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WASHINGTON STATE COURT OF APPEALS, DIVISION I

In re the Marriage of:

TERESA FARMER,

*Respondent,*

v.

DANIEL J. FARMER,

*Appellant.*

TERESA FARMER'S RESPONSE BRIEF

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## **I. INTRODUCTION.**

This case must be seen, like all cases, in the context out of which it arose. It is not properly characterized as an abstract exercise of a damages calculation, nor as an abrupt, unfair limitation on Daniel Farmer's due process rights to a fair hearing. Here, the full context means the fraud and the contract out of which the issue of damages arose and the unhurried, tactical litigation choices Mr. Farmer made. Once this context is fully understood, there is no question Judge Churchill did not err or abuse her discretion and that the judgment must be affirmed.

Teresa Farmer was forced to bring repeated post-dissolution motions to uncover and then hold Daniel accountable for the fraud perpetrated on her and on the trial court by 1) his wrongful exercise of Paccar stock options and sale of that stock in August, 2006, in breach of their just-completed property settlement agreement; and then by 2) the repeated false statements about the options to her and to the trial court. Judge Churchill ruled in April, 2007, that Daniel had to pay Teresa a make-whole remedy that included the full value of the options if kept and exercised at expiration up to 2014, \$617,553. In June, 2007 at the reconsideration arguments of Daniel, Judge Churchill affirmed the measure and amount of damages, but agreed they should be discounted to present value. After submissions limited to the discount, Judge Churchill fixed that discounted present value at \$487, 325 at the final presentation hearing on April 14, 2008. The judgment was ultimately satisfied in lieu

of a supersedeas in June, 2008, nearly two years after the conversion.

Daniel agreed through a CR 2A Agreement negotiated with counsel and filed in Court July 21, 2006, that 50 per cent of the community Paccar stock options belonged to Teresa as part of their divorce property settlement. Teresa thus owned the valuable right to exercise the options. Teresa also owned the right to determine *when* to exercise them, a right that also had substantial value, because the options expired in one-year increments from April 2009 to January, 2014.

Judge Churchill ordered what she considered an equitable and fully make-whole remedy calculated from the sole evidence of value before her, Teresa's expert. Daniel was not permitted to simply turn over the ill-gotten immediate proceeds from the premature exercise; that would have precluded making Teresa whole because it would have given her no value for her right to choose the timing of their exercise over the long, extended life of the options. In order to compensate for that loss, Daniel was required to pay the lost profits based on the projected stock values for each group of options and their exercise on the last date of allowable exercise. He also was required to pay all of Teresa's attorney's fees.

At one level Daniel's Opening Brief tries to cast this as a simple case that focuses on an issue left open by the Supreme Court in *Langham v. Kolde*, 153 Wn.2d 553, 569, 106 P.3d 212 (2005) (Opening Brief, p. 14), *i.e.*, the proper measure of damages for conversion of an asset that is appreciating in value; and a matter of procedure, *i.e.*, that he was

entitled to and denied an evidentiary hearing or the opportunity to present his own evidence on the amount of damages. But on closer examination, these are not the dispositive issues, whether that element of *Langham* is open or not. Rather, the core issues – the measure and amount of damages to make Teresa whole – are plain upon seeing the full factual and procedural context out of which it arose, since that goes to the heart of the rulings made and the make-whole remedy Judge Churchill awarded.

Judge Churchill was given the choice of two remedies for the willful, fraudulent conversion she confronted in the two motions and sworn testimony on April 16, 2007. These were 1) an immediate make-whole damages remedy with a specified amount of damages, presented by Teresa; or 2) the trust-account remedy proposed by Daniel. Teresa requested specific damages by a Rule 60(c) motion for relief from the October 13 decree that awarded Teresa options that no longer existed. Her motion was heard 26 days after service of her papers requesting the specified damages, together with Daniel's long-pending motion for his proposed remedy, placing the stock sale proceeds in trust until "exercised" by Teresa. The trial court chose the remedy of immediate, make-whole damages.

In calculating damages, Judge Churchill was presented with different proposed measures of damages: Daniel's proposed measure of the proceeds received on the date of conversion or shortly thereafter; and Teresa's proposed measure that calculated the potential future profits from

holding each option to the last day of exercise, the future profits that Daniel took from her. As to the amount of damages if lost profits were included, Judge Churchill had as evidence only the analysis by Mr. Roland Nelson (the CPA whose expert analysis was submitted by declaration) before her on April 16 and on reconsideration on June 4.

Daniel had substantial time between March 21 and the April 16, 2007 hearing to submit a responsive expert's analysis challenging Nelson, or to object to the motion calendar procedure, or to take Mr. Nelson's deposition, or to seek a continuance of the damages motion. Instead of any of those options, Daniel chose to submit only his own declaration in response and then present argument; his primary strategy was to get the trust account remedy. Daniel's April 11, 2007, declaration directly challenged Mr. Nelson's valuation and underlying assumptions. *See* CP 130:11-21; 131:9-21. Judge Churchill had the authority to accept all or part or none of the expert analysis under well-established law. She accepted it after considering Daniel's substantive criticisms and determined that is the amount Teresa was damaged for the loss of the options and of the loss of her right to choose the timing of their exercise. She adhered to this measure and quantum of damages after extensive briefing and a full morning of argument on reconsideration on June 4.

Only after Judge Churchill's questions following both parties' arguments in the April 16, 2007, hearing indicated that she would award Teresa immediate damages based on Mr. Nelson's testimony did Daniel

raise what Judge Churchill recognized was a “new issue” – that Daniel wanted a further evidentiary hearing on the amount of damages in order to cross-examine Mr. Nelson. This request was denied and his later efforts to challenge the basis for Judge Churchill’s damages award, long after the fact, were all rejected. Judge Churchill accepted evidence from both parties on the proper present value of the damages award for a later hearing, which reduced the damages from \$617,553 to \$487,325.

It is understandable that, since Daniel did not like the result, he tried various tactics to attack it, all belatedly. But because Daniel did not contest the expert submission on the amount of damages with an expert of his own when the issue was ripe; because he had ample time to do so before Judge Churchill made her decision on the amount of damages in April, 2007 and as part of his reconsideration motion heard June 4, 2007; and because he, in fact, contested the proposed damages both substantively with his own declaration and with oral argument, and also with a proposal for a non-damages remedy -- as a matter of law Judge Churchill was entitled to rely on the evidence before her on the amount of damages because that issue was ripe and before her.

## **II. RESTATEMENT OF ISSUES ON APPEAL.**

A. Where the converted property cannot be restored or replaced, and where that property includes the right of successive future exercises over seven years which are designed to allow the option holder to obtain and maximize substantial future profits, is the proper measure of damages the traditional “make-whole” remedy that compensates the victim for the entire loss, including lost future profit, or must the victim be forced to receive only the stripped-down value of the property when sold

preemptively such that the potential for future profits was destroyed?

B. Must the trial court's determination of damages be affirmed where it is squarely within the only evidence presented as to the future value of damages (as lost profits) by an expert witness and where: 1) the Appellant was heard on his substantive challenge to the basis for that value; 2) Appellant failed to put in any evidence of a contrary value by his own expert or by himself prior to or at the hearing on damages, despite ample opportunity to do so; and 3) the trial court reduced the final award to present value based on later submissions so that the final award was within the range of credible evidence before the trial court?

C. Where Appellant made the tactical choice to contest the motion for determining damages with 1) a substantive response by the party's declaration and argument rather than an expert or other evidence; and 2) a proposal for a different remedy involving a deposit of the converted funds in trust rather than immediate damages, must Appellant's belated challenge to the fairness of the hearing be rejected and the trial court's determination of damages be affirmed because Appellant's request to cross-examine the expert was not made prior to the hearing, Appellant had the opportunity to and did not request a deposition of the expert, Appellant did not object to the form or scope of the hearing which Appellant understood was solely on the papers, and Appellant only raised the issue of cross-examination after each party had presented their positions and, in post-argument colloquy, it was apparent the trial court was going to award damages based on the expert's testimony?

D. Should respondent be awarded her attorney's fees on appeal, whether or not she prevails?

### **III. RESTATEMENT OF THE CASE.**

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

The divorce proceedings between the parties began in 2004 and the docket shows some 336 filings before the final orders were entered on October 13, 2006; the three children then ranged in age from 9 to 16. CP 705. There were continuing disputes related to visitation and insuring the children were able to engage in their range of activities, among other issues. *See, e.g.*, CP 708 – 713 (October 2, 2006 declaration of Teresa's

counsel re arrangements to insure the eldest could attend the football game and related activities for the high school homecoming weekend). The events and tone in this aspect of the dissolution proceedings helps understand the context out of which the property issues arose.

**B. Agreement to divide options and conversion by Daniel, his knowledge of the Court's motion practice on the papers.<sup>1</sup>**

The parties negotiated a "Stipulated CR2A Agreement" dated July 18, 2006 which addressed property and financial issues and outlined of key parenting plan provisions. CP 455-459.<sup>2</sup> It was signed by both Teresa (CP 458) and Daniel (CP 459), and was filed in Superior Court July 21, 2006. CP 455. Daniel exercised Teresa's options on August 14, 2006, netting him \$444,664.63 after taxes. Finding XV, CP 10. Daniel had no authority from Teresa or her attorney to do this. Finding XIV, CP 10. After August 14, Daniel tried twice to get Teresa to decide to exercise

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<sup>1</sup> Daniel did not challenge any of the trial court's findings on the underlying events, so they are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994); *In re Marriage of Knight*, 75 Wn. App. 721, 732, 880 P.2d 71 (1994). The trial court's findings and conclusions, CP 7-14, are Appendix A.

