Statute as a Matter of Law.

Based on its erroneous interpretation of the statute, the trial court ruled that Clay Street substantially complied with the statutory requirements—even when, by its own admission, Clay Street had violated the statute. Moreover, based on an additional misinterpretation of the controlling law, the trial court ruled that the company did not act arbitrarily, vexatiously, or in bad faith with respect to the statutory rights granted to the dissenter.

The statute sets forth two distinct and separate standards for the award of attorney fees and expenses against a company.

> (2) The court may also assess the fees and expenses of counsel and experts for the respective parties, in amounts the court finds equitable:
>
> (a) Against the limited liability company and in favor of any or all dissenters if the court finds the limited liability company did not substantially comply with the requirements of this article; or
>
> (b) Against either the limited liability company or a dissenter, in favor of any other party, if the court finds that the

[13] If the dissenters receive less than their proportionate share, then the result is "a transfer of wealth" from the dissenters to the majority. In re Valuation of Common Stock of McLoon Co., 565 A.2d 997, 1005 (Me. 1989).

> party against whom the fees and expenses are assessed acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this article.

RCW 25.15.480(2)(a)-(b) (emphases added).

The first standard applies only to the company. It enforces the basic purpose of the statute, which is to ensure dissenters' rights whenever a company has violated the dissenter's rights by failing to comply with the Act. Because it enforces the statute's basic purpose, its threshold is deliberately low: any company failure to substantially comply with the Act's requirements can trigger the fee provision. The low threshold is consistent with the policy to "not chill" dissenter's willingness to use the appraisal remedy after having to comply with a short deadline to perfect its right and given the lack of information that the dissenter has at the early stage. CP 1941:19-1942; CP 1984 (ALI Principles of Corporate Governance § 7.23 cmt. c at 340).

In contrast, the second standard applies to both the company and the dissenter. It operates in two ways. First, it protects a company from any extreme attempt by a dissenter to manipulate the dissenters' rights statute for arbitrary, bad faith, or vexatious purposes in demanding payment. Id.; see also RCW 25.15.480(1). Second, it ensures that a company's arbitrary, bad faith, or vexatious attempts to deprive a dissenter of his or her rights under the statute will be punished with fees and expenses. The second standard's threshold is, obviously, deliberately high.

The statute embodies a conspicuous asymmetry. While the company may be subject to fees whenever it violates the Act, the dissenter is subject to fees only in the extreme situation in which the dissenter acts with bad faith or vexatiously—and, for good measure, the second standard encompasses arbitrary, bad faith or vexatious acts on the part of the company as well.

Under the first standard, good faith is simply not a factor—the company either substantially complied with the statutory requirements or did not, and if it did not it is liable for fees. Id. at 2(a) (expressly omitting the "not in good faith" term present in subsection (2)(b)). For that reason, good faith does not immunize the company's failure to substantially comply with the statute's requirements from liability for fees under subsection (2)(b).[14]

1. Clay Street Failed to Substantially Comply With Four Independent Requirements of the Statute and Therefore Owes Humphrey Fees and Expenses under RCW 25.15.480(2)(a). Clay Street violated the statute in at least four significant ways. Although the trial court ruled that "Clay Street, despite having erred in the timing of the payment to Humphrey and in certain other respects, was in compliance with [Chapter]

[14] Starr v. Wash. State Dept. of Employment Sec., 130 Wn. App. 541, 549, 123 P.3d 513 (2005).

RCW 25.15,"[15] that finding is not supported by substantial evidence and is based upon an error of law.

a. Clay Street Violated the Statutory Deadline. Clay Street first patently violated the statute by failing to make the fair value payment within 30 days from the effective date of the merger, together with interest, as required by RCW 25.15.460(1).[16] The comments to 1984 Model Business Corporation Act[17]—in a provision identical to, and modeled by, the Washington provision—states:

> Proposed section 13.25 changes the relative balance between corporation and dissenting shareholders by requiring payment by the corporation within 30 days of . . . the effective date of the proposed corporation action . . . The corporation may not wait for a final agreement on value before making payment . . .
>
> This obligation to make immediate payment is based on the view that since a person's rights as a shareholder are terminated with the transaction, the shareholder should have immediate use of the money to which the corporation agrees it has no further claim. A difference of opinion over the total amount to be paid should not delay payment of the amount that is undisputed.

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[15] CP 2326-27 (Order at 7:25-8:5, Finding No. 43).

[16] RCW 25.15.460. Payment of fair value—Requirements for compliance: "(1) Within thirty days of the later of the date the proposed merger becomes effective, or the payment demand is received, the limited liability company shall pay each dissenter who complied with RCW 25.15.450 the amount the limited liability company estimates to be the fair value of the dissenting member's interest in the limited liability company, plus accrued interest."

[17] RCW 23B.13.310 and RCW 25.15.425 are identical provisions on costs, fees and expenses in an appraisal suit.

CP 1973 (Washington Business Corp. Act, Appendix A: Business Corp. Act Comments, Model Bus. Corp. Act § 13.25, comment [emphasis added]).

It is undisputed that Clay Street made the $181,192.64 payment four months after the statutory deadline. Ex. 73 (May 27, 2007 letter and check.) **That act alone facially violates the statute.** For that reason, almost two years before trial Judge Hayden granted partial summary judgment to Humphrey, ruling that the company violated the immediate payment provision. CP 347:15-19. The statute simply does not give the company the option to use the dissenter as an involuntary banker and loan guarantor beyond 30 days after the effective date of the merger.[18] The public policy underlying the statute requires a mandatory and immediate prepayment procedure enforced through the award of fees. Its purpose is to avoid chilling the willingness of dissenters to use the process, and to avoid creating a settlement or negotiation procedure. CP 1941:12-1943 (summarizing provisions in ALI Principles of Corporate Governance § 7.23 (1994) [which are set forth at CP 1979-1990]). Clay Street persuaded Judge McCarthy to rewrite the statutory requirement and create an exception that permits the

[18] Clay Street triggered the deadlines. Clay Street's own notice of dissenters' rights required Humphrey to make either a demand before "October 11, 2004" or forfeit the dissenting rights. Ex. 31 (second document). Clay Street's plan of merger, not Humphrey, fixed the payment date. Clay Street announced the merger plan in August, postponed the effective date until December, and thus set the January payment date. Ex. 31 (first document). Clay Street was the master of its fate, and its own actions facially violated the statute.

company to postpone the payment by four months, if it claims to have no cash that is readily available. No such exception exists in the statute.

Even if this Court were inclined to rewrite the statute to create an equitable exception, none was warranted in this case. The company quite clearly had other options besides triggering the dissenters' rights statute. The LLC Act's explicit policy gives "the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements." RCW 25.15.800(2). That policy would have been fulfilled had Clay Street responded to Humphrey's prior demands for arbitration which the company agreement required for the resolution of disputes, including valuations.[19] Besides the ADR remedy, the company had judicial remedies, including a declaratory relief or a judicial dissolution.

But to avoid the time, expense, and uncertain outcome of a judicial dissolution that would have given Humphrey the time to buyout the other members' interests as was done in the 899 West Main dispute, the company elected to trigger the dissenters' rights statute. Yet having accepted the benefits of the statute, the company must also assume its burdens.

The company's managers admitted the company had over $1 million in equity; they admitted they had personal funds to make the payment (VRP

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[19] CP 52, 56, 57 (Limited Liability Company Agreement, XII Disputes, XX Arbitration, § 14.3 (valuation of member's interest using mutually agreed appraiser); CP 1686 (Oct. 18, 2004 arbitration demand); CP 1688-89 (Nov. 15, 2004 arbitration demand).

432); and they admitted they were withholding from Humphrey funds from the sale of the 901 Tacoma and Clay Street II properties.[20] But they never asked the company's bank for a loan (VRP 432)—in fact, quite to the contrary, they concealed the effectuation of the merger from the bank. VRP 430 (Ostroff Trial Test); CP 1847:8-22 (Ostroff Dep. Test.).

Finding 43 (CP 2315:9-16)—that Humphrey suffered no financial prejudice from the late payment—is unsupported by any evidence in the record or indeed outside it. Humphrey had previously requested funds to pay taxes from the 901 Tacoma sale. See infra n.20. An amount in excess of $180,000 is hardly a trifling sum. The statute cannot be construed to require proof of a precise quantum of financial injury.[21]

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[20] VRP 432-44 (Ostroff trial Test. [declining an interim distribution of funds from 901 Tacoma to permit the payment of taxes from sale]); Ex. 66 (Mar. 28, 2005 letter [declining to make distribution]); CP 24:11-25:2 (complaint alleging sale of Clay Street II and how Humphrey had not received any funds since construction was completed in 2002); CP 41:1-6 ($700,000 from sale of Clay Street II); CP 2346-47 (Nov. 6, 2006 order approving final accounting of proceeds from sale of Clay Street II).

[21] Quite simply, the managers put the financial squeeze on Humphrey, and by definition this could not have been done in good faith. As demonstrated in n.18, the same managers refused to release funds to Humphrey to pay taxes already incurred from the sale of 901 Tacoma, even while Humphrey was detrimentally relying on the terms of the statute that assured payment no later than January 2005. Their fascination with Humphrey's cash flow was demonstrated within two weeks after sending the plan of merger—as billing records of their attorney reflect: ". . . telephone conference with Scott Rogel regarding result and Humphrey's current development project" on August 30, 2004—a reference to Third Street, Humphrey's project then in development. Ex. 138. A month later Scott Rogel called Humphrey's partner in the Third Street project, Bart Farrar, and claimed Humphrey's company would be homeless. He wanted Farrar to pull out of his project with Humphrey, and purchase Clay Street, because Rogel would take a below-market value to achieve a quick sale. Ex. 43 (Sept. 2004 email from Farrar), Ex. 294 (Rogel's napkin note produced March 2007). Later, when Humphrey filed this suit, two of Clay Street's members (Scott Rogel and Joe Rogel) immediately speculated that Humphrey would be unable to finance the buyout of their interest in the 899 West

(continued . . .)

In summary, the evidence and the statutory requirements not only fail to support Finding 43, they directly contradict it. Clay Street's patent violation of the immediate payment requirement in and of itself required a finding that the company blatantly failed to "substantially comply with the requirements of this article," RCW 25.15.460(1), and in and of itself required the award of fees and expenses to Humphrey. Instead, remarkably and indefensibly, the trial court ignored this patent violation of the statute. The failure to comply with a statutory deadline is not substantial compliance, and the trial court committed an absolute, reversible error in ruling otherwise.[22]

b. Clay Street Independently Violated the Statutory Requirements by Failing to Send Financial Statements Along With the Payment. Clay Street violated the statute in a second way by failing to comply with the statutory provision which required the January 2005 payment to be accompanied by specific records:

(2) The payment must be accompanied by:

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(. . . continued)
Main property next door. Ex. 81. In short, Clay Street manifestly and multiply violated its duty of candor and utmost good faith to Humphrey.

[22] Generally, substantial compliance with a particular statute is defined as actual compliance with the "substance essential to every reasonable objective" of the statute. Cont'l Sports Corp. v. Dep't of Labor & Indus., 128 Wn.2d 594, 602, 910 P.2d 1284 (1996) (quoting City of Seattle v. Pub. Employment Relations Comm'n, 116 Wn.2d 923, 928, 809 P.2d 1337 (1991)). Noncompliance, however, never amounts to substantial compliance. See Crosby v. Spokane County, 137 Wn.2d 296, 302, 971 P.2d 32 (1999). ("Failure to comply with a statutorily set time limitation cannot be considered substantial compliance with [the] statute.") City of Seattle, 116 Wn.2d at 929. It is either complied with or it is not. See also Nevers v. Fireside, Inc., 133 Wn.2d 804, 810-12, 947 P.2d 721 (1997).

> (a) Copies of the financial statements for the limited liability company for its most recent fiscal year; . . .

RCW 25.15.460(2). Clay Street's tardy January 2005 payment included only a 2004 year-end income statement while omitting other financial statements. **That act alone facially violates the statute**. In October 2005, Judge Hayden orally ordered the company to demonstrate that it had delivered the required financial statements, but the company failed to submit any such evidence to him.[23]

This statutory requirement exists to remedy the obvious fact that "the shareholder often lacks the information, at this early stage, to make a reliable determination" of fair value.[24] "A shareholder has the right to financial information in order to value his or her interest. ... The amount of information necessary to value the shares of stock is to be determined by facts about the corporation itself. . . ."[25] Clay Street was buying back Humphrey's equity interest. It had a duty to make disclosures of material information and to avoid material omissions, fraud, negligent misrepresentations, and, in

[23] CP 2071:1-10, CP 2071:19-2072 (refusal to produce Clay Street records, one year before suit); CP 257:1-7 (Reply In. Supp. of Prelim. Inj. at 5:1-5) [refusal to comply with order to produce records and disclose funds being held]); CP 1819-21; (Oct. 14, 2005 letter to Judge Hayden at 2-4); CP 1949:3-1950 (refusal to produce records); CP 1959:1-10 (identifying missing information on income statements); CP 1823-24 and Ex. 106 (Oct. 31, 2005 letter to Judge Hayden about failure to comply.).

[24] CP 1984-85 (Principles, § 7.23, cmt. c at 340, cmt. e at 342).

[25] 12B William Meade Fletcher, Fletcher Cyclopedia of the Law of Private Corps. § 5906.120 at 396-97 (2000).

effect, securities fraud.[26] Clay Street failed to supply the relevant minimal information, as required by the statute, and thereby required Humphrey to file suit to obtain the information.

The income statement for the period ending December 2004 failed to include information critical to determining fair value on both the revenue side and the cost side. While Clay Street's fair value calculation assumed a 45% vacancy, together with tenant improvement costs, commissions, and legal expenses, the December 2004 income statement failed to identify the undisputed new lease deposits (and it contradicted the putative vacancy rate), as well as failed to show any of the transactional costs that then were charged in the fair value estimate and in the calculation offered as part of closing argument.[27] In short, Clay Street's failure to provide the financial statements materially violated the statute.

c. Clay Street Violated the Statute By Failing to Timely File Suit. Clay Street violated the statute in a third way by failing to comply with the statutory requirement that it file suit within 60 days after receiving Humphrey's demand for payment in October 2004. RCW 25.15.475(1).[28]

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[26] Guarino v. Interactive Objects, Inc., 122 Wn. App. 95, 86 P.2d 1175 (2004) (finding fraud, negligent misrepresentations and violations of the Washington State Securities Act).

[27] CP 2275:21-2276:14 (identifying how the complete financial statements show the payment of lease commissions for spaces that were classified as vacant under the value calculation);

[28] RCW 25.15.475(1) Unsettled demand for payment—Proceeding—Parties—

(continued . . .)

The Washington statute lays down a clear deadline. Yet Clay Street filed suit only in July 2005—six months after the statutory deadline – and one month after Humphrey filed suit. As a leading treatise on corporate law notes:

> In some states the statute gives the corporation the primary right to initiate the appraisal proceeding. . . . The purpose of having the corporation initiate the actions is said to be in the interests of judicial economy, thus preventing multiple shareholder actions. If the corporation fails to initiate the proceeding, a dissenting shareholder can bring the action, upon which he or she is entitled to the joinder of all other dissenting shareholders.[29]

Quite clearly, if Clay Street had filed an early declaratory suit or acceded to Humphrey's arbitration or mediation demands, the parties would have avoided the litigation costs which have resulted from its failure to do so. More importantly, Washington law independently holds that failure to meet a statutorily-imposed deadline cannot as a matter of law constitute "substantial compliance." <u>See</u> <u>supra,</u> n.20. Since Clay Street's defense relies on the notion that failure to meet a statutorily-required deadline can somehow constitute "substantial compliance," its defense, accepted by the trial court, amounts to an error of law.

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(. . . continued)
Appraisers states: "(1) If a demand for payment under RCW 25.15.450 remains unsettled, the limited liability company shall commence a proceeding within sixty days after receiving the payment demand and petition the court to determine the fair value of the dissenting member's interest in the limited liability company, and accrued interest."

[29] 15 Victoria A. Braucher, et al., <u>Fletcher Clyclopedia of the Law of Private Corporations</u> § 7165.20 at 436 (1999).

d. Clay Street Violated the Statute by Failing to Make a Credible Fair Value Payment. Clay Street violated the statute in a fourth way by failing to comply with the letter and the spirit of the statute. Its payment to Humphrey was, as a matter of undisputed fact, based on a $2.5 million value that it later expressly admitted was not "particularly reasonable" and was in fact less than the $2.9 and $3.1 million purchase offers that the company had rejected before it had legal authority to sell the property,[30] less than its $3.35 million pro forma offer (Ex. 218), and approximately one million dollars less than the manager's earlier estimates of $3.5 to $3.6 million.[31] Under basic principles of corporate governance, the company must pay the dissenter' fees if the amount so paid is materially less than the amount ultimately determined by the court.[32]

Again, this result accords with the plain purposes of the dissenters' rights statute. If a company could knowingly and deliberately pay the dissenter less than the fair value of his share, without adverse legal consequences, then the basic purpose and function of the dissenters' rights statute would be meaningless. The "fair value" required by the statute would become an empty, meaningless, and unenforceable guarantee.[33]

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[30] VRP 29:23-30:11; Ex 49 (Oct. 29, 2004 offer); Ex. 51( Nov. 4, 2004 offer).

[31] Ex. 17 (Nov. 19, 2003 email stating $3.4 million); Ex. 22 (Jan. 2004 email stating $3.5 to $3.6 million).

[32] CP 1979-86 (Principles § 7.23(d) & cmt f. (1994)).

[33] See RCW 25.15.475(6); State v. Lilyblad, 163 Wn.2d 1, 11, 177 P.3d 686

(continued . . .)

The same basic rationales of statutory construction and corporate governance, at a minimum, impose a strong presumption that the statute has been violated where the company has failed to make a timely mandatory prepayment payment and instead pays an amount that is materially less than its later appraisal of $3.15 million and is materially less than the amount ultimately determined by the Court.[34]

In sum, under Washington law, "substantial compliance" requires some level of actual compliance with the statute. "[A] failure to comply (through inaction, inadvertence, or in a manner which does not fulfill the objective of the statute), or belated compliance, cannot constitute substantial compliance . . ."[35] In addition, "substantial compliance" requires, at a minimum, that the relevant conduct "satisfies the legislative purpose of the statute."[36] Here, Clay Street's conduct was not only untimely but also blatantly violated the purpose of the statute, and admitted that it had no intention of complying from the start and so its conduct cannot as a matter of law amount to substantial compliance with the statute.