<sup>2</sup> The July 18, CR 2A agreement stated:

5. The stock options the husband has shall be awarded such that each party receives one-half of the community options. **Each party shall choose whether or not to exercise the options.** Any party exercising the options shall pay taxes on his or her options. The PACCAR stock account shall be divided such that each party receives one-half of the stocks. These assets are not to be included in the overall 45/55 division of assets.

Stipulated CR2A Agreement, CP 456 (emphasis added).

her options without telling her he had already exercised them. Findings XVI and XVII, CP 10-11.

On September 27, over six weeks after he exercised all of Teresa's options, and after he had twice tried unsuccessfully to coax Teresa into exercising her options, Daniel formally moved the trial court to adopt the CR2A Agreement and enter proposed final documents. CP 385 – 453. The moving papers consisted of a four line motion and five pages of Daniel's declaration, plus the supporting papers related to converting the CR2A Agreement into final orders, including his justifications for various values still in dispute, since the agreement called for a 55-45 percentage split of the community real and personal property. CR2A Agreement, p. 1 ¶¶ 1 & 2, CP 455. Daniel calculated the total assets in these categories at over \$955,000, CP 387, and set out other financial and parenting plan issues that needed to be resolved by the Court. CP 388-90.

The attachments included a proposed Decree with exhibits A & B setting out the breakdown of the assets each party would receive, including the reference in ¶8 for each party stating the amount and protocol for handling the community-owned Paccar stock options that were split 50-50. See CP 445-46 ¶8 & 449-10 ¶8. These charts showed that Daniel was taking the position the only community options were for the first three years, 1999, 2000, and 2001 before separation, which had expiration dates of 2009, 2010, and 2011. *Id.*

These papers raised many “red flag” issues for Teresa which she

addressed in her response declaration filed October 4, 2006 (CP 347-384). A critical one was, what was Daniel's actual income, for purposes of calculating support, among other things? *See* CP 348-49. Another was the lack of information Teresa had been given related to stock options awarded in 2002, 2003, 2004, and 2005. *See* CP 358 ¶5. Given these questions, Teresa raised the failure of Daniel to comply with prior requests for production of his financial records. *See* CP 349; 360-363 (formal requests). A major theme of the response was Teresa's request to make Daniel comply with the CR2A Agreement he had just signed off on:

. . . although I am pleased that the parties were able to resolve these matters pursuant to the CR2A agreement/stipulation, **I am very concerned that [Daniel] is attempting to breach and entirely abrogate the terms and conditions of the CR2A agreement** by virtue of the submission of these final papers on the motion calendar. . . . I implore the court to take the time necessary to enforce the terms and conditions of the CR2A agreement as these final orders will have a significant financial impact on me and the minor children. . . .

I am hopeful that the court will not allow [Daniel] to disavow his commitment to the CR2A agreement and that the court will further obligate [Daniel] to produce all of the documentation necessary so that the final orders are complete, accurate, and thoroughly consistent with the letter and spirit of the CR2A agreement.

Teresa Farmer Dec. (10/4/06), CP 359 (emphasis added).

Daniel's reply declaration of October 5, only one day later, contended he was trying to comply with the CR2A Agreement, recounted various asset issues, and also supplied many documents. CP 251-350. He did not inform Teresa or the trial court that the options no longer existed so that the provisions of ¶ 8 for each party's property awards would have

to be changed. One issue he did address was the value to be assigned to the family home that Teresa would get, which was still disputed. Daniel argued that the use of a February 2006 valuation by an appraiser was not fair to him since the trial court could take “notice” that real estate prices were still rising:

Prices continue to rise at least 14% this year. There have been increases in the value of the home from \$420,000 when we first separated to \$685,000.00 at this time. The house will continue to increase in value. Mrs. Farmer will enjoy the increase in value of the property. She has chosen to keep the house and has known throughout these proceedings that I wanted the house. **She signed a CR2A agreement that the house would be valued as of July 1, 2006, she doesn't get to back out of the agreement now because she doesn't like it.**

Daniel Farmer Dec. (10/5/06), CP 258 (emphasis added).

However, Daniel's argument was not all he submitted for the trial court's consideration on such short notice. He also attached a “current market analysis” from a realtor (CP 395-415) and a letter from a certified appraiser (CP 416-417) which addressed both the value of the home at issue and the general appreciation of real estate at that time), essentially expert submissions as to value that he expected to be considered on the papers. Among other things attached to Daniel's declaration was the Paccar Long Term Incentive Plan (CP 289-330), including specific information as to options and their execution. CP 318-320. These papers on the options were only relevant if Teresa's options had not been exercised; their inclusion therefore reasserted they still existed.

Daniel completed his declaration by addressing why he put the case on the regular motion calendar which did not have live testimony instead of arranging a special setting that would permit more time for addressing what Teresa claimed were important and complicated issues that would affect her and the children:

I put it on the motion calendar because Mrs. Farmer's attorney was "unavailable" for any special set dates until the end of October and I think we can all agree this needs to be finished. **These issues are not time consuming nor complicated. They just need to be resolved.** The most difficult issue, the tax return, has been addressed. The entire parenting plan is already agreed to. The issues are pretty minor and I fail to understand why Mrs. Farmer does not want to get this matter completed.

Daniel Farmer Dec. (10/5/06), CP 263-64.<sup>3</sup>

**C. October 13 Hearing, Subpoenaed Bank Records.**

Hearing on and entry of the final orders was thus set for the regular motion calendar on October 13. The day before, on October 12, Teresa's attorney filed a 19-page memorandum with documents attached (CP 190-250) which presented new information just received from Daniel's bank under subpoena. Though Daniel listed his monthly income as \$10,808 in the proposed Child Support Worksheet filed September 27 and denied any trust or other income other than work, (CP 429), the subpoenaed bank records showed an unspecified deposit to Daniel's savings account of

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<sup>3</sup> Apparently his hoped-for \$85,000 increase to the Coupeville house over the February 2006 appraisal figure (a 14% increase) based on proffered opinion testimony was neither complicated nor significant enough to warrant a special setting and evidentiary hearing.

\$454,664.63. CP 191 (brief); 245-247 (records). Teresa's brief noted there had not been sufficient time to investigate where this money came from or how it should be taken into account for purposes of child support or maintenance, and requested entry of the final orders be delayed pending further discovery. CP 207-208. This was denied at the hearing. Daniel presented a short brief dated October 9 arguing that the only community options were those awarded before separation, in 1999 – 2001, CP 169-175. This was decided against Daniel. *See* CP 181, ¶ 8; 185-186, ¶ 8, listing the options for 2002-2004 as community property.<sup>4</sup>

At the end of the October 13 hearing, Judge Churchill addressed all the issues raised, including valuation issues. *See* CP 696-698 (Oct. 13, 2006 transcript excerpts), App. E. She then entered final orders: the Findings and Conclusions (CP 702-707) and the Decree (CP 176-189). Included in the exhibits to the Decree specifying the property division was the chart and language related to the community-owned Paccar stock options. *See* CP 181, ¶ 8 & 185-186, ¶ 8. The two identical provisions in the Decree signed and entered by Judge Churchill on October 13, 2006 stated as follows:

8. The wife shall receive one-half of the following community stock options.

Option Date	Type	Granted	Price	Expiration Date	Wife's Share
4/27/1999	NQ	1,710.0	\$23.9028	4/27/2009	855 to wife

<sup>4</sup> The brief was formally filed after the hearing on October 17. CP 168.

1/25/2000	NQ	2,029.0	\$18.5555	1/25/2010	1014 to wife
1/23/2002	NQ	4027.0	\$28.2045	1/23/2012	1510 to wife
1/15/2003	NQ	3513.0	\$31.40	1/15/2013	732 to wife
1/15/2004	NQ	1992.0	\$56.9533	1/15/2014	83 to wife
1/24/2001	NQ	1,707.0	\$22.9445	1/24/2001	854 to wife

**The wife will direct the husband when she wishes to exercise her options.** The wife shall be solely responsible for all costs and taxes associated with exercising her options. The husband must declare the transfer on his tax return and pay taxes on the transfer, the wife shall be responsible for the taxes. The husband shall provide the wife with the information on the taxes on the transfer. **If the options are cashed,** the husband shall hold back an amount equivalent to the taxes he expects to pay on the transfer. At the time the husband's taxes are filed, he shall provide proof of the actual tax consequences and the wife shall either pay any additional amount owed or receive a refund from the husband if she overpaid. All remaining stock options are the husband's separate property.

Decree, Ex. B, CP 185-186, reflecting the property to be received by Daniel Farmer (bold added).

Judge Churchill also ordered that "Mr. Farmer will disclose under penalty of perjury the money that was deposited in the Premier account," CP 698 (10/13/06 transcript) and also ordered him to produce all of the documentation as to the purported sale of only his options by October 19, 2006, and provide it to Teresa's counsel and to the Court. CP 698. Finding VII, CP 9.

**D. Disclosure That Teresa's Options Were Exercised; Daniel's Continued Effort to Hide the Details.**

Then, one week after the disclosures were due, on October 25, new counsel appeared for Daniel and disclosed via Daniel's declaration (and a

motion) that Daniel had unilaterally exercised all Teresa's stock options, allegedly "in an effort to preserve the community property." CP 165-167 (Motion). Daniel's declaration stated in part:

Stock Option Trust Deposit. I misunderstood the terms and provision of the CR 2A Stipulation and the advice of my prior counsel. I understood that the value of the stock options was to be evaluated as of July 1, 2006, which was the valuation date of the additional assets divided in our dissolution proceeding. I was concerned given public information regarding the expected decline in stock prices in the manufacturing industry based upon industry performance. Following July 1, PACCAR stock began to drop with this information available to stock traders. In mid-August, the price of PACCAR stock began to rise and in fact reached the level it was at on July 1.

I proceeded to exercise the options in mid August when the stock price had again reached the level that it was at on July 1 when the valuation date was agreed to in order to preserve the value of the stock options as of the valuation date used in our CR 2A stipulation. The issue of valuation dates and changes in the market value of assets since the date of valuation has been subject to great debate in this proceeding. Even at the final hearing, petitioner's counsel was arguing for petitioner to receive additional consideration due to a reduction in the market value since July 1 of an investment account awarded to her.

Nevertheless, after rereading the CR 2A Stipulation and the Decree of Dissolution and discussing this matter again with my counsel, I realize that I inappropriately exercised all of the stock options including the stock options awarded to petitioner by the court as her share of the community options referenced in our CR 2A Stipulation. Therefore, as the stock options are no longer existent as they have been exercised, I am asking the court to amend the decree of dissolution to reflect this change in circumstances.

Daniel Farmer Dec. (10/25/06), CP 160.

Daniel's October 25 motion asked the court to approve his "accounting" of Paccar stock, to give Daniel a judgment for "\$12,444

related to the funds inappropriately consumed by Ms. Farmers [sic] from the parties' joint account shortly after separation without [Daniel's] knowledge or consent"; for a judgment of \$6,526.44 from an allegedly undisclosed bank account in North Carolina; and for an "order amending the decree of dissolution" and approve a deposit of \$187,542.92 into his attorney's trust account "related to the stock options exercised by Mr. Farmer prior to the entry of the decree which awarded a portion of the stock options previously exercised by Mr. Farmer to the petitioner". CP 165-167. Then, like the boy who murdered his parents then pleads for mercy because he is an orphan, in the same pleading in which he admitted unilaterally exercising *all* of Teresa's options she was entitled to exercise under *both* the CR2A Agreement *and* the Decree worth hundreds of thousands of dollars – Daniel requested fees be paid to *Daniel* on the ground that Teresa had concealed a bank account in North Carolina worth a total of \$14,503.21, of which he sought only \$6,526.44. *Id.* However, the documents for the options were not included.

On November 9, Teresa had to file a motion to compel production of all information related to the stock options and Daniel's exercise of them, attaching transcript excerpts from the October 13 hearing on entry of the final orders, CP 696-698, App. E. Teresa described the circumstances in detail, as set forth in her November 8, 2006 declaration. CP 693-94. In addition to the request for an order compelling the stock option paperwork, the motion requested that all the funds from those sales

be placed in a trust account, as well as a request for fees for having to bring the motion. CP 691.

The motion to compel and to deposit proceeds was continued, first to December 11, CP 689, and then to December 18, CP 688, which permitted new filings by Teresa related to the underlying circumstances. *See* CP 581-687, Teresa's December 12, 2006 declaration, which included the evidence of Daniel's two attempts to coax her to exercise her options after he had already exercised them. *See* CP 593-594, emails.

The motion to compel was finally heard December 18 at which point Judge Churchill entered an order again requiring production within seven days of all documents, letters, memos, and other materials "regarding the sale of any & all Paccar stock options." CP 578. The order also awarded Teresa \$2,500 in attorney's fees and restrained Daniel from "withdrawing any money" from Daniel's specified account. The order further provided that all of the stock option sale proceeds "in the amount of \$625,636.55"<sup>5</sup> were to be delivered to Teresa's attorney to be placed in an interest-bearing trust account in the names of both parties, with other directions to provide a basis for the bank to make the transmittal. CP 579.

Daniel's motion to finalize the stock, amend the Decree, and for attorney's fees was then renoted for January 10, 2007, CP 572, even

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<sup>5</sup> Because of Daniel's continued failures to provide documentation as required, the order used the higher value in the documents, which turned out to be the cost of exercising the options, not the immediate net gain, which was \$444,664.63. *See* CP 580, attached to the December 18, 2006 Order Compelling Production.

though the documents related to exercise of the options had not been produced. On the day of the January 10 hearing, Teresa's attorney filed a motion for contempt and sanctions based on Daniel's failure to comply with the December 18, 2006 order. CP 567-570. The show cause for the contempt was set for January 29, at which time Daniel was held in contempt for failing to comply with the order, a judgment awarded against him of \$2,500, and an order to pay sanctions of \$100 per day "for each day all documentation previously ordered on 12/18/06 is not delivered to petitioner commencing January 30, 2007." CP 566. Some of the documents were filed in superior court on February 5, 2007. *See* CP 150-155. Daniel's attorney then re-noted his pending motion to "finalize" the Paccar stock and amend the decree for March 22<sup>nd</sup>, 2007. CP 565.

After finally getting the stock option documents in February 2007, long after they were originally ordered at the October 13 and December 18 hearings, Teresa filed her motion for relief from judgment under Rule 60(b) on March 22<sup>nd</sup>, noting it for April 2<sup>nd</sup>. CP 144-149. Along with the motion and Teresa's declaration, she filed a declaration of Roland T. Nelson, CPA, stating the damages to her from the wrongful exercise of the options and loss of the right to choose the timing of exercise as \$617,553, taking into account federal tax and Medicare tax. *See* CP 136-143, which also shows a facsimile delivery of the declaration to Daniel's attorney on March 21. CP 137. Nelson's declaration included his CV, CP 139-140, and his calculation of estimated loss. CP 141-142.

After coordination by counsel, both Teresa's motion and Daniel's motion were renoted for April 16, 2007 and heard together.

Daniel did not file any papers styled as a response or objection to Teresa's motion or the Nelson declaration. Rather, his response was his "Reply Declaration Re Stock Options, Bank Account and Credit Card Charges" which was faxed to Teresa's counsel's office on April 12, 2007. CP 557. This generated a motion to strike the declaration as an untimely response to Teresa's motion that was sent so late that it did not give her an opportunity to do a timely reply. *See* CP 557-563. The trial court did not strike any part of the declaration at the hearing.

**E. April 16, 2007 Hearing.**

**1. Procedural Posture: both motions heard and ripe.**

Daniel made a tactical decision to combine his functional response to Teresa's Rule 60(b) motion with his reply in support of his proposed alternative remedy; otherwise Teresa's motion was unopposed. His declaration stated:

Petitioner now requests that the entire Decree of Dissolution be set aside, that she be awarded \$617,553 by virtue of a speculated future value of PACCAR stock, that the funds on deposit in my attorney trust account be immediately distributed to the petitioner, and that petitioner be awarded her attorneys fees for having to bring this motion. **I object to the relief being requested by the petitioner and instead I ask that the court adopt my proposal for dealing with the stock options.** My proposal was for a deposit to remain with my attorney in his trust account until the petitioner advised me of her desire to exercise the options at which

point we could account for the proceeds properly payable to the petitioner.

CP 130:11-21, Daniel Farmer Dec. (4/11/02) (emphasis added). In addition to this explicit statement which addressed Teresa's motion (along with others, *see* CP 131:9-21), the arguments of Daniel's attorney stated his understanding that both motions addressed the same issue, *i.e.*, what to do over the improper exercise of the stock options, which remedy ought to be applied by the Court, and that all the pleadings ought to be considered together as addressing both motions. *See* 4/16/07 RP, pp 6-9, p. 8:16-20.<sup>6</sup>

Judge Churchill saw the motions "as the same issue with requests for different relief" and that they should be heard together. *Id.*, p. 10:13-14. She gave a final opportunity for delaying the hearing, which no one requested. *Id.* There also was no contention by either party at the end of the discussion about the procedural posture of the hearing that the hearing was not the correct form, or that either motion was not, at long last, ripe for full and complete adjudication. The court then denied the motion to strike Daniel's reply declaration and proceeded to the merits, starting with Teresa's requested relief under Rule 60(b). *Id.*, p. 12.

## **2. Teresa's argument for immediate damages.**

Teresa's argument was laid out at pages 13-17, including the

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<sup>6</sup> And it's appropriate, Your Honor, that these issues, if we have a motion addressing the stock option issue and they have a motion addressing the stock option issue, it's appropriate for both of those motions to be heard by the Court at the same time."

specified relief per the declaration of the CPA, Mr. Nelson, of \$634,000.

The argument for damages stated:

And he's done an analysis of the historic increase in the value of the Paccar stock over a fairly significant period going backwards. It's a reasonable projection. He's based his projection upon that analysis of this stock. And he has come up with a – a value for what it is that she would have been able to receive had she been able to exercise these stock options on the day before these stock options expired.