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(. . . continued)

(2008) (a court must not "interpret any part of a statute as meaningless or superfluous").

[34] Spinnaker Software Corp. v. Nicholson, 495 N.W.2d 441 (Minn. Ct. App. 1993) (affirming fee award against a company where there was wide discrepancy between the amount paid and the court's determination of fair value and quoting from advisory committee note that "[n]o attempt has been made to define when a 'corporation has failed to substantially comply with this section,' as the failure may be merely procedural, or it may the offering of an estimated fair value which substantially underestimates the actual fair value").

[35] Clymer v. Employment Security Dep't, 82 Wn. App. 25, 28-29, 917 P.2d 1091 (1996).

[36] Arctic Stone, Ltd. v. Dadvar, 127 Wn. App. 789, 800, 112 P.3d 582 (2005).

Clay Street indisputably violated the statute in no less than four significant ways. The sheer number and magnitude of the violations establish beyond any doubt that Clay Street failed to "substantially comply with the requirements" of the dissenters' rights statute. RCW 25.15.480(2)(a). For these reasons, the trial court erred in ruling that the company substantially complied with the statutory requirements and in failing to make a fee and expense award to Humphrey. RCW 25.15.480(2)(b).

2. <u>Even if Clay Street Had Not Committed the Multiple Violations of the Statutory Requirements, the Trial Court Erred in Failing to Award Fees to Humphrey on the Independent Ground that Clay Street Acted "Arbitrarily," "Vexatiously" or Not "In Good Faith" with Respect to the Statutory Rights</u>. The court misstated and misapplied the statutory basis for this alternative ground for a fee award, when it ruled: "It does not appear . . . that any member of Clay Street acted arbitrarily, vexatiously or in bad faith in its conduct toward Humphrey." CP 2326-27 (Order at 7:25-8:5). There were two mistakes: (1) Humphrey's request for fees was against "the company" and never against the individual members (claims against them were subject to arbitration based on the prior order compelling arbitration), and (2) the relevant legal issue was whether the company acted "arbitrarily, vexatiously, or not in good faith with respect to the <u>rights</u> provided by this article." The company may act arbitrarily, vexatiously or in bad faith – even when the

members individually did not. The company's $2.5 million fair value calculation was arbitrary, vexatious, and not in good faith.

Clay Street is vicariously liable for the actions of its counsel who made the "arbitrarily" low fair value calculation that was also vexatious (because it was intended to be negotiation instead of fixing the fair value), the involvement of its managing members in making the calculation and the approval of the lowball valuation.

The $2.5 million value rather fantastically equaled the $2.5 million that Scott Rogel initially used in his divorce.[37] Co-managing member, Gerry Ostroff, knew Scott had used this same lowball number initially in his divorce.[38] But Ostroff still authorized the number. See Appendix A. (Ostroff Test.)

The sole direct evidence of the advice of counsel is Exhibit 28, LLC Merger Procedure. Clay Street unquestionably deviated from Exhibit 28, which set forth the statutory requirements—"The company must tender payment . . . plus interest from the effective date of the merger, within 30 days after the merger becomes effective" and accompanying the payment are

[37] Compare Ex. 13 ($2.5 million that contradicted Rogel's prior financial statements) with Exs. 10 and 10A (prior financial statements using higher numbers). See also Ex. 13A (Oct. 9, 2003 Scott Rogel Dep. at 12:61-13:5 [testimony about values]); Ex. 281 (Oct. 15, 2003 memo to Humphrey from Gerry Ostroff, Scott Rogel and Joe Rogel [stating "you do not wish to be a partner with the investors of the properties stated below"]).

[38] VRP 420; Ex. 13 (Aug. 8, 2003 letter at LG 441 ($2.5 million); CP 1860:16-17 (Oct. 2003 Dep. Test ($2.5 to $3.2 million but not $3.5 million).

"financial statements." The company also deviated from the business advice that: "[i]f payment is demanded, the company will engage an appraiser . . . ." Id. Gerry Ostroff testified that he did not remember any legal advice except what was included within Exhibit 28. CP 1843 (Ostroff Dep. at 17:4-18:14). When asked whether Cowan advised him that the only consequence of failing to pay Humphrey within 30 days after the effective date of the merger would be an obligation to pay interest, Ostroff coyly admitted, "He [Cowan] advised us we would be obligated to pay interest. I don't know if he specified it would be our only obligation." CP 1843 (Dep. at 18:18-24). Finally, Clay Street failed to call its counsel as a witness in this trial.

Finally, Clay Street never called Cowan to testify at trial. The "advice of counsel" defense is not available to a defendant who does not call its counsel as a witness to testify at trial.[39] Despite receiving discovery about a good faith defense in August 2004 and asserting the corporate attorney privilege in September 2004 and again in February 2005, Clay Street waited until December 2005 to waive privilege and assert the defense. During the delay, emails were deleted and memories faded—unrefreshed by documents like Cowan's billing records. Such delay and destruction hardly smack of good faith. As Cowan testified, "there may have been

[39] See Bill Edwards Oldsmobile, Inc. v. Carey, 219 Va. 90, 244 S.E.2d 767, 772 (1978) (holding that affirmative defense was not available to defendant who did not call counsel to testify as to what was disclosed and did not otherwise establish that full information was communicated to counsel).

some movement in some of the assumptions." But, prior drafts and notes relating to the company's calculation were not retained, and he had no recollection about them. CP 1836-37 (Cowan Dep. at 30:20-31:9).[40]

The billing records reflect that the vast majority of Cowan's communications were with Scott Rogel, not Gerry Ostroff, and Rogel was intimately involved in strategic litigation planning about the cash call, the effect on Humphrey, and the fair value calculation. See Appendix D; Ex. 138 (extracts from billing records).[41] Even though the billing records demonstrate Scott Rogel's direct involvement in the fair value calculation, Gerry Ostroff ultimately approved the calculation.

D. The Trial Court Erred in Awarding Fees to Clay Street under the Arbitrary or Bad Faith Standard; that Award is Legally Erroneous and Factually Unsupported.

1. The Trial Court Applied an Impermissible "Equitable" Standard That Considered Evidence Which Was Wholly Irrelevant Under the Statutory Standard. The statute sets precise standards for the award of fees. RCW 25.15.480(2)(b) (fees may only be awarded for arbitrary, vexatious, or bad faith acts). Under the statute, whether a party is entitled to fees is not

[40] See Genesco, Inc. v. Slotznick, 871 S.W.2d 487, 491 (Tenn. Ct. App. 1993) (affirming fee award for bad faith when company failed to consult an established appraiser, destroyed some information necessary to test assumptions used by investment banker that made the calculation, and was less than forthcoming in discovery).

[41] At trial, Scott Rogel testified that the handwritten notes on Cowan's LLC Merger Plan (Ex. 28) were probably his—more evidence of his direct involvement. Rogel's notes indicate "25%" and "225,000" "350,000" $360,000"—all greater than the $181,000 paid to Humphrey—with a range of $"3,300,000, 3,400,000, 3,500,000 and 3,800,000."

some sort of equitable free-for-all. To the contrary, the court may only consider equities in setting the **amount** of the fees—not in determining liability for fees to begin with. RCW 25.15.480(2) ("The court may also assess the fees and expenses of counsel and experts for the respective parties, in amounts the court finds equitable." (Emphasis added)).

Here, the trial court erred as a matter of law when it considered what it viewed as the equities in determining liability for the fees, not just the amount of the fees. CP 2322:20-2324:10;[42] (Order); see also Appendix B (trial court deploying an equitable standard to assess liability for attorney's fees rather than merely to set the amount of the fees). The trial court misstated the statutory standard when it claimed to "assess attorney's fees and expenses equitably *as authorized by RCW 25.15.480."* But entitlement to fees is governed by the specific statutory standards. RCW 25.15.480(2)(b).

At Clay Street's instigation, the court fashioned an "equitable standard" that considered some unfunded settlement offers, offers of judgment and other irrelevant evidence outside the statutory requirements. But a court cannot grant "relief on equitable grounds in contravention of the statutory requirement." Longview Fiber Co. v. Cowlitz County, 114 Wn.2d 691, 699, 790 P.2d 149 (1990). The trial court had no authority to radically

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[42] The court relied upon a declaration by Gerald Ostroff and the decisions. Humphrey moved to strike the testimony lacked for personal knowledge, hearsay, and relevance. CP 2006:5-8.

alter the statutory requirements from a "payment" procedure into an "offer/negotiation" procedure that the legislature rejected.[43] It committed an error of law when it used the impermissible "equitable" standard.[44]

In addition, as explained below, Conclusion (1) and the supporting findings rest on three errors of law. First, the offer of judgment was inadmissible under the plain terms of the statute and CR 68. Even if it were somehow admissible, the offer of judgment fails to reveal any arbitrary, vexatious or bad faith actions with respect to the statutory rights. Second, Clay Street forfeited the right to claim fees, by engaging in the misconduct of repeatedly submitting the settlement offers as evidence. Third, the trial court considered informal arbitration awards which were irrelevant under the statutory framework, and, in addition, the court made inferences about those decisions lacking any support in substantial evidence.

2. <u>The Trial Court Committed an Error In Relying Upon an Offer of Judgment and Settlement Offers to Shift Fees</u>.

a. <u>The Dissenters' Rights Statute Confers No "Right" to Make or Consider Unfunded Offers of Judgment or Settlement Offers</u>. While some statutes create a right to shift costs through the use of an offer of

[43] CP 1984 (Principles § 7.23 cmt c at 340).

[44] The trial court committed the same error in Conclusion (1) (CP 2380:19-26), where it made a generalized equitable ruling about "the pursuit of this matter" instead of relying on the statutory standard concerning "the rights provided by this article." RCW 25.15.480(2)(b).

judgment or an offer of settlement,[45] the dissenter's rights statute does not. And even under statutes which confer such a right, the settlement offer or offer of judgment is deemed inadmissible at trial. See, e.g., RCW 4.84.280.

b. The Trial Court Erred as a Matter of Law When It Violated CR 68's Requirement That an Offer of Judgment Is Inadmissible to Prove Liability or Fees. "Application of court rules to a particular set of facts is a question of law, reviewed de novo on appeal." Kim v. Pham, 95 Wn. App. 439, 441, 975 P.2d 544 (1999).

CR 68 generally prohibits an offer of judgment from being used to shift fees. "An offer [of judgment] not accepted shall be withdrawn and evidence thereof is not admissible except in a proceeding to determine costs."[46] "Costs" as a term of art does not include attorney's fees. "The term 'costs' has been interpreted as not including attorney's fees and expert fees. . . . In the event that the rule is to be expanded to include attorney's

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[45] CP 2006:25-2008:3, CP 2020-2012. For example, RCW 4.84.280 also includes a safeguard which is not present in the dissenter's rights statute: it prohibits the communication of the settlement offer to the "the trier of fact until after judgment." See also RCW 39.040.240, Chapter 8.25 (Additional Provisions Applicable to Eminent Domain Proceedings), RCW Chapter 64.55, Construction Defect Disputes—Multiunit Residential Buildings," RCW 64.55.120, RCW 64.55.160. Clay Street's offer omitted critical requirements that safeguard the offeree: permitting comparison of likes with likes and ensuring the judgment will be paid and is not merely a paper offer.

[46] See, e.g., Hodge v. Dev. of Am., 65 Wn. App. 576, 579-80, 828 P.2d 1175 (1992) (adopted holding in Marek v. Chesny, 473 U.S.1, 105 S. Ct. 3012, 87 L.Ed.2d 1 (1985)).

fees and expert fees as 'costs,' it should be expanded by statute or by amendment."[47]

Nor does the dissenters' rights statute define attorney's fees as costs—to the contrary. The statute has one distinct subsection, RCW 25.15.480(1), governing costs, and a separate subsection, RCW 25.15.480(2), governing attorney's fees and expert expenses. Stated otherwise, the statute expressly distinguishes between attorney's fees and costs. Under the most basic canons of construction, therefore, the dissenters' right statute cannot be construed to treat attorney fees as a subset of costs, and it cannot be bootstrapped to permit a court to consider settlement offers as part of the determination of entitlement to fees.[48] The trial court committed an error of law by considering the settlement offers.

c. There Were Reasonable Bases For Rejecting the Offer of Judgment and the Settlement Offer That Was Withdrawn. Even had it not been an error of law to admit the settlement offer and offer of judgment, Humphrey offered reasonable explanations for rejecting the offers. The initial company had been administratively dissolved and its assets disbursed;[49] the new company had never been capitalized and had

[47] Sims v. KIRO, 20 Wn. App. 229, 238, 580 P.2d 642 (1978).

[48] Brand v. Dep't of Labor & Indus., 139 Wn.2d 659, 670, 989 P.2d 1111 (1999) ("the judicial doctrine of expressio unius est exclusio alterius: . . .).

[49] Supp. CP xx (Clay Street Assocs, LLC's Resp. to Plf.'s Mot. Declaring Waiver of Company Privilege/Immunity and for Prelim. Inj. At 4:23 & n.1, at 6:18) [also stating

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no tax identification number; there was no demonstration of ability to pay; the offer was made a year after the partial summary judgment; it lumped in attorney's fees and costs, which when added resulted in an amount that was less favorable;[50] it did not permit comparison of comparables,[51] and it was a joint offer.[52] And, consistent with its prior actions, Clay Street failed to make an actual tender or deposit the sum.

The July 27, 2005 settlement offer was later withdrawn, when the company reaffirmed in a pleading the $2.5 million calculation in October 2005 and only officially changed its position 20 months later in its June 2007 trial brief.[53] In making its rulings, the trial court clearly relied upon the withdrawn offer. CP 2006:9-13. But in any case, it is impossible to imagine how Humphrey's rejection of the offers could somehow be tantamount to bad faith such that he could be held liable for Clay Street's attorney fees under the statute.

d. Clay Street Forfeited Any Claim For Fees, When It Repeatedly Submitted Evidence of the Unfunded Offers During Trial. A

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"The issue is moot . . . because nearly all of the funds of have already been disbursed"].)

[50] CP 1903:1-16 (Humphrey's Motion for Fees at 21:1-16).

[51] Magnussen v. Tawney, 109 Wn. App. 272, 275, 34 P.3d 899 (2001).

[52] RCW 4.84.120 (Costs where deposit in court is made and rejected).

[53] The offer was based on an appraisal that, on its face, contained false information about the marketing of the property, the age of the building, contained no information about the purchase offers, and understated by square feet of office space, which was a $100,000 error according to the court appointed appraisers. CP 987-93.

party who discloses an offer to a court before entry of judgment, in violation of a statutory prohibition against the disclosure of the offer, forfeits his fess. E.g., Hanson v. Estell, 100 Wn. App. 281, 290-91, 997 P.2d 426 (2000) (construing RCW 4.84.250, and holding that a party who merely disclosed the offer of settlement after the oral ruling by the court but before the entry of the judgment violated the statute and forfeited standing to recover fees.)[54]

An even stronger sanction is warranted in this case after Clay Street's misconduct during trial. Clay Street's misconduct denied or at least jeopardized Humphrey's right to a fair trial before a trier of fact who has not been influenced by the inadmissible offer. The taint of the inadmissible offer was compounded, and the prejudice to Humphrey was deepened, when Clay Street failed to tender funds, withdrew the offer, and then reaffirmed its lower, pre-litigation calculation of fair value.

3. The Trial Court Erred In Considering the Informal Arbitration Decisions Concerning Other Companies and Compounded the Error By Making Arbitrary and Unfounded Inferences. CP 2322:20-

[54] CR 68 contains a similar prohibition: "An offer not accepted shall be withdrawn and evidence thereof is not admissible except in a proceeding to determine costs." The inadmissibility rule in CR 68 is unambiguous and "contemplates that whether jury or judge tries the case the decision maker will be unaware of the extraneous fact that an offer of judgment has been made. This ensures that the trier of fact will not be influenced in its evaluation of the case by any knowledge of a rejected offer or the consequences thereof." Hopper v. Euclid Manor Nursing Home, Inc., 867 F.2d 291, 295 (6th Cir. 1989).

2324:4.[55] While applying its so-called "equitable" standard, the court failed to apply the statutory standard—the evidence must be relevant to the statutory standard that Humphrey "acted arbitrarily, vexatiously or not in good faith with respect to the rights provided by [statutory dissenters' rights statute]." RCW 25.15.480(2)(b). Consistent with its "equitable" approach, the court applied an irrelevant "judicial dissolution" analysis that first considered whether there was a "paralyz[ing]" deadlock ("the highly contentious relationship among the parties ultimately doomed any hope of conducting the business of Clay Street rationally and in the best financial interest of the LLC's members"). CP 2322:20-26.

Although the arbitration decisions concerning the two companies might be relevant to the issue of deadlock, they were clearly irrelevant to the dissenters' rights. Long before trial, Humphrey repeatedly asserted objections to the use of those incomplete and misleading arbitration documents that were never admitted into evidence at trial but were attached to Clay Street's motions and trial brief.[56] The irrelevant awards also created

[55] The court relied upon a declaration by Gerald Ostroff and the arbitration decisions. Humphrey moved to strike the testimony for hearsay, lack of personal knowledge, and relevance. CP 2006:5-8.

[56] CP 832:4-5 (Motion for Declaratory Relief and to Exclude at 3:4-5); CP 1039:23-26 (Order, dated Nov. 3, 2006 [denying without prejudice to file any future motion to exclude]). Humphrey objected the awards were irrelevant and the 899 West Main award was not the final award that permitted him to buy out the other members at $90/sq. ft. (the same value Humphrey used in this case). CP 331:13-16 (Reply In Supp. of Partial Summ. J. and Other Relief at 5:13-16); CP 739:9-22 (Decl. of Spellman in Supp. of Reply ¶ 14); CP 1363:18-21 (Humphrey's Trial Brief at 12:14-21 (stating two weeks before trial, Clay

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confusion of issues, wasted time, resulted in unfair prejudice, and raised collateral issues such as the resignation letter of Joe Rogel that was discovered after the 899 West Main arbitration. CP 1362:21-1365.[57]

Adopting misleading statements in Clay Street's brief,[58] the trial court erroneously ruled the evidence in the 901 Tacoma arbitration had "similarities to the evidence in the Clay Street suit." CP 2323:1-10 (Order at 4:8-23). But there were no findings of fact in the arbitration decision nor any summary of evidence. There was also no ruling that Humphrey acted arbitrarily, vexatiously or in bad faith. The court failed to apply the statutory standard—the phantom, unspecified evidence must be relevant to the statutory standard that Humphrey "acted arbitrarily, vexatiously or not in good faith with respect to the rights provided by [statutory dissenters' rights statute]." RCW 25.15.480(2(b). Yet, the underlying facts and legal claims were dissimilar. See Appendix C.