And the number that he comes up with is \$643,000. It's – it's contained in the declaration. And we are asking the Court for relief from the judgment -- Excuse me -- relief from the Decree only to the extent that this issue is impacted. . . . The relief that we're asking for only has to do with the issue involving the stock options because that's where the fraud is, that's where the misrepresentation is, that's where the surprise is. Hence, 60(b) applies to those events. . . . And in changing [the decree] we are asking the Court to do two things: award a judgment for the amount of damages which my client has sustained as a direct result of what Mr. Farmer did. Order the balance of the money in the trust account maintained by Mr. Saar to be immediately transferred to my client. And then the balance of the judgment will have to be collected from Mr. Farmer.

4/16/07 RP, p. 15:17–p. 16:19. Teresa's attorney concluded by noting that the reason the particular remedy was requested is "it's a remedy that's proportionate to the damage that was caused by Mr. Farmer's conduct. And that's the relief that we're asking for together with attorney's fees in connection with this motion." *Id.*, p. 17:11-14.

**3. Daniel's argument substantially challenging Teresa's proposed damages amount and proposing his alternate remedy.**

Daniel's attorney's argument was styled as "responding to Petitioner's motion." *Id.*, p. 17:17. But he emphasized that he would

address Daniel's motion as well: "I'll also be outlining the argument that we had again because the same issue was noted on motion by Mr. Farmer. . . ." *Id.*, p. 17:17-19. Daniel argued that the nature of the stock options made it more appropriate for the court to adopt his proposed remedy of putting the funds in an account held by a third party subject to later distribution. *Id.*, pp. 18-21. At that point, Daniel's attorney challenged the rationale and the substance of Teresa's proposed remedy of an immediate payment of damages, and also challenged the amount of those damages. *Id.*, pp. 21:4-p.23:22. At the outset, Daniel's attorney attacked the basis for the projection made by the CPA, challenging the time period chosen. *Id.*, p. 21:9-20. Counsel then argued that future projections of stock performance are "speculation," but did not provide an evidentiary basis for that statement, since Daniel chose not to provide a counter declaration by his own expert. *See* pp. 21:21-22:4. Daniel's counsel next challenged the qualifications of Mr. Nelson. *Id.*, p. 22:5-13. He then attacked the idea that the total dollars should be paid without a discount to present value. *Id.*, p. 22:14-18. After further challenges based on Mr. Farmer's non-guaranteed employment status and potential changes to future tax rates, counsel concluded, "We think it's inappropriate to make a monetary judgment award as of today. . . . Instead, it is more appropriate to place this [in a] third-party account which will have funds sufficient in it to compensate Ms. Farmer for any exercise of the stock options at any time." *Id.*, p. 23:17-22.

Nowhere in Daniel's argument was there an objection to the nature of the hearing, or the statement of a need to examine or cross-examine Mr. Nelson (or anyone else) for the matter to be proper. There was not a scintilla of an indication of any need to adjourn or continue the hearing because Daniel was not getting a fair hearing based on the setting and the evidence before the Court. Daniel had fully accepted the terms of engagement and participated as fully as he chose. Moreover, in the September 10, 2007 hearing, his attorney explicitly commented twice that live testimony was not part of such proceedings. *See* 9/10/07 RP pp. 9:4-11; p. 11:1-4.

#### **4. Teresa's rebuttal argument.**

In his rebuttal argument, Teresa's counsel first addressed Daniel's proposal for creating a trust account, noting the uncertainties that it contained and the potential elements of control it would give to Daniel in the future. *Id.*, pp. 23:25-25:8. Her counsel then addressed Daniel's challenge to the calculation of damages, noting that "accountants and actuaries perform these kinds of calculations all the time." *Id.*, p. 25:15-16. Teresa's counsel also pointed out that Daniel was certainly challenging the analysis of the CPA. *Id.*, p. 26:2-5. Finally, while also making the point that "the last thing we want to do is put Mr. Farmer or anybody else in charge of my client's money," (*Id.*, p. 26:22-23), Teresa's counsel pointed out that

making an award based on these assumptions is . . . well, it's not inappropriate. It's exactly what Courts do all the time to protect an injured party in a situation where fraud has occurred, where the whole benefit of the bargain that was bestowed upon her through the agreement has now -- It's now gone. It's evaporated.

*Id.*, p. 26:15-21. Teresa's counsel's conclusion was clear and straightforward: "That money should be awarded to my client immediately."

**5. Post-argument colloquy with Judge Churchill, new procedural issue raised by Daniel requesting cross-examination of Mr. Nelson, and ruling awarding damages.**

The hearing's conclusion is important to sorting out the legal arguments now made on appeal by Daniel. *After* both parties had stated their arguments, *and after* in response to follow-up questions by Judge Churchill that showed where her decision was going, the following occurred beginning with Daniel's attorney:

If the Court is inclined to say, "No, I don't like that idea of the account. I think there should be a judgment awarded," I think we have to proceed on an evidentiary hearing so that we can get Mr. Nelson's testimony in person and be subject to cross-examination as to exactly what assumptions he made or did not make as to the calculation of - of the damages as - as articulated by him in his declaration.

THE COURT: What about this new issue that we should have the evidentiary hearing?

MR. MANNI: I think the Court took this entire matter under advisement at the time that - that the Court and everybody else became aware of what occurred with regard to the misrepresentations.

I don't believe that there is a - a basis for another evidentiary hearing. The matter was properly noted on the motion calendar. It was continued. The declaration from the CPA was submitted. They could have submitted a declaration from another

CPA. But they didn't. They simply chose to submit Mr. Farmer's declaration. Mr. Farmer is not a CPA and he has no qualifications to challenge any of the information in the CPA's declaration.

So my-- In my judgment there is no dispute that requires an evidentiary hearing. Nor am I aware of any rule at this juncture -- This is a motion. This is not a motion for a new trial. It's a motion for relief under 60(b). And the Court has the authority to hear it as a motion and to rule on it as a motion based upon the evidence that's before the Court.

THE COURT: Okay. Thank you.

All right. I was just reading over Rule 60. And I don't see anything in this rule, Mr. Saar, that indicates that you should have an evidentiary hearing.

Do you have someplace in the statute that - in the Court rule that would indicate that?

MR. SAAR: Your Honor, I don't have any - any reference to the Court rule. Like I said, the only reference that I made to that is because of the concerns we have with regard to the assumptions made by Mr. Nelson. And - and, also, in light of the relief being requested where, in essence, a \$170,000 present value becomes a \$617,000 future value that, according to Petitioner, should be awarded today.

THE COURT: All right. Thank you very much.

Well, of course, if you had some concerns about the CPA's analysis, I think that certainly you had the time and perhaps the ability to get another analysis done by - maybe on this point a stock analysis, but that didn't occur. And the relief from judgment or order is by affidavit. So there is nothing before me other than the CPA's affidavit as to what the value of these stocks would be.

If Mr. Farmer had thought that the 20 percent rate of return was way too high, then he had a remedy. And that remedy was never to have exercised stocks that didn't belong to him. And yet he lied -- I won't even cloak it in any other way -- he lied to this Court that those options existed. He lied to this Court that he had-- Well, then he lied further by asking Mrs. Farmer if she would now exercise these options trying to get her to buy into it so that he would have - he would be able to justify the options that he had already done, that he already exercised.

By doing so, he took the risk. He took the risk of the Court's decision here. And the Court believes, that because he chose to lie, that it is appropriate to go ahead and award her the value of that 600 -- I'm sorry. I don't have it -- it's over \$600,000.

This is based upon his actions. No one else's actions but his. And I will award her whatever is in the - the trust account, have it transferred over to her and award her a judgment.

4/16/07 RP 30-33.

**F. June 4, 2007 Hearing of Daniel's Reconsideration Arguments.**

Teresa filed her Notice of Presentation of Orders following the April 16 hearing, CP 542-554, to which Daniel filed an "objection", which turned out to be, in fact, a motion for reconsideration. CP 120-127. Daniel argued that *Langham v. Kolde*, 153 Wn.2d 553, 106 P.3d 212 (2005), requires a calculation of damages at the time of the exercise of the stock options, even though recognizing that the *Langham* court acknowledged that rule would not necessarily apply where the property increased after conversion. CP 125-126. Daniel's brief also raised the question of discounting the future value to present value under *Wentz v. P.E. Connolly, Inc.*, 45 Wn.2d 127, 273 P.2d 485 (1954). CP 126. The brief also raised a number of other arguments relating to specific calculations and offsets. CP 120-125. It did not submit any expert or other testimony challenging or addressing Mr. Nelson's calculation of damages. *See* CR 59(c).

Teresa's reply recognized that Daniel's brief inappropriately tried to get Judge Churchill to reconsider the damages award while not styling the pleading as a motion for reconsideration, but nevertheless addressed the substance of the arguments on the *Langham* case in detail. CP 96-109. Teresa's brief reinforced that the loss was not just the dollar figure on the

date of exercise, but also “her loss includes **the increased value which she reasonably would have been able to receive had she held the stock options until the day before their expiration. That is the true measure of her loss.** That issue was not before the Supreme Court in the *Langham* case and the *Langham* case said so specifically and unequivocally.”

CP 100-101. Daniel thereafter filed his own reply memorandum, again challenging the damages, CP 92-95, which then generated a further memorandum from Teresa. CP 83-91. *See* CP 94, Daniel’s brief’s conclusion: “This court should reconsider its decision and award damages to the wife by calculating damages based on the market value of stock at the time of conversion.” CP 94. In none of his papers did Daniel assert or argue that the April 16 hearing was improper or invalid because it denied him a right to cross-examine Teresa’s expert Mr. Nelson or should have had live testimony.

At the June 4, 2007, all morning hearing, Judge Churchill indicated that she would consider all the briefings which had made her take another look at her decision. 6/04/07 RP, p. 6:17-23. The court heard argument from both sides on the substance of the damages calculations, including the issue of a discount for present value, which was discussed at pages 24-26. Judge Churchill noted that she chose the immediate damages remedy over the trust proposal remedy because “having to deal with him over the years is not going to be a good thing.” *Id.*, p. 18:3-4. Judge Churchill also stated, after a full consideration of all the materials and argument, the

reason why she was staying with the large amount of damages based on the future values submitted by Mr. Nelson's declaration:

And there is language in the *Langham* case that leads the Court to believe that -- that Mr. Farmer should pay for the tort that he committed. And that -- that at least Mrs. Farmer should get the value at the time of the conversion. That "at least" says it could be "more than."

And in this particular case -- I mean, the Court is a court of equity. And Mr. Farmer exercised the stock options in August fraudulently. He knew he didn't have the authority to do so. And he continued to hide his actions and lie to this Court and try to finesse Mrs. Farmer into agreeing that they should be sold so that he wouldn't have to disclose what he had done.

Now, is that punitive to take that into account? I don't think so. Because what he was doing was just out-and-out fraud not only to Mrs. Farmer, but also to this Court. He disclosed in October when he really had no other option but to do so.

So I -- I thought about this. Is this punitive? Is this making him pay more than he's required to do so?

No. It's making him pay for what he did.

The judgment represents her loss. They -- she had the ability to exercise the stock options at some point in the future -- not just today -- but at some point in the future. And the only information that I have is what the value of those would be in the future is the expert opinion that was provided to me.

Now, I thought very long and hard because of the cases that you've provided to this Court. And just -- I kept coming up against the thought of why if -- if we provide that the damages will be on the date of the stock -- stock options were exercised, then we are rewarding Mr. Farmer's wrongdoing. We are letting him have his way for something he knew was wrong, but he didn't have the authority to do.

Is that punitive? No. That's saying you -- you chose to make this decision. Now, here's the results of that decision.

The reasonable time thereafter -- I think the reasonable time thereafter would be when she had the ability to exercise the stock options. And the only information I have as to what the value of that would be is what the expert provided to me.

I do agree with your argument though that this argument should be discounted by the present value, whatever that would be. But, obviously, it's going to be something less than \$617,553 because she would not have received her money this early. And so, therefore, it should be discounted.

. . . I'm going to hold with the decision that was made. I consider this to be your Motion for Reconsideration, but I suppose you could always bring another one because I know that this is going other places than just with me.

But I have considered it long and hard as to whether or not the Court made an error in law. And I don't think so. I think that what's happened is that we haven't caught up with this particular issue in the Court of Appeals.

It's not a windfall. It's the amount that she had the ability to exercise of her own free will. He took her own free will away from her.

And the Court will award the judgment discounted to the present value.

6/04/07 RP, pp. 27-30.

**G. September 10 hearing and the Kessler declaration.**

Shortly thereafter, Teresa submitted a supplemental declaration of Mr. Nelson showing the discount of the damages to present value, CP 79-82, followed by a declaration by an expert for Daniel. CP 67-78. Teresa moved to strike portions of the Kessler Report because she contended they went beyond a present value analysis to attack the underlying rationale for the damages award itself. CP 60-66. Following briefing, the motion to strike was heard on September 10, 2007, in lieu of the anticipated presentation of the judgment. After argument, Judge Churchill granted the motion to strike as follows:

THE COURT: Thank you.

I'm confused as to why Mr. Kessler's opinion was not presented during the original hearing when the - obviously, the

declaration of the other expert was presented. And it was presented in a time that you would have had a chance to respond to it or either ask for additional time to respond to it. But it was not.

I took additional information under consideration when the first presentation came because there was a legal argument as to the authority of the Court to do a particular - to value stock at a particular amount. That was a legal argument based upon a case that you had indicated was newly filed.

That's a lot different from accepting additional factual information long after the hearing has been done, and I'm not going to allow it.

I'm striking the critique in the Declaration of Mr. Kessler. I'm striking the entire paragraph or paragraphs on Critique of Ronald Nelson, Damage Analysis. The pages are not-- Oh, yeah. Page 2, middle of the page to the middle of the page on Page 3.

I'm leaving in the Critique of Ronald Nelson, Present Value Analysis, which is what I asked for.

The concern I had was that there would be a present value calculation and that it really depended on the discount rate that was used. And I allowed that additional information. I did not allow any other additional information because the time had passed for that.

I'm also striking on Page 4 Mitigation of Damages. And I believe that that paragraph is only on Page 4.

The rest of it I'm allowing to be heard at the presentation.

9/10/07 RP, pp. 12-14.

#### **IV. RESPONSE ARGUMENT.**

##### **A. Standard of Review.**

Trial courts have broad discretionary power to fashion equitable remedies so their choice of remedies is reviewed for an abuse of discretion. *SAC Downtown Ltd. Partnership v. Kahn*, 123 Wn.2d 197, 204, 867 P.2d 605 (1994); *Blair v. Washington State University*, 108 Wn.2d 558, 564, 740 P.2d 1379 (1987); *Rupert v. Gunter*, 31 Wn. App.

27, 30, 640 P.2d 36 (1982). Findings of fact are reviewed for substantial evidence; expert testimony “is substantial evidence in the record to support the trial court’s findings, and we will not disturb those findings.” *In re Marriage Shui and Rose*, 132 Wn. App. 568, 580, 125 P.3d 180 (2005) (affirming valuation as to stock options). Unrebutted expert testimony is sufficient to support the valuation of a future loss where it is accepted by the trial court. *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 695, 132 P.3d 115 (2006).

The finder of fact is given great deference in determining valuation and the value will be affirmed if it is within the range of evidence. *Worthington v. Worthington*, 73 Wn.2d 759, 764-765, 44 P.2d 478 (1968); *In re Marriage of Sedlock*, 69 Wn. App. 484, 490-491, 849 P.2d 1243 (1993). Since “the fact finder is given wide latitude in the weight to give expert opinion,” “[i]f the trial had wholly adopted the approach of *either* [one expert or the other], this Court would be constrained to affirm.” *Id.*, 69 Wn. App. at 491. It is also fundamental that “a trial court should not substitute its judgment for the trial court’s, weigh the evidence, or adjudge witness credibility.” *In re Marriage of Rockwell*, 141 Wn. App. 235, 242, 170 P.3d 572 (2007) (internal quotations and citations omitted).

The trial court’s decision to exclude evidence is reviewed for an abuse of discretion. *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn. App. 34, 58, 52 P.3d 522 (2002), *rev. den.*, 149 Wn.2d 1013 (2003) (affirming exclusion of evidence); *Housel v. James*, 141

Wn. App. 748, 755, 172 P.3d 712 (2007) (same). Judge Churchill did not abuse her discretion for excluding the Kessler materials on damages under these facts. *Id.*

**B. Daniel Had a Fair Hearing and Must Live With His Tactical Choices.**

Daniel argues that he was denied a fair hearing because he did not have the opportunity to cross-examine Teresa's expert, Mr. Nelson, relying primarily on *Rogoski v. Hammond*, 9 Wn. App. 500, 513 P.2d 285 (1973), and RCW 2.28.150. He claims *In re Marriage of Rideout*, 150 Wn.2d 337, 77 P.3d 1174 (2003), further supports his argument. But the circumstances leading up to the April 16 hearing and Judge Churchill's decisions on the evidence that was submitted at the hearing and at the June reconsideration demonstrate that there was no violation of Daniel's rights. He just does not want to live with the choices he made.

As shown *supra*, Daniel was in a great hurry to conclude this matter starting in September, 2006, in order to "get it over". The record also shows he was reluctant to provide the information related to the stock options exercise, failing to produce the documentation when first ordered to on October 13 or when he first disclosed he sold Teresa's options on October 25, 2006, and refusing to provide the underlying documentation for months despite direct orders requiring disclosure, until it was finally provided in February, 2007. Under the circumstances, the last thing Daniel wanted was an evidentiary hearing where he would have to testify

about the events related to the stock options, especially after taking so long to produce the documentation. This explains why the posture of his motion heard on April 16<sup>th</sup> never requested an evidentiary hearing but was always noted on the regular motion calendar.

The detailed history laid out *supra* also demonstrates that Daniel knew well the difference between matters on the regular motion calendar, which were done by affidavit, and what would be required on a special setting to get an evidentiary hearing. His October 5, 2006, declaration that responded to Teresa's of only one day earlier demonstrates beyond doubt his ability to submit opinion evidence on values in *very* short order.

But most telling, in this context of Daniel's knowledge and ability to participate fully in the court process, is the set of circumstances from the time Teresa's Rule 60 motion and the first Nelson declaration were sent to Daniel's attorney on March 21, 2007. No response or objection to the motion or to the declaration was filed as such. No request for live testimony was filed. No subpoena for a deposition of Mr. Nelson was served. No continuance was sought in order to obtain any such examination. No counter expert or counter-value was provided. Indeed, Daniel's tactic was to not file a direct response to Teresa's motion but to file a reply declaration which also addressed the substance of Mr. Nelson's declaration.