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Street added the same awards as proposed exhibits and summarizing Judge Hayden's oral ruling that the awards were not relevant.). Clay Street's trial brief attached the awards, but they were not offered as exhibits at trial.

[57] "The first is a suit that Scott Rogel's parents filed to compel the sale of the 899 West Main property. . . . The Rogels won on some issues but lost on others. The second . . . relating to the potential sale of the 901 Tacoma property. Tom Brewer arbitrated that dispute. Neither arbitration involved the dissenters' rights statute." CP 1363:8-13. "It is ironic that, almost two years ago, Humphrey filed a motion to consolidate the partnership disputes and to compel global ADR, but Clay Street opposed the motion." CP 1363:22-24 & n.3 omitting citations.

[58] Supp. CP (Clay Str. Mot. for award of costs and fees at 2:7-3:15).

Next, the trial court offered that the 899 West Main arbitration concerned "another similar dispute over whether 899 West Main should have been wound up pursuant to RCW 25.15.295(1)"—a deadlock issue that was also not relevant to the statutory standard of whether Humphrey "acted arbitrarily, vexatiously or not in good faith with respect to the rights provided by [statutory dissenters' rights statute]." RCW 25.15.480(2(b). CP 2323:11-24. In response to Clay Street's interjection of these irrelevant other disputes, one of Humphrey's counsel submitted testimony concerning Scott Rogels' pro se antics in the 899 West Main dispute, his false corporate name, his refusal to permit the inspection of 899 West Main and Clay Street records, the denial of his receiver motion, his unsuccessful opposition to the motion to compel arbitration, and Scott's statement "that he intended to sell the properties at below market prices to ensure a quick sale. . . ." CP 2070-73 (Decl. of Stan Beck in Supp. of Fees), CP 2080-82 (Apr. 12, 2004 letter to Scott Rogel). <u>See</u> Appendix D. Even the trial court admitted that: "In that case, Mr. Soukup directed that each party pay their own costs and fees" (because each party prevailed on some issues) (CP 2323); yet, the trial court determined that this was "relevant background as prologue" to determine the entitlement to fees. CP 2324.

The incomplete and self-serving evidence about the two arbitrations does not support a ruling that Humphrey acted arbitrarily, vexatiously, or not in good faith. There were no findings or conclusions in either proceeding, and thus no preclusionary effect. Finally, the misleading characterizations about those proceedings were refuted and the irrelevancy demonstrated. "[T]he mere fact that the shareholders took advantage of the statutory remedy and pursued that remedy with great vigor is not in and of itself evidence of bad faith." In re Realty & Utilities Corp., 29 Del. Ch. 480, 500, 52 A.2d 6 (1947).

4. The Trial Court Did Not Rule that Humphrey's Prelitigation Fair Value Estimate Was Arbitrary, Vexatious or Made In Bad Faith. When Humphrey sent his fair value calculation, Humphrey had already filed a motion for global mediation that Clay Street opposed[59] and made requests for company records and information (Ex. 74), which were not provided with the payment delivered on May 27, 2005 (Ex. 75).

His calculation reasonably relied on the information that was then presently available[60] and was in response to Clay Street's lowball $2.5 fair

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[59] CP 1850 (Dec. 3, 2006 Ostroff Dep. Test. at 64:16-65:5).

[60] Humphrey relied on written appraisals that used higher values for the building next door, 899 West Main (CP 1692-1783, 1962), the Third Street appraisal (CP 247), a list of 23 comparables (provided by the leasing agent for Third Street) whose mathematical average was $85.96/sq. CP 226-27, Ex. 113. Humphrey provided this and other information that the court-appointed appraiser considered and adopted in part. CP 987-83, Humphrey's Oct. 2005 declaration, memorialized that his $85/sq. foot demand ($4.1 million/48,352 sq. ft.) was lower than the construction costs for the Third Street project, lower than the appraisal for Third Street, lower than the appraisal for 899 West Main (CP 1692-1783) which is the property next door (CP 987-83), and lower than the buyout price for 899 West Main, as well as lower than the price of other buildings being sold for $90 to $130/sq. ft. The sales price and capitalization rates for some of

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value calculation that meant the property had not appreciated one cent in seven years. Humphrey did not have the rejected purchase offers. But he did have the $3.4 to $3.6 million figures that the co-managing members had used either during the prior years in financial statements provided to the bank or in emails sent to Humphrey. Exs. 10, 10A, 22. Finally, Humphrey had used the higher value for his federal taxes.[61] During trial, Clay Street offered no evidence challenging his good faith and the accuracy and legitimacy of the documentary evidence summarized above. Furthermore, in August 2006, ten months before trial, Humphrey stipulated to the values in the report by the first appraiser appointed by the court. Even though the trial court erroneously concluded Humphrey's figure was outside the mainstream of reasonably based valuations and did not have substantial or credible evidence to support it (Finding 40, CP 2314, CP 2324:14-16), there is no ruling that he acted arbitrarily, vexatiously or not in good faith in making the fair value calculation.

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those other buildings were listed in the June 2006 letter sent to Bruce Allen, the first appraiser appointed by the Court. Ex. 130. The pictures and financial data for the buildings were comparables in the appraiser's files. Ex. 125 (Park 280), Ex. 126 (Park 280 aerial versus) and Ex. 129 (Park 28, aerial, diagram, and property data showing $79/sq. ft. ($1,275,000/16,125 sq. ft.)). Humphrey identified Park 280, Clay Street's mirror image built by the same contractor as Clay Street and sold in October 2004—two months before the merger for $91.69/sq. ft.—which Shedd, the second appraiser appointed by the Court, used as a comparable.

[61] CP 1815; Ex. 24; see also CP 987-83.

5. The Trial Court Erred In Awarding Fees to Joseph and Ann Lee Rogel Under the Dissenters' Rights Statute, When All Claims Against Them Were Stayed Pending Arbitration Two Years Earlier. Conclusion (1) (CP 2331:10-13) erroneously ruled Humphrey was liable for the Joseph and Ann Lee Rogel's legal fees under the dissenters' rights statutory fee provision, RCW 25.15.480(2)(b). This was yet another clear error. There were no statutory claims pending or asserted against the Rogels. Two years earlier the Rogels joined in a motion to compel arbitration (CP 320, joinder) and filed an additional brief that "distinguished 'the dissenter's Clay appraisal claim' from 'breaches of fiduciary duties against Clay I and other members.'" CP 1997:11-14. Judge Hayden granted an order that compelled arbitration of the nonstatutory breach of fiduciary duty claims but stayed any arbitration and permitted trial on the statutory appraisal remedy. CP 342-44 (Order); see also CP 2001-02 (Opp. to Fee Motion arguing claims were stayed). The order's title was clear: "Order Granting Motion to Stay Arbitration of Appraisal Rights and Granting Motion to Compel Arbitration on Other Claims Relating to Clay Street." Id. When asked a year later, Humphrey's counsel responded the Rogels were not a party – the personal claims had been stayed[62] and the discovery responses unequivocally confirmed just that.[63]

[62] CP 2004 (Sept. 16, 2006 email to Rogel's counsel ["the stay affected all obligations in the lawsuit. . . the liquidated status of the company was pleaded in the complaint. There is a statutory presumption that members owe creditors a fiduciary duty."])

E. <u>The Trial Court Erred In Concluding $3.15 Million Was the Fair Value. The Ruling Imposes Multiple Penalties On the Dissenter, Is Contradicted by Market Actions, Ignores Misinformation Given to the Market and Clay Street's Appraiser, Results in a Transfer of Wealth and Rewards the Company For its Violations of the Statute</u>.

When the valuation is not supported by the evidence or the trial court has given undue weight to a factor, Washington appellate courts will reverse a trial court's valuation decision.[64]

Here, while arriving at a putative "fair value," the trial court made a cascading series of prejudicial errors, including errors of law. First, the trial court refused to permit George Humphrey to offer expert testimony (VRP 233-44), because his CPA status was inactive and allegedly because he had not been disclosed as an expert witness. In fact, an inactive CPA may perform non-public services,[65] and his opinions had been filed with the Court

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[63] When he answered the Rogels' interrogatories about "the damages you claim . . . under the RCW 25.15 dissenters' rights statute," Humphrey unequivocally responded he was not seeking damages from them: "The judicial appraisal will determine the fair value of Humphrey's interest . . . the judgment will be for the fair value of HI's interest, not for damages." CP 1999:15-23. The answer continued, "At the time this suit was filed, Clay Street was an administratively dissolved company which had liquidated and distributed substantially all of its assets to the non-dissenting members. <u>The members who received the liquidation distributions hold the funds in trust subject to creditor claims such as HI</u>." CP 2000:1-4 (emphasis in original). To recover the distribution, RCW 25.15.235(3) required the members to be named as defendants in lawsuit. <u>See also</u> CP 255 (discussing winding up, equitable and statutory remedies).

[64] <u>In re West Waterway Lumber Co</u>., 59 Wn.2d 310, 367 P.2d 807 (1962) (reversing and remanding where the trial court accorded weight only to the current liquidation value of the shares and dismissed other factors of considerable importance); <u>Petition of Northwest Greyhound Lines, Inc</u>., 41 Wn.2d 672, 251 P.2d 607 (1952) (ruling the evidence preponderated against the trial court's findings and showed a lower share price).

[65] Resp. to Clay Str. Brief Re: Fair Value, June 16, 2007 citing authorities and

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eight months earlier. CP 978, 987-93. "Proof of fair value may be by any techniques or methods that are generally accepted in the financial community." Matthew G. Norton, 112 Wn. App. at 874 (citing official comment). But the trial court used a different, improper standard, when it excluded testimony about what is actually accepted in the financial community, before and after Enron. The excluded material opinion testimony about FASB's FAS Statement 157 on Fair Value Measurement, (CP 987-97) as on:[66] a fair value versus a fair market value standard; the hierarchy that requires the use of market rates instead of the use of "as is" entity rates (to eliminate anomalies, distortions, and unintended manipulations—as in this case); the orderly transaction requirement; the deduction of transactions cost from fair value; the financial statements that Clay Street failed to provide with the statutory payment; and the financial consequences and potential liability caused by the merger that involved an uncapitalized new company with no tax identification number and the failure to obtain written consent from the lender, and leaving Humphrey as its guarantor after the putative effective date of the merger. CP 987-93. The

(. . . continued)
RCW 18.04.350(6) & (7) to be filed with Supp CPs.

[66] The exposure draft was issued in 2004. FAS compliance is a requirement of GAAP and applies to financial statements. Ex. 97(O). FAS No. 157's purpose was to clarify what fair value means. Barnes' appraisal was not a fair value appraisal. It was error to rely upon it. Neither Barnes nor Shead had taken continuing licensing classes on the standard. But Humphrey had.

exclusion was prejudicial. Instead of the fair value, the trial court erroneously used an "as is" approach that failed to correct anomalies and misinformation given to the market.

Second, the trial court erred in adopting the $3.15 million valuation of Clay Street's appraiser, Ken Barnes. His valuation is actually lower than a $3.19 million purchase offer that the company rejected as too low. Ex. 227.[67] Clay Street never gave him the rejected offers. Clay Street placed blinders on Barnes before, while, and after he made his report. Before he was retained, Barnes supplied Clay Street's counsel with lower cap rates but Clay Street in its fair value calculation used higher cap rates (ones less favorable to Humphrey) instead of the lower rates that Barnes used. Compare VRP 563, 575-76, CP 1679 (Barnes Test and notes showing 7.5%) with Ex. 75 (company's calculation using 8%). With those and other cram down deductions, the company's $2.5 million valuation was "not consistent with" his later conclusion of $3.15 million. VRP 576. Barnes admitted that he did not know the ultimate buyer had used an even lower 7.2% rate. VRP 584. He did not even interview the buyer, who is a commercial broker who said he'd sell it back at $4.9 million now. VRP 529-31.

[67] A purchase offer which is not accepted or negotiated by the company is probative of fair market value and tends "to prove the lowest possible value of the shares. Chrome Data Sys., Inc. v. Stringer, 109 Or. App. 513, 820 P.2d 831, 833 (1991).

In response to his requests, Clay Street gave Barnes inaccurate information about the building's age, the vacancy rate,[68] the start date for marketing, and the square feet office space (Ex. 41, the misleading pro forma that omitted 1200 sq. ft. office space), and marketing[69]—and no information at all about rejected purchase offers, prior operating statements, and budgets.[70] In contrast, the parties had the two court-appointed appraisers spend over a year investigating these deficiencies. Their conclusion was the additional office space alone was worth another $100,000 and the construction costs for the building were $3.9 million. VRP 53:4-59:4. But Barnes interviewed no one about the office space. He never even looked at it. VRP at 570:11-:21.

At trial, Barnes rendered new opinions. First, when asked about the phantom office space, he merely opined that the market had spoken (VRP 549), but admitted the market works on information. VRP 585 (market operates on information). Second, he theorized the report by the

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[68] CP 2275-76 (summarizing information showing vacancy rate was less than the claimed 45% because lease commissions were being paid for 2 or 3 vacant spaces, and LOI was out for A-1/A-2 before merger)

[69] Material misinformation given to one prospective buyer was dockwells for trucks were made out of asphalt instead of concrete (VRP 326:23-328:13, Newell Test. (docks being asphalt affected the price offered). See other the non-party witness written testimony about the lack of responsiveness in marketing and compression. (Attach B. to Reply In Supp. of Motion to Alter at 3-4, 8-9, to be attached to Supp. CPs.).

[70] VRP 574:8-574:16 (information provided); Ex. 132 letter (requesting information); VRP 576:12-:21 (he was told marketing started in December after the merger—but Clay Street started it earlier in September but told the market it could not sell until December; VRP 545:2-:16 (after producing his report learned about the additional office space). As a result, his report does not comply with GAAP and issued FAS.

second court-appointed appraiser was high because it was a look-back appraisal—made two years later. VRP 552-54.[71] But he never read the report of the first court-appointed appraiser, Bruce Allen, that was also $400,000 to $500,000 higher than his. Ex. 113. Finally, Barnes testified the sales price hugely influenced his final figure (VRP 587)—but his report does not say that. As stated before, he didn't even interview the buyer.[72] His rebuttal opinions were prejudicial, unfair surprise, and not disclosed in the appraisal or discovery responses. The trial court erred in failing to exclude the improper testimony or altering its oral decision. The ultimate ruling is not supported by substantial evidence.

Third, the trial court improperly applied a liquidation measure instead of the fair value measure, improperly deducted transaction costs, used hypothetical costs instead of the lower actual ones, and deducted

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[71] He was not given the working files or deposition testimony of the two-court appointed appraisers (VRP 589-91), or the report and letters of the first appraiser, Bruce Allen, who he admitted was the dean of local appraisers before his demise shortly before trial. VRP 570-71. He also was not informed that Bruce Allen and the second court-appointed appraiser had confirmed that two of his comparables had understated values (J&J and Formula One) due to an error concerning the amount of office space. VRP 580.

[72] The price may be unreliable due to biases, anomalies, and distortions such as the misinformation given to the market. CP 1631:5-18. He relied on the misleading pro forma (Ex. 41) that omitted 1200 sq. ft. of office space, misstated the age of the building, and the vacancy rate and did not know about the material misinformation given to one prospective buyer that the dockwells were made out of asphalt instead of concrete. VRP 326-27 (Newell Test. [false information that docks were asphalt, not concrete affected the price offered]). See also the non-party witness testimony about the lack of responsiveness in marketing (Attach B. to Reply In Supp. of Motion to Alter at 3-4, 8-9, Supp. CPs), and the compressed duration of the marketing that Clay Street's own appraiser stated should have been nine months.

legal fees from the merger. Even, Clay Street's first counsel had admitted that transaction costs were not deductible.[73]

<u>Fair value is intended to protect dissenters—not impose multiple penalties against the dissenter</u>. RCW 25.15.425(3) and the MBCA define "fair value" as ". . . the value of the member's limited liability company interest immediately before the effectuation of the merger to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the merger unless exclusion would be inequitable." Read in the context of the official comments and the case law, the definition is intended to (1) preserve the dissenters' prior rights, (2) afford him the appreciation resulting from corporate actions in the normal course of business, and (3) require the court to consider both future revenues and expenses. In other words, the trial court was required to look beyond the December 2004 income statement that Scott Rogel supplied and consider the mysteriously omitted office space, the signed leases, and other facts that were known or which could be reasonably ascertained on the date of the merger which throw any light on the prospects of the company.

[73] CP 1679 (note stating "dissenter gets paid on going concern basis, no deduct for closing costs"); Ex. 73 (first fair value calculation without deducting those costs).

The trial court failed to consider the "future prospects."[74] Those "future prospects" would involve curing the misleading marketing information and factoring in the letter of intent to sell the property that was received one day prior to the merger date and signed one day later, the effect of the signed letter of intent on the marketing, the signed leases for 79% of the building,[75] the prospect of a future lease for the remaining 21%, and the prospect for income from the omitted office space—but Barnes' report and the fair value ruling fail to consider those facts or prospects in favor of the dissenter.

The timing of the merger is also relevant to the fair value.[76] The substantial violations of the statute were relevant to the valuation contentions.[77] The trial court's original rationale for the deduction of the

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[74] Matthew G. Norton Co. v. Smyth, 112 Win. App. 865, 885-86, 51 P.2d 159 (2002) ("all "facts [that] were known or which could be ascertained as of the date of the merger and which throw any light on future prospect*s* of the merged corporation are not only pertinent to an inquiry as to the value of the dissenting stockholders' interest, but *must be considered* by the [court]" (omitting citations)).

[75] CP 1650 n.25 ($150,000 used by Barnes for lost rent and rent up of the phantom 45% vacancy, where he ignored two signed leases); 1651:19-26 (rented area was closer to 75% versus 55%).