The facts of the hearing itself also demonstrate plainly there was no denial of Mr. Farmer's due process rights. No written objection to the

hearing was filed. Nor did Daniel's attorney state at the outset, when the trial court was entertaining procedural issues including Teresa's motion to strike Daniel's reply declaration, that the damages portion of the motion could not go forward because Daniel needed the opportunity to cross-examine Mr. Nelson. Daniel was counting on winning his request for the remedy of putting the funds in trust and then doling them out over the years to Teresa, which Judge Churchill rejected.

With the April 16 hearing showing no objection to the normal motion procedure and proceeding on the written materials then before the court, the *Rideout* case actually supports affirming the trial court. *Rideout* involved a contempt hearing arising out of a family law parenting plan dispute and the Court acknowledged the preference for live testimony where issues of credibility are at stake. *Rideout, supra*, 150 Wn.2d at 352. But the Court also noted that the party there had failed to request the opportunity to present live testimony pursuant to CR 43(e)(1) or the local rule equivalent so that the matter was properly reviewed on a substantial evidence standard on the papers, rather than *de novo*, given the apparent waiver of any right to live testimony. *Id.*<sup>7</sup>

The same principle applies here to reject Daniel's claim the trial court violated his right to a fair hearing. It cannot be considered timely to permit a request for live testimony in the circumstances here, at the end of

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<sup>7</sup> Since Daniel challenged Nelson's credibility, the *Rideout* rule of substantial evidence applies. See *Langham, supra*, 153 Wn.2d at 559 and n. 4.

the hearing after both sides have completed their arguments, and where the complaint is not raised as to any new information or testimony or surprise application of that evidence that arose during the hearing; but only when Daniel realized he was going to lose his motion. Under the unique circumstances of this case -- Daniel's detailed knowledge of the proceedings; his more than ample opportunity and demonstrated ability to provide counter-evidence; his failure to seek examination of Mr. Nelson prior to the hearing; his failure to object at the outset of the hearing -- under *Rideout* Daniel waived any right to live testimony and his claim of denial of due process must be denied.

What Daniel is really complaining of are the tactical decisions that were made by him or his attorneys. But parties are bound by their attorneys' tactical decisions. *See State v. Newman*, 4 Wn. App. 588, 591-592, 484 P.2d 473 (1971) (tactical decision at trial to not object to admission of photographs precluded using the photos as the basis for later appeal). He must live by his roll of the dice.

Finally, CR 43(e)(1) contains the permissive language that "the court *may* direct that the matter be heard wholly or partly on oral testimony or depositions." Daniel did not come to the April 16 hearing with the belief that live testimony was required from Mr. Nelson because, since Nelson was in the Seattle area and the hearing was in Coupeville, advance arrangements would have been required to get him to court or on the telephone for that specific date. Since Daniel had been aware since at

least March 21<sup>st</sup> of Mr. Nelson's opinion, he had more than enough opportunity in the following 26 days until the hearing on April 16 to seek his testimony by deposition or by having him present in court in person or by phone. By failing to take those basic steps, and by filing a declaration which responded to Mr. Nelson's in substance, and by arguing on the merits without having raised or suggested any objection to the propriety of considering Mr. Nelson's materials for procedural reasons, Daniel waived any right to cross-examination, as in *Rideout*.

**C. The Damages Award Was Designed to Make Teresa Whole; It Can Still be Affirmed Even if it Arguably Contains a Punitive Element for the Willful Conversion.**

**1. Measure and Calculation of Damages.**

The measure of damages is a question of law, while the calculation of damages is a question of fact that is left to the discretion of the trier of fact so long as it is supported by substantial evidence. *Rorvig v. Douglas*, 123 Wn.2d 854, 861, 873 P.2d 492 (1994); *Womack v. Rardon*, 133 Wn. App. 254, 262-263, 135 P.3d 542 (2006).

In *Rorvig* the Supreme Court affirmed the award of damages where the challenge was to the method of calculating those damages, similar to Daniel's arguments here. In *Rorvig*, as in this case, the person challenging the damages "offered no evidence to support an alternate method of calculating damages." Thus, the Court affirmed the trial court's damage award because, as with the Nelson declaration here, the evidence of damages "is sufficient if it affords a reasonable basis for estimating the

loss” without subjecting the trier of fact to speculation or conjecture, which it did, and Nelson’s does. *Rorvig, supra*, 123 Wn.2d at 861. In April 2007, Judge Churchill accepted Mr. Nelson’s projections and the judge did not have to speculate as to the damages when she applied his analysis. Her decision should be affirmed. *Rorvig*.<sup>8</sup>

Similar to the tort remedies, and since there was a breach of contract in this case, contract damages analyses can be used as to a basis to affirm the trial court’s award. Under a contract analysis, the injured party is entitled to a recovery of “the amount which would have been received if the contract had been kept, which means the value of the contract, **including the profits and advantages which are its direct results and fruits.**” *Rathke v. Roberts*, 33 Wn.2d 858, 866, 207 P.2d 6716 (1949) (emphasis added). The court cites numerous other decisions, including United States Supreme Court decisions recognizing the right to future profits for breach of contract. *Id.* As to the tort recovery for lost profits, see 16 DeWolf and Allen, WASHINGTON PRACTICE: TORT LAW AND

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<sup>8</sup> Another example of calculating the appropriate damage amount where there was no ready market-place benchmark to apply, and also in the stock context, is *Hedrick v. Smith*, 67 Wash. 664, 122 P. 363 (1912). In that case stock had been converted by an attorney and one of the issues was the calculation of damages for that corporate stock. The practical problem was that “the stock had no known market value. None of it was ever listed for sale or sold.” *Id.*, p. 669. The Court concluded that the value could be established by a “book value” valuation that was no less speculative than the calculation adopted by Judge Churchill. The *Hedrick* analysis is thus similar to the analysis that the CPA, Mr. Nelson, presented because, as in *Hedrick*, there was no market value for stock options and their time value since they cannot be bought or sold and they cannot be recovered or replaced once lost.

PRACTICE, § 5.9 (2006). Lost profits are proper here.

**2. The damages award was not punitive just because it was at the high range of present value evidence before the trial court; it was designed to make Teresa whole.**

Teresa does not contend that the damages award is in any way punitive and never requested punitive damages. She requested a make-whole remedy that accounted for the loss of not just the options, but the ability to exercise in the future. *E.g.*, 6/4/07 RP, p. 23. Judge Churchill expressly stated the amount reflected the quantum of damage to Teresa from Daniel's wrongful exercise and extinguishment of her option rights. 6/4/07 RP, pp. 28-29. Nevertheless, Daniel argues that damages were punitive. Opening Brief, pp. 26-27. His argument must be rejected based on the record which provides a very specific evidentiary basis for the damages calculation consistent with Washington law.

Daniel argues that the court erroneously valued the stocks using a projected value that would have resulted from Teresa exercising the options on the day before expiration to maximize value and, thus, profit. He contends that the proper date of valuation should be the date of exercise, rather than the "speculative" value of their future exercise, and characterizes the higher valuation as a "windfall" to Teresa. He relies heavily on *Langham v. Kolde, supra*, which also involved the wrongful exercise of stock options by the husband after a divorce. The Court there concluded that the wife was entitled to restitution calculated by the market value of

the property at the time the husband exercised the options. There are at least three reasons why *Langham* does not require Daniel's desired result.

*First*, in *Langham* the husband converted the stock options into stock, then held the stock before selling it, and the value **declined** significantly prior to his actual sale of the stock. The Court determined that where the value of the property declines, "a person whose property is converted may recover *at least* its value at the time of conversion." *Langham*, 153 Wn.2d at 569 (emphasis by the Court), quoting, *In re Salmon Weed & Co.*, 53 F.2d 335, 341 (2nd. Cir. 1931), a case also cited in the Opening Brief. *Second*, *Langham* specifically stated that it was *not* determining the proper valuation of property when it **increases** in value after its conversion, as it did here, but specifically reserved that issue "for another day." *Id.* *Langham* does not require valuation as of the date of exercise. *Third*, *Langham* did not present the same kind of trial court ruling. As Judge Churchill recognized on reconsideration in June, 2007, this issue has not been addressed by the appellate courts, at least in this form of make-whole remedy.

Here, Judge Churchill applied the language in *Langham* that the aggrieved party is entitled to "*at least* its value at the time of conversion," indicating that the value at the time of conversion was the minimum or "threshold" amount of damages that may be awarded where the value **declines**. See 6/04/07 RP, pp. 27-28. This language protects an aggrieved party from being limited to damages of the reduced value of the property

after it was converted. Thus, in *Langham* the wife was entitled to “at least” the higher value at the time of conversion, rather than the later, lower value at the date of sale. This language, however, does not limit or restrict an aggrieved party to damages of only the value of the property at the time of conversion where that value subsequently increases.

Daniel also ignores the fact that the conversion involved in *Langham* was not fraudulent, as it was here. As referred to in *Langham* (153 Wn.2d at 568 & n.9) and argued by Teresa, the proper measure of damages where fraudulent activity is concerned is described in RESTATEMENT (FIRST) OF RESTITUTION § 151 (1937) and is not limited:

Where a person is entitled to a money judgment against another because by fraud, duress or other consciously tortious conduct the other has acquired, retained or disposed of his property, the measure of recovery for the benefit received by the other is the value of the property at the time of its improper acquisition, retention or disposition, ***or a higher value if this is required to avoid injustice where the property has fluctuated in value or additions have been made to it.***

Daniel also cites *Brougham v. Swarva*, 34 Wn. App. 68, 78, 661 P.2d 138 (1983), for the proposition that in valuing property that may have fluctuating value, such as stocks, the measure of damages is at most “the highest value of the property . . . between the time of conversion and a ***reasonable time*** after the victim learns of such conversion,” which also quotes the Second Circuit’s phrase in *In re Salmon Weed Co.*, *supra*. Daniel argues a valuation period of six years after the conversion is not reasonable under *Brougham* where Teresa learned of the conversion only

two months after it occurred. He also cites language from *Brougham* that the victim should not be granted a “windfall.”