[76] Glassman v. Unocal Exploration Corp., 777 A.2d 242, 248 (Del. 2001). Here the effective date of the merger was timed to coincide with the first date that the company could legally sell the property on December 7, 2004—and a letter of intent was signed the next day. But Barnes' appraisal falsely reported the property was "marketed for sale beginning in, December 2004" and it was placed under contract in March. (Ex. 257 at 1.) Actually, the property was placed under contract on December 8, 2004 with an agreed rent guaranty, the guaranty was waived no later than early January, and the purchase agreement was formally signed in February 2005, while Humphrey was being denied his right to immediate payment. Ex. 85 at Clay 000170-80.

[77] "Additionally, courts may examine wrongful actions in gauging or impeaching the credibility of minority shareholders with respect to their valuation

(continued . . .)

transaction expenses was the other members "took the risk of marketing it and paying the expenses." CP 1677:18-24. But there is no evidence of such a risk—Humphrey shared the risk by remaining the involuntary guarantor of the company's bank loan[78]—but he shared none of the appreciation.

Finally, the definition of fair value is intended to protect the dissenter while he is in the "twilight zone"[79] and to permit him to share in the appreciation. But Humphrey remained in that "twilight zone" long after the effective date of the merger—being an involuntary guarantor for six months. Clay Street later failed to supply Humphrey with material information before this suit was filed—in violation of its fiduciary duties and the requirements of the statute and first fought and then ignored discovery requests. Clay Street reaffirmed the $2.5 million valuation in October 2005 only to retreat from it at trial. In the meantime, Humphrey did not have the use of the funds and was penalized further because the fair value ruling excludes the appreciation from the growth that increased the "market value" and the appreciation from the foreseeable leasing up of the property that also increased the "capitalized earning value." According to

(. . . continued)
contentions." HMO-W, Inc. v. SSM Healthcare Sys., 234 Wis.2d 707, 729, 611 N.W.2d 250 (2000).

[78] Conclusion 48 (CP 2368:3-11) erroneously makes "dysfunctionality" a standard for deducting transaction costs. The trial court again applied a judicial dissolution standard, when the company did not elect that remedy that could have given Humphrey other relief such as time for a buyout as in 899 West Main, where sales commissions were avoided.

[79] CP 1645.

the second court-appointed appraiser, Clay Street's value increased $300,000 (10%—over 20% annualized) in the five months between the merger and closing—but Humphrey was paid a lower 6.5% rate. Ex. 113 (Apr. 13, 2007 report at 2).

The trial court erred in granting a liquidation value and not the "best value[80]/fair value" that requires by definition—an orderly transaction, known as a "fair sale" where "the buyer and seller are each acting prudently, knowledgeably, and under no necessity to buy or sell—i.e. other than a forced or liquidation sale." Over forty years ago, the supreme court reversed a trial court's use of primarily a liquidation value in an appraisal suit brought by dissenters.[81] The decision is instructive and governs this case. A liquidation value was overemphasized when the "most . . . significant factor" should be the "but for" situation prior to the merger.[82] Likewise, "but for" the merger and new articles, Clay Street could not be sold unless Humphrey consented and the *status quo ante bellum* was to hold the property and avoid a $79,726.75 prepayment penalty payable to the bank. Similarly, "but for" Scott Rogel's misleading statements in 2003-04 about the value of Clay Street in his divorce which triggered this sequence of events (Compare CP 1860:16-

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[80] In re 75,629 Shares of Common Stock of Trapp Family Lodge, Inc., 169 Vt. 82, 725 A.2d 927, 931 (Vt. 1999) ("Thus, to find fair value, the trial court must determine the best price a single buyer could reasonably be expected to pay. . .").

[81] In re West Waterway Lumber Co., 59 Wn.2d 321-22.

[82] Id. at 321-22 (stating "a most significant factor . . . is the fact that . . . but for the amendment to the articles" the company would be liquidated in five years).

1861:5 (testimony) <u>with</u> Exs. 10 &10A (financial statements sent to banks)), there would have been no dispute, no sale, or transaction costs. Ex. 73 (settlement statement). Yet, these liquidation costs are being deducted from Humphrey's fair value interest.[83] He suffers even more penalties, because Barnes' appraisal used higher hypothetical transaction costs for leasing and tenant improvements rather than the lower actual costs. CP 1653:15.

The deduction of these costs deviates from the general rule that in a fair value measurement the costs incurred after the measurement date (the effective date of the merger) are not included. CP 487-93. Humphrey was not a member at the time of the sale and was not a willing seller. None of the appraisers, not even Clay Street's lawyer, included these costs in their appraisals.[84] The sales costs are specific to the sale itself and can be avoided entirely or in part.[85] Finally, none of these expenses appear on the Income Statement for December 2004, Ex. 73.[86]

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[83] As in <u>West Waterway Lumber</u>, the historic revenues are relevant and should be considered to check for anomalies and manipulations. The tax returns prove that during 2000 to 2003, the individual members had profited and received $58,000 in cash distributions. Ex. 96A-G (tax returns). The five year average for the gross rent was $248,839 but in December 2004 it dipped to $195,332.

[84] VRP 573-74; CP 1679 (Barnes' note of Clay Street's attorney stating: "dissenter gets paid based on going concern basis, no deduct for closing costs.").

[85] For example, Statement of Financial Accounting Standards No. 157, Fair Value Measurements ¶ 9 specifically states: "The price in the principal market (or most advantageous) market used to measure fair value of the asset or liability shall not be adjusted for transaction costs. . . . Transaction costs are not an attribute of the asset or liability; rather, they are specific to the transaction and will differ depending on how the reporting entity transacts." CP 987-93 (summarizing statement).

[86] When converting from a stabilized appraisal of $3.3 million to an "as is" basis, Barnes deducted $150,000 for lost rents, lease commissions, tenant improvements, and soft

(continued . . .)

These multiple defects demonstrate that the fair value ruling is not supported by substantial evidence. The trial court applied an improper liquidation standard that imposed penalties and distortions and not the required fair value standard.

## V. CONCLUSION

Clay Street repeatedly violated the dissenters' rights statute, and under the statute it was therefore liable for Humphrey's attorney fees. RCW 25.15.480(2)(a). Yet the trial court repeatedly excused those violations as instances of "substantial compliance," with the statutory requirements But that is an error of law. None of the four violations as a matter of law can amount to substantial compliance. This Court must reverse those errors of law and remand the proceeding for a determination of the amount of attorney fees that Clay Street owes Humphrey under the dissenters' rights statute for repeatedly and facially violating the statute.

Moreover, the trial court's award of fees to Clay Street must be reversed for numerous reasons. First, the trial court impermissibly employed a "free floating" equitable standard to determine attorney fee

(. . . continued)
costs to fill a mythical 45% vacancy. Ex. 257 at 72. For Suite B-2, the actual lost rent was two months (December and January) versus the six months that Barnes forecasted. Ex. 202. Barnes' forecast defied reality. He ignored the lease signed two months earlier and the actual rent. The lease required none of the additional built out and expenses that Barnes forecasted. Ex. 202 at MPC 151, § 28.1 ("Landlord will provide, as currently built-out, approximately 1100 square feet of office space, including one (1) bathroom.").

liability—and that violates the statute. Second, the trial court predicated its award of attorney fees to Clay Street on evidence that is blatantly inadmissible under CR 68. Third, the penalty for submitting such evidence is forfeiture of attorney fees. See Hanson v. Estell, 100 Wn. App. 281, 290-91, 997 P.2d 426 (2000). The award of fees to Clay Street must be reversed for that reason alone. Fourth, the trial court impermissibly considered the informal arbitration decisions concerning other companies. In short, the trial court's decision to award Clay Street attorney fees was a tissue of errors, and it must be reversed.

Finally, the fair value ruling failed to apply the governing standard, was a tissue or errors and must also be reversed.

Pursuant to RAP 18.1 Humphrey should be awarded fees under the standard set forth in RCW 25.15.480(2)(a) and on the grounds set forth supra at IV.C.1.

RESPECTFULLY SUBMITTED this 30th day of April, 2008.

LANE POWELL PC

By________________________
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## APPENDIX A

Clay Street's counsel, George Cowan, testified in a deposition that before publishing the $2.5 million "fair value" estimate, he consulted with Gerry Ostroff:

> Q: So he didn't have any input into it at all?
> A: We had a telephone discussing about the number.
> Q: Before or after you concluded the valuation and submitted it to my client?
> A: Oh, before.
> Q: Okay. And did he [Ostroff] provide any input in terms of the number?
> A: He did provide any input? I think that he believed the number was high.
> Q: And he believed it was high because of what?
> A: Because he was the one that would have to pay it, I assume.

CP 1835 (Cowan Dep. at 26:3-15, Feb. 7, 2006). At his deposition, Gerry Ostroff testified:

> Q: Did you approve Mr. Cowan's calculation.
> A. I discussed it.
> Q; Did you tell Mr. Cowan that his calculation was actually too high?
> A: I don't recall.

CP 1849 (Ostroff Dep. at 46:12-16).

## APPENDIX B

> "In order to assess attorney's fees and expenses equitably *as authorized by RCW 25.15.480*, it is necessary to understand the relevant history relating to the deterioration of the relationship of the members not only of the Clay Street LLC but other related LLCs.
>
> . . . .
>
> Mr. Ostroff declared that given the history of Mr. Humphrey's conduct of the 901 Tacoma and Westwood Villages LLC litigation, he "decided to offer Humphrey f[a]r more that I believed he would be able to recover in this suit just to avoid the hassle, high attorney's fees and opportunity costs of the litigation, Humphrey rejected all of our [settlement] offers. . . .
>
> . . . .
>
> With the foregoing relevant background as prologue, the events causing the Clay Street failure, as established by the trial evidence take on added meaning.

(CP 2322:20-23, CP 2323:26-2324:10, Order (adding emphasis.)

## APPENDIX C

CP 1935:20-1936, stating:

> The 901 Tacoma suit sought to enforce Humphrey and Lori Goldfarb's mother and step father's contractual right to arbitrate disputes—and preserve the status quo and prevent the possible sale of the company's sole asset. Ostroff and Rogel were then the company's managing members. Over a weekend, they gave Humphrey/Malin an option to purchase the property for $1.6 million ($100,000 more than offered by Pierce County). [Counsel] sent opposing counsel an email confirming Humphrey/Malin agreed to purchase the property for an amount more than the County had offered. Without any notice, 901 Tacoma (Ostroff/Rogel) signed a deal with the county—for the lesser price. Tom Brewer ruled that Ostroff/Rogel's actions were protected by the business judgment rule. Brewer's ruling is irrelevant for three reasons. First, after the ruling, the court of appeal ruled members owe each other fiduciary duties—Brewer did not have the benefit of the decision. Second, 901 Tacoma differs from Clay Street. In 901 Tacoma, the power to sell was vested in Humphrey/Rogel the original managing members—while in Clay Street, the members retained the right to veto a sale. Therefore, the business judgment rule does not apply to Clay Street—where the members, not a manager, has the relevant power. Third, 901 Tacoma did not involve the dissenters' rights statute." In fact, the appraised value of 901 Tacoma was $4.1 million, when it was sold for $2.5 million, but the arbitrator excluded the appraisal as untimely under the discovery rules. (VRP at 299-30 regarding Hess/901 Tacoma appraisal.) As to Westwood: "As to Westwood, Humphrey/Malin sent an offer to purchase the property for $350,000 and Ostroff/Rogel later sold the property for $325,000—without any prior notice. Another sale preferring an outsider to a partner.

(CP 1936:17-19.)

## APPENDIX D

CP 1937:1-19, stating:

899 West Main involved property whose bank financing was expiring and was leased by Humphrey's affiliated company, Seattle Mechanical. Unlike Clay Street, the members had multiple disagreement concerning basic operations: the bank financing, the terms of the lease, the terms of insurance, and whether Scott Rogel should continue to receive property management fees, and whether Joseph Rogel was a member. Those were fundamental disagreements which resulted in the awards. The Rogels later asked the Court to vacate Judge Soukup's awards. Judge Soukup later permitted Humphrey to buyout the Rogels and adopted Humphrey's proposed buyout price—the result –avoidance of transaction costs, commissions and tax issues.

One premise of Judge Soukup's initial award in 899 West Main was that Joseph Rogel never resigned as a member. Months after the final arbitration, we discovered Joseph Rogel's resignation letter which opposing counsel later used and relied upon in the 901 Tacoma arbitration.

Finally, Judge Soukup never ruled that Humphrey acted with an improper purpose in the suit. Actually, the Rogels filed the suit, and Humphrey compelled arbitration—which probably saved everyone time and money.") Even though the arbitrator ruled that Humphrey breached his fiduciary duty in failing to raise the rental rate and to promptly collect rent, he declined to award fees and permitted Humphrey to buy out the Rogels.

APPENDIX E

[INCLUDES CITATIONS AND QUOTATIONS FROM HUMPHREY EDITS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED BY CLAY STREET AND JOSEPH AND ANN LEE ROGEL; SUBMITTED TO THE TRIAL COURT]

| | |
|---|---|
| HUMPHREY INDUSTRIES LTD.,<br><br>Plaintiff,<br><br>v.<br><br>CLAY STREET ASSOCIATES LLC,<br><br>Defendant. | NO. 05-2-20201-7 SEA<br><br>(Consolidated With 05-2-24967-6 SEA)<br>ASSIGNMENTS OF ERROR TO FINDINGS OF FACT AND CONCLUSIONS OF LAW |
| CLAY STREET ASSOCIATES LLC, a limited liability company,<br><br>Petitioner,<br><br>v.<br><br>HUMPHREY INDUSTRIES, LTD, a Washington corporation,<br><br>Respondent. | |

*ASSIGNMENTS ARE IN ITALICS*

**HUMPHREY EDITS TO PROPOSED FINDINGS AND CONCLUSIONS SUBMITTED BY CLAY STREET AND JOSEPH AND ANN LEE ROGEL [PROPOSED] ARE IN BOLD**

**See Humphrey's Proposed Findings and Conclusions, Dkt. 225A, Apr. 26, 2007**

**See Humphrey's Edits to Findings and Conclusions of Law Submitted by Clay Street Associates, LLC and Joe and Ann Rogel, Dkt. 332, July 30, 2007**

## I. FINDINGS OF FACT

1. Clay Street was formed for the purpose of developing a commercial warehouse property at 116 Clay Street, N.W., in Auburn, Washington. [CP 2357]

2. The members of Clay Street at the time of formation were George Humphrey, Scott and Lori Rogel, ABO Investments, and Joseph and Ann Lee Rogel. Each member held a 25 percent interest in Clay Street. *Mr. Humphrey initially acted as managing member. Scott Rogel acted as the property manager and real estate agent for Clay Street.* [CP 2357-58] *[They were co-managers]*

**"Ex. 31, § 1.4 of the Limited Liability Company Agreement of Clay Street Associates which defines managing members as Humphrey and Scott Rogel," § 8.1 requires consent of members to sell.**

**HUMPHREY EDITS at 3:16-24.**

3. Gerry Ostroff is the principal in ABO Investments. The Court found Mr. Ostroff s testimony in this matter to be credible. Mr. Ostroff provided a credible summary of how events led to the merger and ultimately to the sale of the Clay Street property. [CP 2358]

4. Mr. Ostroff has been involved in investing in real estate since the mid- 1970s. Eventually, Mr. Ostroff became involved in Clay Street, as well as in 901 Tacoma Avenue,

LLC and Westwood Village Apartments, LLC, with George Humphrey, Scott Rogel, and Joseph and Ann Lee Rogel. [CP 2358]

5. *With respect to Clay Street, Mr. Ostroff originally invested between $425,000 and $450,000.* Joseph and Ann Lee Rogel initially invested some money into Clay Street as well. *George Humphrey and Scott Rogel did not invest any cash at the inception of Clay Street.* At the time the Clay Street project received permanent financing, the four members equalized their investments. At that point, each member had approximately $100,000 invested in the project. [CP 2358]

*[This was contradicted at trial by Scott Rogel's and George Humphrey's testimony, and tax returns; Humphrey invested funds and advanced funds]*

**"S. Rogel Trial Test. (June 14, 2007) . . . . Ex. 96A (1998 Schedule K-1, line j(b) $107,227 which is Humphrey's contribution); Ex. 8 ($33,104) . . . . Ex. 96A, 1999 K-1s showing $106,076 for each partner. . . . Ex. 8. Rogels' partner call states "Humphrey Industries has funded the Tenant Improvement work, total cost $33,631. Ex. 8 at Clay I 00001. The memo confirmed that the office space had been built out to '2,200 sq feet and is two stories.' Ex. 8 at Clay I 00003. . . . Ex. 204 (Calkins lease). The memo states: 'After that date the office space shall be fully leased at $19,000 + per year.' Ex. 8 at Clay I 00003. . . . From a lawsuit against the general contractor, Clay Street received $120,000 in proceeds . . . Ex. 9A (check and release); [VRP 669:12-22] Scott Rogel Trial Test. The funds were used to install concrete instead of the asphalt in front of the dock wells. . . . Clay Street appraiser requested a list of remodeling costs. . .Ex. 132."**

**HUMPHREY EDITS at 4:18-5:16.**

6. Mr. Ostroff wished to remain a passive investor in Clay Street. However, by 2003, the relationship between George Humphrey and the Rogels had markedly deteriorated,

causing great friction. [CP 2358] *It is undisputed that by 2003 Clay Street had become dysfunctional and was not operating successfully for a period of time.*

*[The company was not dysfunctional—Scott wanted to sell it, was the property manager, and Humphrey had previously made advances for tenant improvements. Also erroneous application of judicial dissolution standard].*

**"The Rogel/Rogel dissolution suit was filed in January 2003. Ex. 121, docket sheet." "Gerry Ostroff subsequently filed a declaration in the divorce. Ostroff Trial Test.; Ex. 121 at Dkt. # 78." "In an arbitration proceeding to compel Lori Goldfarb to consent to the merger, Scott Rogel testified that the merger/dissolution was required by his property settlement agreement and that the options were either a partner call or foreclosure. Ex. 34, Rogel Decl. at 2 (stating he agreed to dissolve Clay Street six months ago and choices are partner call or foreclosure)." VRP 134, 363 Scott Rogel Trial Test. (loan guarantees required that member financial statements be sent to bank. "In 2001-02, Scott Rogel valued Clay Street at $3.5 million, but during divorce in 2003, reduced value to $2.5 million.)" VRP 475, <u>compare also</u> Exs. 10 and 10A, Ex. 13 (Aug. 8, 2003 letter, valuing Clay Street at $2.5 million), CP 1860:16-1861:5 (Oct. 9, 2003 Rogel Test. about $2.5 million value), Ex. 14 (Oct. 15, 2003 memo to Humphrey "you do not wish to be a partner" and demand for property transfer). "In early 2004, Scott Rogel, Joseph Rogel, and Gerry Ostroff sent a memo that confirmed that they had decided to file for the judicial dissolution of Clay Street. Ex. 21 (Jan. 8, 2004 memo)."**

**HUMPHREY EDITS at 5:16-6:8, 8:4-7, 9:3-7.**

7. In August 2003, George Humphrey resigned as managing member. Because no other member would do it, Mr. Ostroff, through ABO Investments, became the managing member of Clay Street. [CP 2358]

8. *In his role as managing member*, Mr. Ostroff determined that the most reasonable solution to the dysfunctionality of the LLC was to sell the Clay Street property and dissolve the LLC. Prior to moving forward with a sale of the property, Mr. Ostroff explored the possibility of trading interests in various properties in which the parties were involved in order to separate the parties' business interests. The trading idea did not work out. [CP 2358-59]

*[The managing member had no authority to sell the company under the company agreement, unlike the one for 901 Tacoma]*

**<u>Compare</u> Ex. 31 (LLC Co. Agreement, § 1.4 defining two managing members, § 8.1 requiring consent of members to sell, § 11.1 stating managing members may lease) <u>with</u> CP 1936:7-10 (901 Tacoma Agreement vested in the original managing members the power to sell.**

**HUMPHREY EDITS at 6:215-7:15.**

9. The Clay Street Operating Agreement required unanimous approval of the members to sell the property. Because Mr. Humphrey would not agree to a sale, Mr. Ostroff sought the advice of counsel concerning how to end the parties' business relationships in Clay Street. Ultimately, Mr. Ostroff was referred to George Cowan, an attorney with the Vandeberg Johnson & Gandara firm in Seattle, Washington. [CP 2359]

10. After reviewing the situation, Mr. Cowan advised Mr. Ostroff that a merger of Clay Street into a new LLC was the best means to solve Clay Street's problems. In particular, a merger would allow the new LLC to have different voting rights which would allow a sale of Clay Street's property to occur without the consent of George Humphrey. Mr. Cowan further advised Mr. Ostroff that Humphrey would have a right to notice of the merger and payment of his fair share in the LLC as of the date of the merger, should he dissent from the planned merger. In August 2004, a new LLC, The WXYZ LLC, was formed. [CP 2359]

11. *The Court finds that Mr. Ostroff's reliance on the advice of counsel was in good faith.* [CP 2359]

*[The attorney did not testify at trial so the burden of proof was not sustained. Further, this is relevant only to good faith and not substantial compliance with the statute.]*

12. Mr. Cowan did make some errors in the merger process in that Bank of America's consent was not obtained, a new identification # was not obtained and Mr. Humphrey was neither timely informed nor timely paid as required by statute. [CP 2359]

*[The company also was not capitalized]*

**VRP 426:5-11 (Gerry Ostroff Test., don't recall making capital contribution).**

**HUMPHREY EDITS at 8:20-23.**

13. Clay Street's loan documents with Bank of America required the bank's consent to any transaction such as the merger at issue. *The bank did not expressly consent in writing to the plan of merger; however, the bank continued to accept Clay Street's payments and did not at any time declare Clay Street or its successor LLC to be in default. Instead, the bank allowed Clay Street and its successor to continue making loan payments up through the sale of the Clay Street property.* [CP 2359]

*[The testimony was that no one informed the bank that the merger had been effectuated, the new company had no tax identification number and used the same checking account].*

**VRP 430:18-431:17 (Ostroff Test.); CP 1847:8-24 (Ostroff Dep. Test.); CP 2297 (copy of check), Jan. 18, 2007 Cowan Dep. at 67:16-69:10.**

**HUMPHREY EDITS at 14:3-11, 37:20-38:6.**

14. The Plan of Merger was initiated in late August and early September 2004. Pursuant to the Plan of Merger, the merger would become effective on December 7, 2004. [CP 2360]

15. In September 2004, after the merger was initiated, Mr. Ostroff moved forward with listing the Clay Street property for sale. To maximize the return on his and the other members' investment, Mr. Ostroff wished to sell the Clay Street property and dissolve the parties' dysfunctional business relationship. [CP 2360]

16. *After conferring with various brokers and considering other information*, Mr. Ostroff, in conjunction with Scott Rogel, decided to list the property for sale at $3.35 million. A listing agreement was signed on September 15, 2004. The property was listed with Morris Piha Real Estate Services, a real estate brokerage company with which Scott Rogel was affiliated. *At the time the property was listed, the market was regarded by all witnesses with knowledge of the real estate market at issue as being reasonably flat and soft.* Mr. Ostroff did not believe that the LLC property would justify a listing much above $3.3 million. [CP 2360]

**Ex. 257 at 13, 15, 20, 25, 29, 30, 31, 34 (Barnes' report about growth being expected, further expansion, and in the Auburn submarket "average rates rose slightly during third quarter" and has "one of the lowest vacancy rates" and "professionals and participants reported a higher level of recent activity").**

**HUMPHREY EDITS at 38:18-40:17 (see block quotes from the report).**

17. At the time the Clay Street property was listed for sale, *it was suffering from a vacancy rate of approximately 45 percent.* Specifically, two of the seven units within the building were vacant and another had only a short term lease. In October 2004, a lease was signed for one vacant space with a move-in date in February 2005. *In January 2005, Clay*

*Street obtained commitments or long-term leases for the other two vacancies with a scheduled move-in date in May 2005.* [CP 2360]

[*It was a short-term problem. There were offers and a letter of intent within a week period before the merger date—the company was also billed commissions for the new leases during the merger period.*]

**CP 2275:24-2276:14, 2278-82 ("Clay Street paid commissions for A-2 and B-2 in November 2004. Exs. A and B to second Spellman Reply Decl. In late November, Scott Rogel represented to another broker: 'Info as requested. A LOI is out for suite A-1, the only vacancy,' Ex. C to second Spellman Reply Decl. A week after the merger, Gerry Ostroff asked Scott Rogel in a December 15, 2004 email: : 'How much rent are we getting now against what they want guaranteed <u>and did they get a chance to look at the offer for A1 & A2,</u>' Ex. D to second Spellman Reply Decl."**

**HUMPHREY EDITS at 40:18-41:11.**

18. *At the time the property was listed for sale, Clay Street was losing money. By year-end 2004, the property had an annual loss of approximately $29,000.* In September 2004, prior to the effective date of the merger, Mr. Ostroff made a capital call to the other LLC members. Mr. Ostroff requested a $10,000 contribution from each member to cover mortgage payments, taxes, and other expenses anticipated for the last quarter of 2004. Mr. Ostroff, Scott Rogel, and Joseph and Ann Lee Rogel each made the requested capital contribution of $10,000. *Mr. Humphrey disagreed with the capital call and did not contribute $10,000.* Subsequently, he dissented from the proposed merger. *The financial problems of the property gave further support to Mr. Ostroff's decision to sell the property.* [CP 2360-61]

[*Documentary evidence shows Ostroff intended to sell via a judicial dissolution in 2003. The leasing problem was short-term. Humphrey alone made some prior advances. The sole purpose of the merger was to condemn his veto right and the process had started* *before the capital call. An email shows that Humphrey offered to pay the short-fall. Humphrey objected to paying legal fees for the merger. The trial court erred in permitting those legal fees to be deducted from the fair value payment.]*

[See supra text to Finding No. 5 (prior advance from Humphrey); Finding No. 6 (equity in property). "Prior to the request for $10,000 per member in 2004, Clay Street had paid members over $58,000 in distributions during 2000-2004. Ex. 96 at HIC/Clay 503 ($20,364 in calendar year 2002), at HIC/Clay 520 ($4,000 in calendar year 2003); Ex. 96A ($14,000 in calendar year 2001); Ex. 96B ($24,000 in 2000). The members had reimbursed Humphrey in 2001 for a loan to cover the tenant improvements. Ex. 8. The prospective request for funds in the fall of 2004 were for less than 1/3 of the $33,632 that Humphrey had alone advanced for tenant improvements three years earlier for several months and which had been treated as an interest free loan. Ex. 8. Later, in October 2004, Humphrey offered to intervene and pay the mortgage, if required. Ex. 46."

["On September 10, George Cowan's billings reflect: "Telephone conference with Scott Rogel regarding cash requirements and <u>capital call, and effect on Humphrey's position</u>." Ex. 138 (emphasis added). Three days later, on September 13, Gerry Ostroff sent a letter calling for $10,000 from each member to fund <u>new</u> lease commissions, tenant improvements, and taxes. Ex. 39, Sept. 13, 2004 letter; Ostroff Dep. at 35:7-36:3, Dec. 3, 2006.>"

[See also Ex. 235 at MPC 1259 (year-end balance sheet showing equity -- $15,602.54 cash in{ hand but next two pages are the Dec. 2004 income statement which shows the $29,451.95 loss; $13,999 in "Lease Com. Renewal" for the year to date at MPC 1261; next page shows checks from BL Price on Nov. 3 and Dec. 5—one of the new tenants; next document is a Jan.-Dec. 2004 income statement—which shows no Jan. –July lease commissions but is missing data for August through December 2004); CP 2275-82 (complete income statement showing lease commissions paid in November; but 45% vacancy is used); "George Cowan filed in the Rogel/Goldfarb arbitration a declaration that described how the purpose of the merger was to "eliminate the veto power of the dissenting member." Ex. 32, Aug. 24, 2004 letter from Cowan, Ex. 35," Cowan Decl.]; Ex. 31 (Aug. 20, 2004 Cowan letter sending notices of dissenter rights to Humphrey's attorney, which at stated merger plan was "effective as of Sept. 5, 2004"); Ex. 39 (Sept. 13, 2004 Ostroff letter asking for capital contribution); Ex. 46 (Oct. 8, 2004 email from Ostroff "legal fees and commissions will show up on financials"); Oct. 8, 2004 email from Humphrey about partner call and offer to cover short fall after call from bank); Ex. 73 (Seller's statement form May 16, 2005 closing showing $5,000 payment to Cowan's firm for legal fees); Ex. 139 (Summary of Cowan's billings showing $7,934 in work from Sept. 04 to May 05 [Humphrey claims he is being charged for merger costs as part of the deductions at closing])

**HUMPHREY EDITS at 9:7-10, 10:3-18, 11:1-10, 14:3- 18, 14:24-15:6; 19:8-941:15-42:8. See also** Ex. 73 (Seller's statement form May 16, 2005 closing showing $5,000 payment to Cowan's firm for legal fees); Ex. 139 (Summary of Cowan's billings showing $7,934 in work from Sept. 04 to May 05 [Humphrey claimed was he was charged for merger costs as part of the deductions at closing]).

19. In this matter, Mr. Humphrey has alleged that Scott Rogel was attempting to sell the property in a "*fire sale*" — i.e., *attempting to sell the property as quickly as possible for an artificially low price*. The Court finds that the most credible evidence does not support this allegation. Specifically, the evidence established that Scott Rogel marketed the property aggressively. The property was listed through the CBA (the commercial multiple listing service) and received many "hits." Mr. Rogel additionally contacted numerous individuals in an effort to market the property, including brokers, agents, neighbors, and individuals known to Mr. Rogel to have an interest in industrial properties in the area. Further, Mr. Rogel worked to fill the vacancies, *and kept potential buyers apprised of the decreasing vacancy rate as the property was leased*. Mr. Rogel prepared aggressive pro-forma valuations that

valued the property as if it were fully leased, and provided his pro-forma evaluations to agents and potential buyers. On balance, the Court finds that the most persuasive evidence is that Scott Rogel made a good-faith attempt to market the property for the best price that could be obtained in the market. [CP 2361]

[Scott Rogel did not deny that he told Bart Farrar and Stan Beck (CP 2070-73) and others that he intended a quick sale at a low price. The testimony of others some misinformation. See, e.g., proposed findings and (CP 2115-16:2; CP 2138:20-2139:2, 2147:12-16 (Newell test. about asphalt at dock highs and Scott not being able to sell until merger was completed); (CP 2178:10-2179:10, 2180:14-2182:25 (Claeys Test. about partnership issues at Clay Street, Shedd interviewed him, his cap rate was 6.5 to 7, no adjustment for vacancy, would sell for $4.8 today).]

**Ex. 51 (Nov. 4, 2004 offer for $3.19 million offer from Remco whose agent was Ari Salomon); CP 882-83, 2249-53, Allen Dep. Test. at 31:5-32:13, at 34:5-12 ((Ari Salomon "he kind of missed that one . . .He didn't come up on the radar screen quick enough for him to get an offer; that's how I took it. Q: Meaning, given the market the way the market increased? A: . .. .So I think his deal was that he was, yeah, a little upset that he didn't see it soon enough to get a proper offer in that he would be in the range where I am and have one of his investors buy it." ).]; Ex. 257 at 5 (Barnes appraisal stating exposure period was nine months); Ex. 137 (quoting FAS 67 (1982): "The fair value of a parcel is affected by its physical characteristics, its probable ultimate use, and the time required for the buyer to make such use of the property considering . . . <u>market absorption factors</u>."); Ex. 125 (Park 280 property in Auburn with the same footprint and the same builder on the market for five months before it was placed under contract in October 12, a month after Clay Street was listed, and sold for a higher price ($91.69/sq. ft); Ex. 42 at MPC 402 (Newell inquiry one day after Clay Street listing about potential purchase); Ex. 123 at 27 (Shedds notes and Newton (broker/buyer testimony:**

**"Never made an offer, could not get any info from Scott Rogel left messages and would not return calls cou[ld] not get any numbers out of him to evaluate the property") Ex. 123 at 2 (Shedd notes and Turbak (leasing agent) testimony that vacancy was due to market and lack of effort), CP 2256:13-25 (Turbak).**

**HUMPHREY EDITS at 13:1-5, 14:19-15:14, 34:24-35:9 43:6-4, 17-26, 44:8-9**

20. While questions have been raised about Scott Rogel's motivations, the Court notes that it was in Scott Rogel's financial self-interest to obtain the best possible price for the property. In any event, the Court finds Scott Rogel's motivations largely irrelevant, as it was *Mr. Ostroff who was ultimately making decisions about the price for which, the property should be listed and ultimately the price that the LLC was willing to accept for the Clay Street property. [CP 2361]*

*[He did not have the legal power under the company agreement and the decision had been made via the merger].*

**"Ex. 31, § 1.4 of the Limited Liability Company Agreement of Clay Street Associates which defines managing members as Humphrey and Scott Rogel," § 8.1 requires consent of members to sell.**

**HUMPHREY EDITS at 3:16-24**

21. *At the time it was listed, the property did not generate much interest.* The first offer came in late October from a Mr. Oliver for $2.9 million. Mr. Ostroff rejected the offer as too low. [CP 2361]

*[Prospects were told it could not be sold until December.]*

**(CP 2115-16:2; CP 2138:20-2139:2, 2147:12-16 (Newell Test. about asphalt at dock highs and Scott not being able to sell until merger was completed).**

**HUMPHREY EDITS at 13:1-19, 45:20-21.**

22. A second offer came from a buyer called Remco in November of 2004 for $3.19 million. Again, Mr. Ostroff considered the offer too low, and instructed Scott Rogel to counter at $3.3 million. Remco did not respond to the counter-offer. [CP 2362]

23. In early December 2004, an offer was made by the Favro Group at $3 million. Mr. Ostroff again instructed Scott Rogel to counter at $3.3 million. The Favro Group agreed that it would pay $3.3 million, but only if the LLC agreed to an unfavorable rent-guarantee clause. *Mr. Ostroff was not willing to accept the rent- guarantee clause.* [CP 2362]

*[He signed a letter of intent with a lease up guarantee].*

**Ex. 58 at Clay 000177-180, Dec. 2, 2004 letter of intent with rent guarantee.**

**HUMPHREY EDITS at 17:26-18:2, 34:15-19.**

24. *While the Clay Street property did receive some bids below the list price, by no means did it generate a bidding war, as would be expected if the property were listed well below its value.* [CP 2362]

*[Assumes accurate marketing information and conflicts with the 9 month exposure period that Clay Street's appraiser opined].*

**Ex. 257 at 5 (Barnes appraisal stating exposure period was nine months)**

**HUMPHREY EDITS at 44:8-13.**

25. *In December 2004 and January 2005, Scott Rogel kept the potential buyers informed of the status of the property and, in particular, of developments concerning the leasing of the property's vacancies.* Ultimately, in January 2005, after receiving a commitment to lease the property's last remaining vacancies, the Favro Group agreed to a price of $3.3 million without a rent guarantee. In early February 2005 Clay Street and the Favro Group entered a Purchase and Sale Agreement ("PSA") for $3.3 million, admitted at trial as Exhibit 65A. The Favro sale did not close until May 2005. From the time of the

February 2005 PSA to the closing in May 2005, Mr. Ostroff continued to leave the property in the commercial multiple listing service in an effort to generate back-up offers or other interest in the property. Clay Street did not, however, receive further offers. [CP 2362] *[But Rogel testified that he received one other offer during this time, Arie Solomon told Shedd that this one got away from him, and brokers complained about his getting back to them]*

**See Ex. 123 at (Newton's interview -- Rogel failed to get back to him and provide information); Allen's testimony (about Solomon saying he missed this one); Ex. 123 at 19 (Shedd's notes of interview of Scott Rogel stating "One guy Neil Waters, 1031 interest but didn't bother since close to closing."); Ex. 232 (Dec. 22, 2004 email from Preston, two weeks after Clay Street signed the non-binding letter of intent: "Scott—Per our phone conversation, Clay Street BP sounds interesting, but we couldn't move fast enough at this point. If you run into a glitch, please let me know . . ") Ex. 233 (email nine days later for Tom Durkin sent Scott Rogel about Clay Street: "Closed across the street. Have some questions! 1. Still for sale? 2. Can a P&S be signed? 3. Can the current mort. Be assumed? We most likely will put 1.4 million down +/-. 4. Anything new with vacancies/changes in rates? Please advise Jeff & myself. Thanks, Tom.").**