But as Judge Churchill recognized, stock options with a long expiration date such as Teresa had here are a unique form of property with two aspects, the inherent stock value and the value flowing from the right to choose the time to exercise the options, or the time value. 6/04/07 RP, pp. 28-29. Her remedy was to make Teresa whole so that, as Judge Churchill said: “It’s not a windfall. It’s the amount that she had the ability to exercise of her own free will. He took her own free will away from her.” *Id.*, p. 29:22-24.

Employee stock options derive much of their value from the holder’s option to observe market fluctuations and exercise at a later date with very little risk of loss. The present value of the stock option is positively correlated to the date of maturity (the later the date, the higher the value). Once the option is exercised, the resulting stock no longer has that significant **time value** attached to it and the price of the stock only consists of its **inherent value**, or the face value of the stock on the date of exercise as determined by the market. Thus, in determining a “make-whole value” of Teresa’s options, the court **must** take into account the maturity date, or the amount of time Teresa had to observe the fluctuation of the underlying stock price with no obligation to exercise and thus, little or no risk. In short, Teresa’s loss **must** incorporate the time value

associated with the options in order to “avoid an injustice” as is anticipated by the Restatement.

That is what Judge Churchill did when making her “make whole” remedy in April 2007. The ruling honors and gives effect to the first premise stated in *Brougham* (and which the Opening Brief neglected to quote): “[t]he innocent victim should not suffer a loss because of the wrongful taking and withholding of [her] property.” *Brougham, supra*, 34 Wn. App. at 78. Teresa is not getting a windfall. She is getting the present value of *the whole of* her property – the time value and the inherent value – that Daniel took from her. It would have been error to award Teresa only the net inherent value of the stock options as Daniel proposed (some \$173,000, CP 121:11) because Teresa then suffers a substantial loss, the entire net time value of the options. Mr. Nelson calculated that net value and Judge Churchill accepted it, as she is entitled to do. *Marriage of Sedlock, supra*, 69 Wn. App. at 490-91. The appellate court may not “substitute its judgment for the trial court’s” and must affirm if the damage amount is within the range of evidence. *Marriage of Rockwell, supra*, 141 Wn. App. at 242; *Brougham, supra*, 34 Wn. App. at 70-79. Unrebutted expert testimony is sufficient to support the value assigned to future losses where, as here, it was accepted by the trial court. *Mayer v. Sto Indus., supra*, 156 Wn.2d at 695.

Thus, Judge Churchill’s reliance on Mr. Nelson’s unrebutted value for Teresa’s total loss must be affirmed. *Id.* So too must her decision to

accept Mr. Nelson's analysis and figures for the discount to present value over that of Daniel's expert, Mr. Kessler. *Marriage of Sedlock, supra*, 69 Wn. App. at 491; *Marriage of Rockwell, supra*, 141 Wn. App. at 242.

**3. The damages can be affirmed even if it appears there was an element of punishment.**

The trial court may be affirmed on any basis supported by the record, including theories not presented to or considered by the trial court. *See Hanson v. Snohomish County*, 121 Wn.2d 552, 557-560, 852 P.2d 292 (1993) (applying rule); *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027, *cert. den.*, 493 U.S. 814 (1989). Thus, the trial court can be affirmed under the long-standing principles that limited so-called punitive damages<sup>9</sup> are recognized in cases of willful conversion with the showing of intentional bad faith or fraud. The Supreme Court held in 1965:

We correctly stated the rule in these cases when, in *Grays Harbor County v. Bay City Lbr. Co., supra*, [47 Wn.2d p. 879, 886, 289 P.2d 975 (1955)] we said:

Because the rule allowing a higher measure of damages in cases of wilful conversion is in conflict with our frequently expressed policy with regard to punitive damages, it should be strictly limited in its application to those situations in which the *mala fides* of the defendant's act is proven by a preponderance of the evidence. That is, it should be shown that the

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<sup>9</sup> In fact, calling such damages punitive is a misnomer. In the willful conversion context such damages, though early in their history were called punitive, are in fact closely tied to the rationale and facts of what constitutes full compensation for the victim. Rather than a blank check for punishing the willful converter as an extra amount beyond the loss, they are the safeguard to insure the victim in fact is fully compensated and the wrongdoer gets no benefit from the circumstances.

defendant either intended to deprive the plaintiff of his property or, having knowledge of facts sufficient to put him on notice of the plaintiff's ownership, acted in reckless disregard of the probable consequences.

*Smith v. Shiflitt*, 66 Wn.2d 462, 467, 403 P.2d 364 (1965). *Accord*, *Pearce v. G.R. Kirk Co.*, 92 Wn.2d 869, 873, 602 P.2d 357 (1979); *Bailey v. Hayden*, 65 Wash. 57, 117 Pac. 720 (1911).

In *Rose v. Galbraith Motor Company*, 51 Wn.2d 31, 35-36, 314 P.2d 924 (1957), the Supreme Court recognized the availability of punitive damages for willful conversion of property other than timber, citing some of the above cases, but noted that rule did not apply there because, in that case, the trial court did not find that the defendant acted “*in mala fides*” or intentional bad faith. The rule does apply here since Judge Churchill explicitly found that Daniel’s conduct was fraudulent, Findings XIX and XXIV, CP 11-12, which has long been held to be equivalent to (and thus meet) the intentional bad faith requirement. *See Rozelle v. Vansyckle*, 11 Wash. 79, 84, 39 P. 270 (1895) (“the parol promise upon the part of Vansyckle, and upon which the plaintiff relied, was made in bad faith, and with intent to deceive, and hence amounted to an actual fraud.”).<sup>10</sup>

The characterization of the “higher measure of damages in cases of willful conversion” as somehow punitive yet also harmonized with the

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<sup>10</sup> *Accord*, *Sherbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 410-411, 161 P.3d 406 (2007), *rev. den.*, 163 Wn.2d 1055 (2008) (equating intentional bad faith and fraud); *Phil Schroe Ins. Inc. v. Royal Globe Ins. Co.*, 99 Wn.2d 65, 73, 659 P.2d 509 (1983) (same).

state policy of requiring a statutory basis for genuine punitive damages is understood once the rule and its history are examined. This is because what the Court was talking about in *Smith v. Shiflitt* and the other cases was not, in fact, punitive damages in the way we think of them today unrelated to any specific measure of loss; rather the Court was making sure both that the victim was made whole (did “not suffer a loss because of the wrongful taking” in the words of *Brougham*) and the wrongdoer got no benefit from the conversion.

A good example is *Fischnaller v. Sussman*, 167 Wash. 367, 9 P.2d 378 (1932). The conversion in that case was of steel rails from a railroad. The malefactor, Sussman, obtained the rails and, by the expense of labor and transportation, moved them to another location where they were then sold. Sussman contended on appeal that the damages were too high because the trial court refused an instruction that he was entitled to be reimbursed for the money he spent for labor and transportation in handling the rails, *i.e.*, the victim Fischnaller was getting a windfall because the value of the rails when converted was higher than the rails when they were taken from Fischnaller’s location. *Id.*, p. 372. This was rejected.

The Supreme Court then went on to quote the basis for the more generous damages provisions where there is fraudulent or intentional bad faith conversion, derived from an 1880 decision from the House of Lords which has been quoted by the United States Supreme Court and other decisions since, and is the basis for the Restatement’s provisions on

conversion. The central focus of the analysis is that the perpetrator must return the value for “the whole of the property,” not just a portion. The principle was stated as follows:

There is no doubt that if a man furtively, and in bad faith, robs his neighbor of his property, and because it is underground is probably for some little time not detected, the court of equity in this country will struggle, or I would rather say, will assert its authority, to punish the fraud **by fixing the person with the value of the whole property which he has so furtively taken**, and making him no allowance in respect of what he has done, as would have been justly made to him if the parties had been working by agreement.

*Fischnaller v. Sussman*, *supra*, 167 Wash. at 372 (bold added), quoting *Livingstone v. Rawyards Coal Co.*, L.R.5 App. Cas. 33 (H.L., 1880).<sup>11</sup>

The U.S. Supreme Court quoted Lord Hatherly’s *Livingstone* decision from the House of Lords more fully in *E.E. Bolles Wooden Ware v. United States*, 106 U.S. 432, 433-434, 1 S. Ct. 398, 27 L. Ed. 230 (1882).<sup>12</sup> The full quotation adds the rule where there is inadvertence (or arguable mistake) behind the conversion, for which “the simple course is to make every just allowance for outlay on the part of the person who has so acquired the property” while giving back to the owner as much of the

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<sup>11</sup> Another non-timber case applying the rule of the higher measure of damages in cases of willful conversion is *Parks v. Yakima Valley Production Credit Ass’n.*, 194 Wash. 380, 392-395, 78 P.2d 162 (1938) (affirming higher measure of damages than the value at time of conversion for willful conversion of hops).