**HUMPHREY EDITS at 33:14-34:13, 44:25-45:1, 46:1-5.**

26. When considering all of the evidence concerning the Favro sale, including the testimony of Mr. Ostroff, Mr. Claeys, Mr. Newell, and Mr. Scott Rogel, the Court finds that the sale was the result of *aggressive marketing of the property* and reflected an effort to obtain the best price available from the various potential buyers interested in the property. *The Court further finds that the most credible evidence does not in any way support plaintiffs allegation of a distressed, forced, or fire sale.* [CP 2362]

**{"Humphrey's pleadings do not use "fire sale." Ex. 20 at 16 -18 of 024 (Rogel property settlement agreement requiring sale, liquidation and judicial dissolution); Exs.**

**21& 24 (Jan. 2004, April 2004 Ostroff and Joe and Scott Rogel memo and letter stating their intention to seek a judicial dissolution ); Ex. 30 (plan of merger);Ex. 32(Aug. 24 letter from Clay Street's attorney that the merger is to over come minority veto and "avoid expensive and time consuming litigation"); Ex. 33 (Aug 25, 2004 letter from Scott Rogel's attorney seeking authorization to sell per agreement, poor financial performance, avoid foreclosure, and to pay obligation to his ex-wife); Ex. 34 at 2:14-18 (Decl. by S. Rogel—sale to avoid foreclosure), CP 696-705 (Clay Str. Assoc., LLC's Opp. to Humphrey Indus. Mot. to Adopt the Report of the Ct. Appointed Appraiser at 3:10-12 ["the Property was in distress"]; VRP at 11:15-12:3 (Opening Statement by Clay Street's counsel (property was worthless in "distressed").**

**HUMPHREY EDITS at 8:1-9:10, 47:18-48:8**

**Fair Value**
**"the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date." FAS 157 ¶ 6.**
**Orderly transaction "assumes exposure to the market for a period prior to the measurement date to allow for marketing activities that are orderly and customary . . . .' it is not a forced transactions (for example a forced liquidation or distressed sale.)." FAS 157 ¶ 7. [EXCLUDED EXHIBIT]**

**Market participants are:**
**"a. independent of the reporting entity; that is, they are not related parties." Ex. 113 at 3.**
**--Clay Street is a related party seller thus by definition is not a market participant.**

**Further, the sale was distressed.**

**HUMPHREY EDITS at 48:19-24.**

27. At trial, the Court received evidence from expert appraisers concerning the definition of a fair market sale. The expert appraisers agreed that to establish a *fair-market* sale, a transaction must satisfy five conditions, including that the buyer and seller are typically motivated, that they are well informed, that there has been a reasonable time for exposure in the open market, that payment is made in cash, and that the price represents normal consideration unaffected by any special or creative interests or financing. *The Court received other evidence concerning the definition of fair value, including Exhibit 137, offered by*

*George Humphrey. Exhibit 137 is consistent with the definition of fair value offered by the appraisers. Specifically, Exhibit 137, which the Court has at times called the "FASB exhibit," establishes that the "fair value" of real estate is the amount in cash or cash equivalent that the real estate parcel would yield in a current sale between a willing buyer and a willing seller, other than in a forced or liquidation sale. [CP 2363]*

**"Humphrey was relying upon: 'Orderly transaction "assumes exposure to the market for a period prior to the measurement date to allow for marketing activities that are orderly and customary . . . . it is not a forced transaction[] (for example a forced liquidation or distressed sale.).' FAS 157 ¶ 7 which the court excluded." Ex. 138 states the following: "Rarely will market value and fair value be exactly the same because market value assumes that the property has been previously exposed for sale and the closing takes place on the appraisal date, while fair value assumes the property has not yet been exposed to sale and the sale will occur in the future." American Institute of Certified Public Accountants, Guide for use of Real Estate Appraisal Information (1987 and 1990) quoted in Ex. 137, Appraisal Board Advisory Opinion 8, Subject Market Value vs. Fair Value in Real Property Appraisals; Ex. 137 quoting FAS 67 (1982) . . . .'The fair value of a parcel is affected by its physical characteristics, its probable ultimate use, and the time required for the buyer to make such use of the property considering . . . market absorption factors.' The market absorption effect of Park 280 was not considered."**

**HUMPHREY EDITS at 47:10-21.**

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| **Fair Value**<br>**"the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date." FAS 157 ¶ 6.**<br>**Orderly transaction "assumes exposure to the market for a period prior to the measurement date to allow for marketing activities that are orderly and customary . . . .' it is not a forced transactions (for example a forced liquidation or distressed sale.)." FAS 157 ¶ 7. [EXCLUDED EXHIBIT]** |
| **Market participants are:**<br>**"a. independent of the reporting entity; that is, they are not related parties." Ex. 113 at 3.** |

**--Clay Street is a related party seller thus by definition is not a market participant. Further, the sale was distressed.**

**HUMPHREY EDITS at 48:19-25.**

**Ex. 113 at Aug. 28, 2006 letter from Allen at 1-2 (report understates building improvement sizes and effect was $100,000); CP 2253:13-19, 2254:11-21, 2255:14-22 (Shedd testimony about additional office space).**

**HUMPHREY EDITS at 52:18-53:2 & nn.12-13.**

28. Having considered all of the evidence, the Court finds that the ultimate sale of the property to the Favro Group was an orderly sale that satisfied the five conditions for a fair-market or fair-value sale. [CP 2363]

**Ex. 113 at Aug. 28, 2006 letter from Allen at 1-2 (report understates building improvement sizes and effect was $100,000); "Shedd Dep. at 36:20-23: "I had buyers and brokers, some telling me it was fair at the time; it was fair market. I had other ones telling me they thought it was cheap and it was under market." <u>Id.</u> at 37:9-21. (With respect the second factor of whether the parties were "well informed and well advised," Shedd testified, "I couldn't tell whether both sides were well informed.") in Supp. CPs, Ex. B to Spellman Reply Decl."**

**HUMPHREY EDITS at 51:1-7, 52:5-53:2.**

29. At trial, the Court considered the testimony of experts Darin Shedd, appointed by the court, and Ken Barnes, retained by Clay Street. Both, appraisers used the traditional appraisal approaches, including the cost approach, the sales comparison approach, and the income approach. [CP 2363]

30. Mr. Barnes' appraisal was conducted in June-July 2005, shortly after the sale of the property closed. Mr. Shedd's appraisal was completed in 2007 in connection with the

anticipated trial of this matter. Mr. Shedd's report (exhibit 113) also included an earlier report done by appraiser Bruce Allen. [CP 2363]

31. After considering the three appraisal approaches, Mr. Shedd opined that the "as is" value of the property on December 7, 2004 was $3.5 million. Mr. Shedd opined that the "stabilized value" on that date — i.e., the value of the property if fully leased — was $3.885 million. [CP 2363]

32. Notably, Mr. Shedd did not consider the Favro sale because he could not determine if it met the five conditions for a fair-market sale. More precisely, he stated "he couldn't get to the bottom of it." *Notably, Mr. Shedd had been informed of allegations of a distressed sale, including allegations that Scott Rogel's divorce may have affected the sales price. Given the possible doubts created by such allegations, Mr. Shedd disregarded the $3.3 million sale of the property in May 2005.* [CP 2364]

**Shedd Dep. at 36:20-23: "I had buyers and brokers, some telling me it was fair at the time; it was fair market. I had other ones telling me they thought it was cheap and it was under market." <u>Id.</u> at 37:9-21.(With respect the second factor of whether the parties were "well informed and well advised," Shedd testified, "I couldn't tell whether both sides were well informed.") in Supp. CPs, Ex. B to Spellman Reply Decl.; Ex. 123 (Shedd's notes from interviews of market participants, brokers, including the buyer and seller.**

**HUMPHREY EDITS at 34:1-12, 35:1-10, 52:5-12.**

33. Mr. Shedd and Mr. Barnes both testified to the difficulty of a "look back" appraisal such as that done by Mr. Shedd several years after the effective date of the appraisal. [CP 2364]

34. Mr. Barnes, Clay Street's expert, approached the appraisal with the same goal as Mr. Shedd — to determine the market value of the property as of December 7, 2004. Like Mr. Shedd, Mr. Barnes used the cost approach, the sales comparison approach, and the income approach. *Mr. Barnes testified that he gave greater weight to the sales comparison approach and the income approach and less to the cost approach.* Mr. Barnes concluded that the "as-is" value of the property was $3.15 million on December 7, 2004; he further concluded that the "stabilized" value as of that date was $3.3 million. [CP 2364]

35. Unlike Mr. Shedd, *Mr. Barnes considered the May 2005 sale of the Clay Street property to the Favro Group. In Mr. Barnes' estimation, the sale met the five requirements of a market-value sale. Mr. Barnes testified that such a sale is the best evidence with respect to the sales comparison approach. As he testified, "you can't beat it as a comp." In reconciling the various approaches, Mr. Barnes gave significant weight to the actual sale of the property, and testified specifically that he weighted the sale at approximately 70 percent as far as his entire appraisal was concerned. [CP 2364]*

**"This is nowhere in (Ex. 275) Barnes' 77 page report makes no mention about giving any consideration or weight to the sale to Favro—although when asked by the Court at trial Barnes testified that he gave 70% of the weight to the Favro sale.[1] In applying the three methodologies or in making conclusions, the Favro sale is not mentioned.[2] There is no evidence in Barnes report that either his assistant or he spoke**

**[1] Barnes made his report almost two years ago. Humphrey sent written discovery to capture the report, the working file, and the communications. Humphrey filed a motion last November to preclude any testimony by Barnes outside the four corners of his report. Humphrey filed an additional motion to exclude rebuttal testimony by Barnes. In short, Humphrey has been prejudiced by Barnes' new testimony.**

**[2] For example, the sales approach does not mention the Favro sale. Ex. 257 at 57-61. Likewise, his chart and narrative (Ex. 257 at 70) for the income approach do not mention the Favro sale. In fact, instead of using the 7.2% cap rate that Favro used, Ex. 124, the report uses a higher cap rate of 7.5% that decreased the value by $111,000**

(continued . . .)

to anyone with the Favro/Claeys buying group to determine the actual terms of the sale or the five-part criteria for a fair market value sale. In contrast, before trial, Shedd testified that he could not determine whether the actual sale was a fair one: 'I had buyers and brokers, some telling me it was fair at the time; it was fair market. I had other ones telling me they thought it was cheap and it was under market.' Shedd Dep. at 36:20-23. With respect the second factor of whether the parties were 'well informed and well advised,' Shedd testified, 'I couldn't tell whether both sides were well informed.' Id. at 37:9-21. In fact, the parties were not well informed, because they were ignoring the omitted office space. Claeys had been involved in only a couple industrial transactions. Furthermore, while Barnes' report contains adjustments for vacancies, Claeys testified that the deal was 'straight forward' with 'no adjustment to compensation for vacancy.' Those same words are in Shedd's notes. Ex. 123 at 22.

"[Add: Barnes' appraisal relied upon two inaccurate facts that he deemed to be 'Salient Facts.' First, Barnes' appraisal had the percentage of office space as 11% versus 14% used in Shedd's appraisal and Allen's supplemental letter.[3] Allen reported that the extra 1,200 square feet of office space was worth $100,000.[4]"

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(. . . continued)
according to his own calculations. Ex. 257 at 70-71 ($3,340,548 at 7.25% but $3,229,197 at 7.5% rate).

[3] Compare Ex. 257 at fourth page (Barnes report stating 11% office) with Ex. 113 at 1 (Shedd's report stating 14%).

[4] Compare Ex. 113 at second document, Aug. 28, 2006 letter from Allen at 2, with Ex. 253 (Allen's July 24, 2006 appraisal at 38 -39 showing original values). The increased office space would have similar effects on Barnes' calculations for the cost, income and sales approaches. For the income method, his blended rate of $5.42 per square foot for leasing would have increased to $6.24 per square foot, a $.82 difference that results in an increase of $39,648 per year that causes the net operating income to increase from $242,190 to $282,838. Ex. 257 at 65, 69. Using Barnes' cap rate of 7.5% and the direct capitalization approach, the result increases the income approach value from $3,229,197 to $3,771,173. ($282,838 ÷.075 = $3,771,183 versus $242,190 ÷.075 = $3,229,197.)
Barnes' report stated that he had given the most weight to the sales comparison and income approach. Ex. 257 at 72. He reported $3.4 million for the sale approach and $3.25 for the income approach. If one averages the two, the result is $3.3 million his appraised value.

(continued . . .)

**Edits at 50:3-51:5.**

36. At trial, Mr. Humphrey took issue with certain of the comparables relied on by Mr. Barnes in his appraisal. *The Court finds, however, that the comparables used by Mr. Barnes were not out of line with market conditions and, in the Court's view, were reasonably considered in support of his valuation.* [CP 2364]

**"[Comment: The there is an $8/sq. ft. increase which is in the range of $400,000 or more when one uses either the 48,352 sq.ft. foot print or the actual 49,569 .**

**Barnes' sales comparables used the Formula Holdings (June 2004) and Flagstick Properties (April 2004) as comparables 2 and 3 of 5 comparables and used 9 and 10% office space for them. Ex. 257 at 57. Allen and Shedd confirmed that the Flagstick Building and Formula One buildings had no office space although Barnes classified them as having office space. Ex. 127, 128.**

**Shedd used a $75/sq. ft. adjustment for office building out. At 38.**

**Let's apply that figure to the two buildings.**

**Formula Holdings 55,960 sq. 10% =5,596 x $75/sqft = $419,700.**

**$4,302,547 + $419,700 = 4,722,247. Barnes at 57.**

**$4,722,247/55960 sq. ft. = $84.30/sq. ft. versus $76.89 used by Barnes at a page 57.**

**Flagstick Holdings 20,868 sq.ft. 10% = 2,087 x $75/sq.ft. = $156,525.**

**$1,500,000 + $156,512 = $1,656,512 /20,868 sq.ft = $79.38 sq.ft. versus $71.88 used by Barnes.**

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(. . . continued)
**However, if one uses the corrected figure for the income approach using that actual office built out, then the average is $3.51 million. ($3.25 million plus $3.77 million ÷.2 = $3.51 million.**

**Finally, Barnes' sales comps 4 and 5 were from 2003 – a year before the valuation date. In short, from a mathematical standpoint, there is a substantial change. Barnes was not provided the information that Allen and Shedd confirmed. Barnes Trial Test. at 587:17-588:10. Clay Street misled its appraiser.]"**

**HUMPHREY EDITS at 51:8-52:14.**

37. *Both appraisers offered opinions about how to work back from a value established by a fair-market sale (here, the May 2005 sale for $3.3 million) to establish a value at a point earlier in time (the December 7, 2004 merger date). Using the methodology described in his report, Exhibit 257, and to which he testified at trial, Mr. Barnes estimated the fair market value of the property as of December 7, 2004 to be $3.15 million. Mr. Shedd opined that if the $3.3 million sale in May 2005 was a market sale, the fair value of the property in December 2004, given the fifteen percent rate of market appreciation in the relevant time period, would be a bit less than $3.1 million.* [CP 2365]

**"[Comment: This is not supported by substantial evidence. First, his report does not say this. Second, at trial, Barnes testified that he discounted on the basis of vacancy, developer's fees, and tenant improvements to arrive at the as is basis from the stabilized. Barnes Trial Test. at 574:10-576:8. Finally, the lease commissions paid for the so-called vacant space contract the assumption that the space was vacant.**

**Furthermore, even if the court were to adopt the approach of discounting from the sale price from the closing date, there is the issue of timing, relative to the simultaneous withholding of the fair value payment from Humphrey. Favro agreed to pay $3.3 million with a lease guaranty in December. Clay Street did not make any material expenditures after the effective date of the merger before Favro orally agreed to $3.3 million in midJanuary – while Clay Street was holding ransom the fair value payment due to Humphrey. Furthermore, Clay Street was legally obligated to sell for**

**$3.3 million in early February. The discounting from the May closing date is arbitrary.]"**

**HUMPHREY EDITS at 52:23-53:9.**

38. At trial, George Humphrey, the principal of plaintiff Humphrey's. Industries, LLC, offered testimony concerning the LLC and the value of its property. Mr. Humphrey is not an appraiser, and his opinions concerning value were considered by the Court *only as lay opinions based on his experience with real estate.* In the Court's judgment, Mr. Humphrey's opinions, while based on considerable investment and property management experience, are not entitled to the same weight as those of Mr. Shedd or Mr. Barnes, experts on whose testimony the Court placed considerable weight with respect to the value of the Clay Street property on December 7, 2004. [CP 2365]

**"[Comment: Humphrey had already stipulated to the numbers in the values in reports of Allen. In response to the bad faith claim by Clay Street, Humphrey's opinions were being offered for the purpose of showing his good faith in making his earlier estimate of fair value. See Humphrey's trial brief at 11:8-20. Humphrey was also offering an opinion about what fair value meant per the accounting standards in FAS 157 which Barnes and Allen had not addressed, when Humphrey's conclusions were filed with the court last November.]"**

**HUMPHREY EDITS at 53:16-23.**

39. At trial, Mr. Humphrey placed a value of $4.1 million on the Clay Street property as of December 7, 2004. *In the Court's view, the evidence used by Mr. Humphrey in his valuation appears to be well outside the mainstream of reasonably- based valuations,*

*whether based on the cost approach, income approach, or sales comparison approach.* [CP 2365]

"**<u>[Comment: Humphrey's testimony was about his prior valuation in June 2005 for the purpose of proving his good faith. In part, he relied upon the Park 280 building which was sold in October 2004 for a higher price per square foot, had the same footprint and was built by the same contractor. Humphrey's estimate was less than that value. Allen and Barnes used Park 280. Ex. 117, Barnes report at 35 (Barnes appraisal, sales comparison item 3); Allen report at 34 (sales comparison, Item 2.) Barnes never looked at Park 280 and did not consider the market absorption factor. Furthermore, the information that he forwarded to Allen and Shedd on the Formula One and Flagstick properties, which Barnes had used, showed Humphrey's good faith. Second, Humphrey did not have the information about the purchase offers for the property which was obtained only through expensive discovery.</u>**"

**HUMPHREY EDITS at 54:1-13 (bold and underlining in the original).**

40. The Court further notes that, *during the relevant time frame, and despite the fact that the property was openly and aggressively marketed, no one offered anything close to $4.1 million for the Clay Street property. In short, Humphrey's $4.1 million figure does not have substantial or credible evidence to support it.* [CP 2365]

"**[Comment: Humphrey did not [have] information about the purchase offers until five months after this suit was filed. Moreover, Clay Street had failed to provide Humphrey with information requested before the fair value calculation was made. The finding also does not consider the market absorption effect of Park 280. Barnes stated a nine month exposure period was reasonable. Misinformation was provided to the market – the office space and construction date which suppressed value. The finding**

**does not consider the evidence gathered by Allen and Shedd about the compressed marketing/exposure period.]"**

**HUMPHREY EDITS at 54:14-24.**

41. *Based on all evidence available, including the expert testimony and the evidence concerning the fair-market sale of the property in May 2005, the Court finds that Mr. Barnes provided the best estimate of fair value as of December 7, 2004. Between the two appraisers, the Court found Mr. Barnes's approach more persuasive, in particular insofar as he considered the fair-market sale of the property in May 2005. Based on all of the evidence, the Court concludes that the fair value of the property as of the merger date of December 7, 2004 was $3.15 million. The Court further notes that, given the market conditions and the actual conditions of the property in December 2004, including the property's vacancy problems, the property necessarily had to be worth less in December 2004 than at the time of the fair-market sale of the property in May 2005 for $3.3 million.* [CP 2365-66]

**"[Comment: First, this is probably a conclusion and not a finding. Second, it is based on the false assumption about the 45% vacancy in December which has been refuted by the lease commission payments and Scott Rogel's statement to a broker that there was only one vacancy in November 2004. Third, it ignores the fact that Clay Street was legally obligated to sell for $3.3 no later than early February and had informally agreed to sell for that price several times earlier. Finally, it ignores that fact that Clay Street had rejected the $3.19 million offer from Remco as too low in November 2004. Ex[s]. 51, 52. Clearly, there is a double standar[d]."**

**HUMPHREY EDITS at 55:8-16.**

42. Exhibit 70 is the title company settlement statement from the May 2007 sale of the property. The settlement statement reflects the payments and deductions made to account for the liabilities of the LLC at the time of the sale and the costs of the transaction. *The Court finds that the LLC members could not realize their equity in the property without paying existing liabilities and incurring such transaction costs. In connection with the $3.3 million May 2005 sale, each of the remaining LLC members received net proceeds of $266,529.67. Mr. Humphrey's share in that amount was placed in the Vanderberg Johnson Gandara trust account.* [CP 2366]

**Humphrey requested the deletion of the first italicized sentence. HUMPHREY EDITS at 55:19-22.**

43. *At the time of the merger on December 7, 2004, the LLC did not have any liquid assets with which to make a payment to George Humphrey pursuant to the dissenter's rights provisions of the LLC Act. Mr. Cowan advised the LLC that it could satisfy the LLC Act by paying Mr. Humphrey the amount due, plus interest, at the time the property was sold. As previously determined by Judge Hayden, the delay in payment to Humphrey until the property was sold constituted a violation of the statute. However, given that Clay Street lacked any funds to make the payment to Humphrey, that it could not obtain the requisite funds without a sale of the property, and that it was willing to pay the statutorily required interest during the period of delay, the Court finds that, notwithstanding the delayed payment, the LLC substantially complied with the LLC Act. The material question before the Court is simply the extent to which George Humphrey was financially prejudiced and the amount that he is due an additional payment based on the Court's determination of fair value.* [CP 2366-67]

**"[Comment: there is no evidence of the following advice: "Mr. Cowan advised the LLC that it could satisfy the LLC Act by paying Mr. Humphrey the amount due, plus interest, at the time the property was sold." See footnote[5]]"};**

---

[5] [ Ostroff in his deposition testified:

Q: Did you, prior to entering into the merger, ever intend to make a payment within 30 days after the effective date of the merger?
A: I don't remember discussing it. (Dep. at 19:13-16.)
Q: Prior to entering into the merger, how did you intend to pay for the appraiser to determine the fair value of Mr. Humphrey's interest in Clay Street?
A: I would imagine we would have paid for it out of pocket.
Q: Why didn't you do that?
A: I don't remember. I don't remember the reason. (Dep. at 19:22-20:3.)
Q: Did Clay Street always intend to pay Humphrey from the sales proceeds?
A: Yes, I think that is fair. Dep. at 68:10-16.
Q: Was there ever a call to raise funds to pay Humphrey Industries within 30 days after the effective date of the merger?
A: Not that I can recall.
. . . .
Q: If we assume the debt of the property's at 1.85 [million] and you[r] purported fair value is 2.5 million, did the company have the financial ability to pay Humphrey Industries on December 7, 2004?
A: The members collectively of the company could have. (Ostroff Dep. at 71:22-72:2.)
. . . .
Q: Did you have the money—could you have made the payment?
A: I probably could have. (Dep. at 72:13-15.)
. .. . . .
Q: Is it fair to say that the company could have borrowed the money based on the equity in the property?
A: It's fair to say that we weren't advised to that or not to do that.

Q: Did someone advise you not to do that?
A: No. And no one advised us to do that.

Q; Did you go and talk to Bank of America about that?
A: I told you earlier that all of the conversations between Bank of America and the LLC took place between George Cowan and Bank of America, not myself. (Dep. at 72:16-73:1.)
. . . .
Q: Fair to say, you didn't have any discussions with any potential lenders about sending a fair value payment or pre-payment to Mr. Humphrey or Industries.
A: Yes. (Dep. at 73:20-21.)

When asked whether Cowan advised him that the only consequence of failing to pay Humphrey within 30 days after the effective date of the merger would be an obligation to pay interest, Ostroff admitted, "He [Cowan] advised us we would be obligated to pay interest. I don't know if he specified it would be our only obligation." (Dep. at 18:18-24.)

**HUMPHREY EDITS at 56:1-27; 57:11-26.**

44. *Following the May 2005 sale, Mr. Cowan calculated Mr. Humphrey's share as of December 7, 2004 to be worth $181,192.64, and caused Clay Street to distribute that amount to Humphrey. Mr. Humphrey objected to the calculation, and, based on his alleged value of over $4.1 million, demanded an additional payment of $424,607.05 (for a total payment of $605,799.69) — an amount which, as noted above, the Court has determined is without support. As required by the LLC Act, the disagreement over valuation resulted in the instant valuation proceeding before this Court.* [CP 2367]

**"[The later statement is a conclusion of law which conflicts with the statutory terms and intent. See legal section.]"**

**HUMPHREY EDITS at 59:9-10.**

## II. CONCLUSIONS OF LAW

45. Pursuant to RCW 25.15.475, Humphrey is entitled to the "fair value" of his interest in Clay Street as of the date of the merger. "Fair value" under RCW 25.15.475 is defined as "the value of the member's limited liability company interest immediately before the effectuation of the merger to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the merger unless exclusion would be inequitable." RCW 25.15.425(3). [CP 2367]

46. *Mathew G. Norton Co. v. Smyth,* 112 Wn. App. 865, 874, 51 P.3d 159 (2002) and related authorities ultimately *leave the question, of fair value to the Court, and afford the Court discretion to consider any valuation evidence or methodology appropriate under the specific circumstances of the case, including accumulated case law regarding market value, value based on prior sales, capitalized earnings value and asset value, Further, under Norton, "[w]hen available, evidence as to the price an unaffiliated third party would be*

*willing to pay for the [company] as a whole should be particularly probative in the appraisal context." Id. at 880 n.5. [CP 2367]*

47. Here, the evidence established that, in the context of a single-asset LLC owning a parcel of real estate, "fair value" is essentially the price for which the real estate parcel could be sold on the open market between a willing buyer and willing seller, other than in a forced or liquidation sale. [CP 2367-68]

48. *Under Norton and related authorities, the Court also has discretion, in appropriate circumstances, to consider the company's liabilities and transaction costs in determining the fair value of a dissenter's interest. Here, given the dysfunctionality of the LLC and the need for the members to terminate their business relationships, and further given the fact that no members could enjoy any return from the property without satisfying the LLC's outstanding liabilities and incurring transaction costs in connection with a sale, the Court holds that the valuation of the dissenter's interest must account for a proportional share among all Clay Street's principals including the transaction costs incurred, as well as the LLC's outstanding liabilities. [CP 2368]*

49. *Attached hereto as Exhibit A is a spreadsheet offered by Clay Street in closing arguments calculating the value of Humphrey's interest at a fair value of $3.15 million, less proportional transaction costs and outstanding liabilities. The Court holds that the calculations set forth, therein appropriately calculate the additional payment due to George Humphrey for his share of the fair value of the LLC at the time of the merger. Based on those calculations, and including interest from the date of the merger at the rate of the LLC's then-current bank note of 7.75%, as required by the LLC Act, the Court concludes that Mr. Humphrey is due an additional payment of $60,588.22.* [CP 2368]

50. *The parties have submitted motions for attorney fees and costs. Once the Court rules on those motions, final judgment should be entered that takes into account a*

*valuation award in favor of Humphrey against Clay Street in the amount of $60,588.22, and any appropriate adjustments based on any award of fees or costs to any of the parties. [CP 2368]*

DATED this 29 day of August, 2007.

/ s /

Honorable Harry J. McCarthy

120144.0004/1520330.1

## APPENDIX E

| | | |
|---|---|---|
| HUMPHREY INDUSTRIES LTD.,<br><br>PLAINTIFF,<br><br>vs.<br><br>CLAY STREET ASSOCIATES LLC, Washington Limited Liability Company and JOSEPH and ANN LEE ROGEL, Husband and wife, et al.,<br>DEFENDANTS.<br><br>CLAY STREET ASSOCIATES LLC, a limited liability company,<br><br>PETITIONER,<br><br>vs.<br>HUMPHREY INDUSTRIES, LTD, a Washington corporation,<br>RESPONDENT. | ) | ***<u>ASSIGNMENTS OF ERRORS RE</u>***<br>ORDER REGARDING ATTORNEY'S FEES AND EXPENSES |

ASSIGNMENTS ARE IN ITALICS – HUMPHREY'S PROPOSED FINDINGS AND CONCLUSIONS ARE INCORPORATED BY THIS REFERENCE

I

BACKGROUND

*In order to assess attorney's fees and expenses equitably as authorized by RCW 25.15.480, it is necessary to understand the relevant history relating to the deterioration of the relationship of the members not only of the Clay Street LLC but other related LLCs. The highly contentious relationship among the parties ultimately doomed any hope of conducting the business of Clay Street Associates rationally and in the best financial interest of the LLCs* *members. Before Clay Street's operations became paralyzed, there were other LLCs involving the same parties that suffered the same preventable fate as Clay Street Associates. [CP 2374]*

*The conduct of Mr. Humphrey involving two other closely related LLCs, 901 Tacoma Avenue and Westwood Village, foreshadowed the outcome of the Clay Street Associates LLC trial. On August 3, 2006, arbitrator Thomas J. Brewer dismissed all Humphrey's claims with prejudice against respondents 901 Tacoma Avenue LLC, Westwood Village Apartments LLC, ABO Investments, Scott Rogel, Joseph Rogel and Ann Lee Rogel, Lori Goldfarb and Avram Investments. The evidence presented to Mr. Brewer had similarities to the evidence in tine Clay Street Associates LLC trial. Mr. Brewer found respondents to be the prevailing party and 'awarded them attorney's fees of $220,566.06. [CP 2375]*

*A year before the arbitration before Mr. Brewer, another arbitration took place before retired Judge David Soukup. That arbitration concerned another similar dispute over whether 899 West Main LLC should have been wound up pursuant to RCW 25.15.295(1). That arbitration, like the 901 Tacoma Avenue LLC and Westwood Village Apartments LLC and like Clay St. Associates, involved the same parties and was marked by the same extreme animosity among those parties. Mr. Soukup noted that Humphrey Industries had a number of breaches of fiduciary duties and had created a situation where not only was there cause to wind up the LLC, it was "the only rational solution". (Exhibit D to Declaration of Gregory G. Schwartz in Support of Defendants' Motion for Award of Costs and Attorney Fees). In that case, Mr. Soukup directed that each party pay their own costs and fees. [CP 2375]*

*As he did at trial, Gerald Ostroff summarized the history of the decline of 901 Tacoma and Westwood Villages LLC. Mr. Ostroff also had been named as a defendant in the earlier cases. Mr. Ostroff declared that given the history of Mr. Humphrey's conduct of the 901 Tacoma and Westwood Villages LLC litigation, he "decided to offer Humphrey for more that I believed he would be able to recover in this suit just to avoid the hassle, high attorney fees and* *opportunity costs of the litigation, Humphrey rejected all of our offers". Declaration of Gerald Ostroff in Support of Defendants' Motion for Award of Cost and Attorney Fees. [CP 2375-76]*

II
DISCUSSION
A.
CLAY ST ASSOCIATES LLC
AND HUMPHREY INDUSTRIES LTD.

*With the foregoing relevant background as prologue, the events causing the Clay St. LLC failure, as established by the trial evidence and the pleadings, take on added meaning. The LLC was sold May 25, 2005 for $3.3raillion. The court found that the trial evidence showed the most reasonable appraisal value for the LLC as of the date of the merger, 'December 7, 2004, was $3,150,000. The court also found that Mr. Humphrey's estimate of $4.1 million was not based on credible, substantial evidence and was well outside the mainstream of reasonable valuations (Findings of Fact 39-41). [CP 2376]*

*At the closing of the LLC sale, defendants had paid Humphrey $181,192.64. Humphrey objected to the payment amount. Defendants then hired an appraiser who appraised the property at $3,150,000 and the Defendants then offered an additional $150,764.00 and did not deduct his transaction costs which they themselves had already paid. The defendants were willing to accept a net total of $216,275.01 in order to settle the case. In effect, the defendants had offered Humphrey a substantial windfall to resolve the case. Humphrey rejected that offer as well and a trial followed which resulted in Humphrey being awarded $60,588.22. [CP 2376]*

*In September, 2006, defendants made a CR 68 offer of judgment of $165,275.59. Humphrey had previously received $181,192.64, bringing the total amount he could have received 7 months before trial to $346,469.23. Humphrey refused the Rule 68 offer, an offer which exceeded the court's award by $104,688.37. [CP 2376-77]*

B.
## JOSEPH AND ANN LEE ROGEL, ABO INVESTMENTS AND HUMPHREY INDUSTRIES LTD.

Defendants Joseph and Ann Lee Rogel are a retired couple and members of Clay Street Associates LLC as passive investors. Mr. & Mrs. Rogel are also the parents of Scott Rogel, with whom Mr. Humphrey had developed an extremely acrimonious relationship. Scott Rogel was closely involved in efforts to market the Clay Street LLC and was a witness at trial. He was also a respondent in the arbitration before Mr. Brewer. [CP 2377]

Humphrey Industries, Ltd. included Mr. and Mrs. Rogel in a complaint in June 2005, alleging that the Rogels were involved in an unlawful sale of a property located at 615 Commerce Street, Tacoma, Washington, another LLC known as "615", *That suit against the Rogels was dismissed with prejudice in the Spring of 2005 by Judge Lum and was later dismissed a second time by Judge Hayden. Although the Rogels were never active members of Clay Street, Humphrey refused to dismiss them and they were therefore required to prepare for trial and to participate in trial.* In his opposition to the Rogel's Motion for Attorney's Fees and Expenses, at page 4, Humphrey referred to his response to the Rogels Motion for Definite Statement, stating that "[although [Joe Rogel] was not a managing member of the company, he may have acted in concert with the two managing members, his son and Gerry Ostroff." Humphrey also stated that "[d]epending upon the extent of his involvement in Clay Street's misconduct, Joe Rogel may have some direct liability for the breaches. Id. [CP 2377]

*No evidence was admitted at trial showing the Rogels acted in concert with any officer of Clay Street, including their son. Neither was any evidence admitted at trial showing that the Rogels had any involvement in any alleged misconduct by the Clay Street LLC. Humphrey further stated that the Rogels were merely incidental defendants who held funds in trust from the sale of Clay Street and against whom Humphrey had no claim. Id. at 9.*

*However, when the opportunity was presented to dismiss them from the suit, he refused and required Mr. and Mrs. Rogel to defend a case that really did not involve them nor did it require their presence at trial. [CP 2378]*

C.
RCW 25.15.480

RCW 25.15.480 provides in pertinent part:

> (1) The court in a proceeding commenced under R.CW 25.15.475 shall determine all costs of the proceeding, including the reasonable compensation and expenses of appraisers appointed by the court. The court shall assess the costs against the limited liability company except that the court may assess the costs against all or some of the dissenters, in amounts the court finds equitable, to the extent the court finds the dissenters acted arbitrarily, vexatiously, or not in good faith in demanding payment.
>
> (2) The court may also assess the fees and expenses of counsel and experts for the respective parties, in amounts the court finds equitable:
> (a) Against the limited liability company and in favor of any or all dissenters if the court finds the limited liability company did not substantially comply with the requirements of this article, or
> (b) Against either the limited liability company or a dissenter, in favor of any other party, if the court finds that the party against whom the fees and expenses are assessed acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this article.

*The court has previously found in Finding of Fact No. 43 that Clay Street, despite having erred in the timing of its payment to Humphrey and in certain other respects, was in substantial compliance with RCW 25. The late payment by Clay Street to Humphrey was caused by a lack of funds by the LLC at the time and did not ultimately result in financial prejudice to Humphrey. It does not appear to the court that any member of Clay Street Associates acted arbitrarily, vexatiously or in bad faith in its conduct toward Humphrey Industries, Ltd. Therefore, fees and expenses are not assessed against Clay Street.*
[CP 2378-79]

III
ATTORNEY'S FEES AND COSTS
CLAY ST. ASSOCIATES

A.
FINDINGS OF FACT

(1) *The court incorporates by reference the Findings of Fact and Conclusions of Law entered on August 30, 2007. [CP 2379]*

(2) *The court finds that the real amount in controversy in this case was between $50,000 to $85,000. [CP 2379]*

(3) *The court further finds that Clay Street's Rule 68 offer would have given Humphrey nearly $80,000 more than any other LLC member received from the sale of the property, far more than the amount actually in controversy, and nearly three times the actual award of this court.* [CP 2379]

(4) *The court also finds that Humphrey had no reasonable or legitimate basis for his refusal to accept the Rule 68 offer and, instead, Humphrey's insistence on litigation and trial after October 27, 2006 was arbitrary and vexatious.* [CP 2379]

(5) *The court further finds that after October 27, 2006, Clay Street reasonably incurred expert fees of $3,375 and reasonably incurred attorney fees of $184,343.* In making these findings, the court has applied the lodestar analysis, pursuant to Mahler v Szucs, 135 Wn. 2d 398 (1998) and Bowers v Transamerica Title Co., 100 Wn. 2d 581 (1983), and has reviewed the invoices submitted as Exhibit M to the Declaration of Gregory G. Schwartz, the Declaration of Gregory J. Hollon in Support of Motion for Award of Costs and Attorney Fees, and the Supplemental Declaration of Gregory J. Hollon Regarding Motion for Attorney Fees. [CP 2379-80]

(6) The court finds the hourly rates charged .by counsel to be reasonable. [CP 2380]

(7) *The court also finds the number of hours expended on behalf of Clay Street in this litigation to be reasonable.* The court has taken into account potential adjustments under the lodestar analysis, including consideration of the difficulty of the problem, the skill and experience of counsel involved, the amount at issue in the dispute, and the quality of work performed. [CP 2380]

(8) No adjustment to the lodestar amount is necessary. [CP 2380]

B.
CONCLUSIONS OF LAW

(1) *Considering the totality of the trial evidence and the related LLC arbitrations before Mr. Brewer and Mr. Soukup, the court concludes that Humphrey Industries Ltd., and George Humphrey acted arbitrarily, vexatiously and not in good faith with respect to the pursuit of this matter against Clay Street Associates LLC, its members and Joseph and Ann Lee Rogel. Accordingly, attorney's fees and expenses should be assessed pursuant to RCW 25.15.480 (2)(b). [CP 2380]*

(2) *Based on these findings of fact, the court hereby concludes and ORDERS that Clay Street is awarded reasonably incurred expert fees of $3,375 and reasonably incurred attorney fees of $184,343 pursuant to RCW 25.15.480(2)(b). [CP 2381]*

(3) *In addition, Clay Street Associates is entitled to its costs of $24,961.55 subsequent to October 27, 2006, pursuant to CR68. [CP 2381]*

IV
ATTORNEY FEES
AND COSTS
JOSEPH AND ANN LEE ROGEL

A.
FINDINGS OF FACT

(1) *The court incorporates by reference the Findings of Fact and Conclusions of Law entered on August 30, 2007. [CP 2381]*

(2) *The court also incorporates by reference herein the Findings of Fact and Conclusions of Law concerning Clay St. Associates in Part III, A and B supra.* [CP 2381]

(3) Defendants Joseph & Ann Lee Rogel were retired, passive investors of Clay Street Associates, LLC. [CP 2381]

(4) Plaintiff Humphrey Industries, Ltd., owned and operated by George Humphrey, was the dissenter in this dissenter's rights valuation case. [CP 2381]

(5) *In Humphrey Industries, Ltds. Dissenter's rights valuation case, Humphrey Industries named Joseph & Ann Lee Rogel as defendants. In September and October 2006, Joseph & Ann Lee Rogel demanded that they be dismissed from the dissenter's rights case, but Humphrey Industries refused to dismiss them as parties.* [CP 2381]

(6) The court finds that Humphrey Industries named Joseph & Ann Lee as defendants involving the allegedly improper sale of real property located at 615 Commerce Street ("615") in Tacoma, Washington in which Joseph & Ann Lee and Humphrey Industries were members. [CP 2382]

(7) Judge Lum dismissed all disputes related to "615", during Spring 2005, with prejudice. [CP 2382]

(8) Judge Hayden dismissed, by summary judgment order, Humphrey Industries' "615" claims against Joseph & Ann Lee Rogel, with prejudice in October 2005. [CP 2382]

(9) *Alan Bornstein of the Seattle law firm of Jameson Babbit Stites & Lombard represented Joseph & Ann Lee Rogel throughout this dissenter's right lawsuit.* This court finds that the time spent by attorney Alan Bornstein to defend Joseph & Ann Lee Rogel in this dissenter's rights case has been segregated from other time defending Joseph & Arm Lee Rogel from other Humphrey Industries, Ltd.'s claims. [CP 2382]

(10) *The court further finds that Joseph & Ann Lee Rogel has segregated out time spent on particular defense activities, including the discovery (written discovery propounded and answered; deposition preparation and examination), appraiser selection, valuation of the company (legal research; review documents in support of fair-market -value sale and sales efforts plus witness lists and court filings), mediation (before mediator-attorney Gregory Bertram), and trial. [CP 2382]*

(11) *Joseph & Ann Lee Rogel claim that the total fees incurred for the defense of Humphrey Industries Ltd.'s dissenter's right case equals $38,241.25.* [CP 2382]

(12) In making these findings, this court finds that the rates charged by Mr. Bornstein are reasonable and are their normal hourly billing rates and are the rates actually charged to Joseph & Ann Lee Rogel. [CP 2383]

(13) The court finds that the reasonable amount of litigation expenses incurred from August 1, 2003 to the present equals $292.70. [CP 2383]

B.
CONCLUSIONS OF LAW

This court adopts the following Conclusions of Law:

(1) *The court concludes that Humphrey Industries acted "arbitrarily, vexatiously, or not in good faith" in pursuing its dissenter's rights claim against Joseph & Ann Lee Rogel. RCW25.15.480(2)(b). [CP 2383]*

(2) *Joseph & Ann Lee Rogel are entitled to an award of attorney's fees and litigation expenses against dissenter Humphrey Industries, Ltd. pursuant to RCW 25.15.480(2)(b). [CP 2383]*

(3) The hours and rates charged by Joseph & Ann Lee Rogel's attorney are reasonable rates as used in the lodestar calculation, as adjusted. [CP 2383]

(4) The lodestar fee of $38,241.25 is the sum of the annual hours multiplied by the annual hourly rates in each year against Humphrey Industries pursuant to RCW 25.15.480(2)(b). [CP 2383]

(5) The court deducts $5,000.00 from $38,241.25in attorney's fees associated with counsel's trial participation at trial, leaving a balance of $33,241.25 This adjustment is appropriate because counsel for Joseph and Ann Lee Rogel, while exhibiting professional advocacy skills at trial in representing his clients, relied primarily on the Presentation of evidence at trial by counsel for Clay Street Associates. Counsel for the Rogels assumed a more secondary role at trial. [CP 2383-84]

(6) *The $292.70 of reasonable litigation expenses are recoverable under RCW 25.15.480(2)(b) and are awarded to Joseph & Ann Lee Rogel against Humphrey Industries, Ltd. [CP 2384]*

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McNaul Ebel Nawrot & Helgren PLLC

V

SUMMARY OF AWARD OF ATTORNEY'S FEES AND COSTS

| | | |
|---|---|---|
| A. | Clay Street Associates LLC | |
| | *1. Attorney's Fees and* | *$184,343.00* |
| | *Expert Fees* | *3,375.00* |
| | *2. Costs CR 68* | *24,961.55* |
| | *Subtotal* | *$212,679.55* |
| B. | Joseph and Ann Lee Rogal | |
| | *1. Attorney's Fees* | *$33,241.25* |
| | *2. Expenses* | *292.70* |
| | *Subtotal* | *$33,533.95* |
| *C.* | *Total Attorney's Fees and Costs* | *$246,213.50* |

DATED this 17 day of October, 2007

/s/

Harry J. McCarthy, Judge

120144.0004/1516850.1

ORIGINAL

No. 60923-8-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

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HUMPHREY INDUSTRIES, LTD.,

Plaintiffs-Appellant

v.

CLAY STREET ASSOCIATES LLC, et al.,

Defendant-Respondents

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ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Harry McCarthy)

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# ERRATA TO APPELLANT'S OPENING BRIEF

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FILED
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ORIGINAL

Appellant is submitting a revised opening brief that corrects the errata listed below.

| Page No. | Description |
|---|---|
| i. | Table of Contents at Section D.2, change "a" to "an" before "Error." |
| v. | Table of Authorities, after China Product N. Am., insert ", Inc." |
| vi. | After Guarino citation, add "Glassman v. Unocal Exploration Corp., 777 A.2d 242, 248 (Del. 2000) . . . 45 |
| vi. | change from "Hansen" to "Hanson." |
| vii. | First line, change "Marek v. Chesney" to "Marek v. Chesny." |
| vii. | Change "RCW 25.15.245" to "RCW 25.15.235(3)." |
| viii. | Delete "RCW 25.15.475." |
| ix. | Delete "of" in "Model Business Corporate Act" |

ASSIGNMENT OF ERRORS

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| 1 | At page 1, Assignment 3, second line, add "s" to "expense," so it is "expenses." |

STATEMENT OF ISSUES

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| 3 | Issue A.4, insert "the" before "equitable standard. |
| 3 | Issue B.2, delete "the" before "Barnes." |
| 3 | Issue B.3, change "impose" to "imposes" and add a question mark. |

## I. SUMMARY INTRODUCTION

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| 3 | Third line from bottom of page, delete "of" in "Business of Corporate Act." |

## IV. ARGUMENT

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| 8 | Footnote 5, add pinpoint cite to 175. |
| 8 | Footnote 6, add pinpoint cite to 156. |
| 8 | Footnote 7, add pinpoint cite to 354. |
| 8 | Footnote 8, add pinpoint cite to 712. |
| 9 | Footnote 9, insert ", Inc." after "Amer." in case name and add parenthetical (omitting citation; changing tense from plural to singular in quotation). |
| 9 | Footnote 12, add to Douty a pinpoint cite to 936. |
| 14 | Line 2, delete open parenthesis, omit coma, and insert coma, so citation reads: "Ex. 73 (May 27, 2003 letter and check)." |
| 16 | First full paragraph, delete the third sentence: "The statute does not permit Humphrey to make a claim for the damages that resulted from the statutory violation." In the next sentence, insert "require" after "to" and before "proof." |
| 16 | Footnote 21, fifth line from bottom, insert a period after "Ex. 138." |
| 18 | At the end of footnote 23, add a period. |
| 18 | Footnote 24, add correct citation to CP, so it states: "CP 1984-85 . . .." |
| 19 | First full paragraph, line 6, delete "and" and replace with an open parenthesis, at line 7 add closed parenthesis, at line 8, |



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add "and in the" and delete "or" so it states "failed to identify the undisputed lease deposits (and it contradicted the putative vacancy rate), as well as failed to show any of the transactional costs that were then charged in the fair value estimate and in the calculation offered as part of closing argument."

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| 20 | Line three add a colon at the end of the line after "notes." |
| 22 | Footnote 34, fourth line, change "corporations" to corporation." |
| 23 | Fourth line from the bottom of the page, insert closing parenthesis after "arbitration" and before the coma. |
| 24 | Footnote 37, after the first citation, omit the sentence and modify the second citation so it states: "See also Ex. 13A (Oct. 9, 2003 Scott Rogel Dep at 12:16-13:5 [testimony about values]); Ex. 281 (Oct. 15, 2003 memo to Humphrey from Gerry Ostroff, Scott Rogel and Joe Rogel [stating "you do not wish to be a partner with the investors of the properties stated below"]). |
| 25 | At the start of the first complete paragraph, add "Finally," before "Clay Street . . .." |
| 26 | Footnote 41, first line, insert a comma between trial and Scott. |
| 28 | Fourth line from the bottom of the page, change "a" to "an" in front of "Error." |
| 29 | Fifth line from the bottom of the page, insert brackets around [of judgment]. |
| 29 | Third line from the bottom of the page, last word, delete the brackets surrounding "The." |
| 29 | Footnote 46, change from "Chesney" to "Chesny." |

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| 31 | Third line, after "costs" delete "that exceeded the amount and was not more favorable" and replace with "which when added resulted in an amount that was less favorable." |
| 31 | First full paragraph, third line, change "eight" to "20." |
| 31 | First full paragraph, second to the last line, change "it" to "he." |
| 32 | Third line, change "Hansen" to "Hanson." |
| 32 | Footnote 54, second line, change "thereon" to "thereof." |
| 33 | Line 5, at the end of the sentence, add "RCW 25.15.480(2)(b)." |
| 35 | Fourth line from the bottom, last word, change "determining" to "determine the." |
| 36 | The citation in the last sentence before Section 4, change the pinpoint cite from "501" to "500." |
| 37 | Line nine, change "Finally" to "Furthermore." |
| 39 | Footnote 63, second line from the bottom of the note. Change from "RCW 25.15.245 required the members to named" to "RCW 25.15.235(3) required the members to be . . . ." |
| 39 | Footnote 64, change from "In re Westwater Way" to "In re West Waterway" and in the parenthetical change "important" to "importance." |
| 40 | Line 3, change "Mathew" to "Matthew." |
| 40 | Line eight after "(CP 987-97)," insert a "was on" before the comma, delete the comma and insert a colon. Line eleven, after the double parentheses, change the comma to a semicolon an "a." Line twelve, after the semicolon, omit the "and." Line thirteen after the first and, add "the" before "financial consequences." Line 14, delete "of" and insert |

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| | "caused by" Line 15, after "number," delete the coma and insert "and." |
| 40 | Footnote 66, after the first sentence, insert: "Ex. 97(O)." Before "Barnes," insert a period. |
| 41 | First full paragraph, lines five through nine, replace the sentence starting with "Before he was retained . . .. VRP 563." and replace it with: "Before he was retained, Barnes supplied Clay Street's counsel with lower cap rates but Clay Street in its fair value calculation used higher cap rates (ones less favorable to Humphrey) instead of the lower rates that Barnes used. <u>Compare</u> VRP 563, 575-76, CP 1679 (Barnes test. and notes showing 7.5%) <u>with</u> Ex. 75 (company's calculation using 8%). |
| 41 | Footnote 67, change the pinpoint cite from "832-33" to "833." |
| 42 | Fourth and fifth lines, change "two-court appointed" to two court-appointed." Seventh line, after $100,000, delete the remainder of the sentence and replace with "(and the construction costs for the building were $3.9 million). Line eight, before "space," insert "office." |
| 43 | Second line, change "first-court appointed" to "first court-appointed." Third line, delete the parentheses around, Ex. 113. Line nine, between "decision" and "The," insert a period. |
| 44 | Line 12, change "requires" to "require." |
| 45 | Second line, after "future prospects," delete "were the misleading marketing information" and replace with "would involve curing the misleading marketing information and factoring in . . .." Seventh line, insert "but" before "Barnes." |
| 45 | Footnotes 76 and 77, move the first sentence (the quotation) and the citation to "<u>HMO-W, Inc. . . . "</u> from footnote 76 to footnote 77 and delete the original text of footnote 77. Add to the beginning of footnote 76, |

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| | "Glassman v. Unocal Exploration Corp., 777 A.2d 242, 248 (Del. 2001)." Add to end of footnote 76 cite: "Ex. 85 at Clay 000170-80." |
| 46 | First full paragraph lines 9 through 13, modify the sentence by adding a "was," an "of," "foreseeable," and quotation marks, and changing one word, so it states: "In the meantime, Humphrey did not have the use of funds and was penalized further because the fair value ruling excludes the appreciation from the growth that increased the "market value" and the appreciation from the foreseeable leasing-up of the property that also increased the "capitalized earning value."" |
| 47 | First full paragraph, first line, change "thee" to "the." Line eight, after factor," change "is" to "should be." Line twelve, change "but for" to "'but for.'" Lines 14-15 replace the parenthetical with "Compare CP 1860:16-1861:5 (testimony) with Exs. 10 & 10A (financial statements sent to banks).)" |
| 47 | Footnote 80, in the parenthetical, delete the repeated "the trial court must determine." |
| 48 | Run over paragraph, delete the last sentence and the citation, and replace with: "He suffers even more penalties, because Barnes' appraisal used higher hypothetical transaction costs for leasing and tenant improvements rather than the lower actual costs. CP 1653:15." |
| 48 | First full paragraph, line six, omit: "Third" and change "the" to "The." |
| 48 | Footnote 84 in the parenthetical delete "note" and replace with "attorney stating . . .." |
| 48 | Footnote 86, first line, insert quotation marks around "as is." |

V. CONCLUSION

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| 49 | First paragraph, line five, insert "as a" before "matter . . ..' |
| 50 | Change "<u>Hansen</u>" to "<u>Hanson</u>." |
| 50 | Last paragraph, after "RCW 25.15.480(2)(a)," insert "and." |
| Appendix E | Is revised to insert text from Edits to Proposed Findings and Conclusions submitted by Clay Street and Joseph and Ann Lee Rugel, which will be in supplemental clerks papers. |

RESPECTFULLY SUBMITTED this 30th day of April, 2008.

LANE POWELL PC

By______________________

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DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

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HUMPHREY INDUSTRIES, LTD.,

Plaintiff/Appellant

v.

CLAY STREET ASSOCIATES LLC, et al.,

Defendant/Respondents



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ON APPEAL FROM THE KING COUNTY SUPERIOR COURT
(Hon. Harry McCarthy)
No. 05-2-20201-7 SEA

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# PROOF OF SERVICE

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I, Jacqueline L. Caplan, declare under penalty of perjury as follows:

1. I am now and at all times herein mentioned, a citizen of the United States and resident of the State of Washington, over the age of eighteen years, not a party to the above-captioned action, and competent to testify as a witness.

2. I am employed with the law firm of Lane Powell PC, 1420 Fifth Avenue, Suite 4100, Seattle, Washington.

3. On April 30, 2008, I caused to be filed and served true copies of the following documents: **Appellant's Revised Opening Brief** and **Errata to Appellant's Opening Brief** on the following parties in the manner as indicated below:

| | |
|---|---|
| <u>ORIGINAL:</u><br>The Court of Appeals of the<br>State of Washington<br>Division I<br>One Union Square<br>600 University Street<br>Seattle, WA 98101-4170 | ☐ U.S. Mail<br>☐ Facsimile<br>☐ E-mail<br>**XX** Legal Messenger |
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The foregoing statements are made under penalty of perjury under the laws of the State of Washington and are true and correct. Signed at Seattle, Washington, this 30th day of April, 2008.

Jacqueline L. Caplan



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