<sup>12</sup> The most recent citation to *Livingstone* was two years ago for its definition of damages as “that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.” See *Petrolane, Inc. v. Robles*, 154 P.2d 1014, 1039 N. 68 (2007), Eastaugh, J., dissenting.

full value of whatever cannot be restored in kind. *Id.*

The distinction between the general rule for damages for conversion from a mistake or honest belief of ownership in the property versus from willful act or fraud is well-stated in a New Hampshire decision, *Beede v. Lamprey*, 64 N.H. 510, 15 A. 133 (1888). After a summary of the English rule and a review of cases from other states, 15 A. at 134-135, the court summarized why the “higher measure of damages” is permitted for cases of willful fraud:

In cases of conversion by willful act or by fraud, the value added by the wrong-doer, after conversion, is sometimes given as exemplary or vindictive damages, or because the defendant is precluded from showing an increase in value by his own wrong, and from claiming a corresponding reduction of damages.

*Beede v. Lamprey, supra*, 15 A. at 135. In that case the court denied the plaintiff requested damages of the increased value in the logs “by the expense of cutting and removal to the mill” because the defendant’s acts were negligent and not willful. *Id.*

The Second Circuit decision of *In re Salmon Weed* which is cited for the “reasonable time” phrase for stock conversion, is fully consistent. That case also must be examined carefully because it has two parts, the main decision and then the decision on rehearing appended to the first decision. The “reasonable time” phrase had to do with taking into account the fluctuating stock value, the ability of the aggrieved party to mitigate their damages by replacing the sold stock with newly acquired stock, and the need to not reward a plaintiff who delayed mitigation. *See* 53 F.2d at

340-341. But the Second Circuit's analysis is predicated on the fact the item converted can be replaced or repurchased, so its language cannot fairly be used to limit the damages for Teresa's options with their valuable time value. However, the bolded language in the decision *infra* recognizes the underlying premise for damages for conversion, the make-whole provision, and thus supports Judge Churchill's decision:

But where the property consists of fluctuating securities like stocks which had advanced in price since the date of notice of the conversion, this measure of damages [value at the time of conversion] is inadequate because insufficient to **restore the owner to the position he would have been in but for the conversion**. He should therefore be given a reasonable opportunity after he has received notice of the conversion to purchase similar securities in the market.

*Id.*, 53 F.2d at 341 (emphasis added).

The Washington cases cited *supra* are consistent and apply the rule that the wrongdoer gets no benefit from the conversion, even if he or she added value to the item, while the victim should be made whole by getting full value for the "value of the whole of the property" taken. Here, that means fixing a value for the valuable but now extinguished time value of the options holder's right to maximize the profit based on choosing the time of exercise.

Judge Churchill followed these central principles. She "fixed" Daniel Farmer with the value of the "whole of the property which he had so furtively taken", which includes Teresa's right to choose the time of exercise, up to the date of expiration. What Daniel loses sight of is that

right of exercise has a value which was quantified by Mr. Nelson and for which Daniel chose to not submit a value. Judge Churchill's damages rulings are wholly consistent with Washington and underlying common law given the unique facts, and should be affirmed.

**D. Any Remand Need Not be Made to a Different Judge.**

Daniel argued that if there is any remand, it should be made to a different judge because the damages imposed by Judge Churchill were punitive, citing *In re Marriage of Muhammed*, 153 Wn.2d 795, 108 P.3d 779 (2005). Opening Brief, p. 30. This argument must be rejected.

First, the damages were not punitive or outside the normal bounds of damages for willful, bad faith conversion as occurred here. Second, this case is not at all like the *Muhammed* case where the Supreme Court remanded to a different judge in order to preserve an appearance of fairness in a highly discretionary redivision of the marital property. In contrast, here Daniel's argument is about the legal issue of the proper measured damages. If a different rule is required, nothing in this record suggests Judge Churchill would not apply it fairly. Since the Supreme Court cautioned in *Muhammed* that any order of remand to a different judge should be done sparingly, and the circumstances are so different that they cannot be equated with that case, and the damages are compensatory, not unlawfully punitive, this argument also fails.

**E. Request for Attorneys Fees on Appeal.**

RAP 18.1 permits an award of attorney's fees on appeal if

permitted by applicable law. Fees are properly awarded based on ¶ 20 of the CR2A Agreement and the unchallenged finding that Daniel frustrated the terms of the agreement in bad faith.<sup>13</sup> FOF XIX, CP 11. The circumstances permit an award of fees to Teresa under the CR 2A Agreement even if the Court reverses some aspect of this case and requires remand for the simple reason that none of these proceedings would have been necessary except for Daniel's intentional misconduct and bad faith. He should be responsible for all the consequences of his actions, including all fees and expenses on appeal.

Teresa alternatively requests fees and costs under RCW 26.09.140, which provides in part that “[u]pon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining an appeal and attorneys fees in addition to statutory costs.” The history of this case demonstrates that fees are also appropriate on appeal for Daniel's intransigence by his conversion and fraud. *In re Marriage of Wallace*, 111 Wn. App. 697, 710, 45 P.3d 1131 (2002), *rev. den.*, 148 Wn.2d 1011 (2003); *In re Marriage of Mattson*, 95 Wn. App. 592, 606-06, 976 P.2d 157 (1999); *Seals v. Seals*, 22 Wn. App. 652, 655,

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<sup>13</sup> Paragraph 20 states as follows at CP 458 and 459:

20. The court will retain continuing jurisdiction to enforce the terms and conditions of this agreement. Disputes as to the terms of this agreement shall be resolved on the motion calendar. The court may award attorney's fees in the event the court concludes in its discretion that either party has by his or her actions frustrated the terms of this agreement and or had acted in bad faith.

658, 590 P.2d 1301 (1979) (fees awarded on appeal where husband fraudulently concealed assets during the dissolution, forcing the wife to bring a separate action after the divorce was final, noting that the new action must be seen as a continuation of the original dissolution action, and “to hold otherwise would be to penalize Mrs. Seals for the fraudulent conduct of Mr. Seals.”).

**V. CONCLUSION.**

Teresa Farmer wants to be made whole and not be penalized for any of Daniel’s fraud. Nothing more; nothing less. She therefore respectfully asks this Court to affirm the judgment below and award her the attorney’s fees and costs she incurred on appeal.

DATED this 4<sup>th</sup> day of July, 2009.

CARNEY BADLEY SPELLMAN, P.S.

By: Gregory M. Miller  
Gregory M. Miller, WSBA No. 14459  
Counsel for Respondent Teresa Farmer

COHEN, MANNI, THEUNE & MANNI, LLP

By: Kenneth A. Manni  
Kenneth A. Manni, WSBA No. 9511  
Trial Counsel for Respondent Teresa Farmer

NO. 61638-2-I

WASHINGTON STATE COURT OF APPEALS, DIVISION I

In re the Marriage of:

TERESA FARMER

Respondent,

v.

DANIEL J. FARMER,

Appellant.

CERTIFICATE OF SERVICE

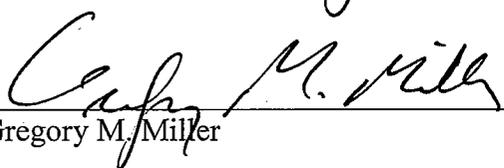
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STATE OF WASHINGTON  
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I declare under penalty of perjury that I caused copies of Teresa Farmer's Response Brief, and this Certificate of Service by causing a true copy thereof to be served to counsel of record on Feb. 4, 2009, as follows:

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Catherine Wright Smith, WSBA #9542 Edwards, Sieh, Smith & Goodfriend PS 1109 1 <sup>st</sup> Avenue, Suite 500 Seattle, WA 98101-2988 P: (206) 624-0974 F: (206) 624-0809 Email: <a href="mailto:cate@washingtonappeals.com">cate@washingtonappeals.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> Fax <input type="checkbox"/> Email <input type="checkbox"/> Other

Kenneth A. Manni, WSBA #9511 Cohen, Manni, Theune & Manni, LLP PO Box 889 Oak Harbor, WA 98277-0889 P: (360) 675-9088 F: (360) 679-6599 Email:	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> Fax <input type="checkbox"/> Email <input type="checkbox"/> Other
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DATED this 4<sup>th</sup> day of February, 2009.

  
\_\_\_\_\_  
Gregory M. Miller

**APPENDICES**

APPENDIX A: Findings of Fact and Conclusions of Law,  
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APPENDIX B: Declaration of Roland Nelson, March 21,  
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APPENDIX C: Supplemental Declaration of Roland  
Nelson, June 5, 2007, CP 79-82.....C-1 – C-4

APPENDIX D: Declaration of Roland Nelson, April 10,  
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APPENDIX E: Transcript Excerpts, October 13, 2006  
hearing, CP 696-698 ..... E-1 – E-3

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SUPERIOR COURT OF WASHINGTON  
COUNTY OF ISLAND

In re the Marriage of:

TERESA FARMER,

Petitioner,

and

DANIEL J. FARMER,

Respondent.

NO. 04-3-00086-4

FINDINGS OF FACT,  
CONCLUSIONS OF LAW

THIS MATTER having come on regularly before the undersigned judge on the Petitioner's motion for the entry of an order for relief from judgment; the petitioner appearing by and through her attorney of record Kenneth A. Manni of Cohen, Manni & Theune; the respondent appearing by and through his attorney of record of Douglas A. Saar, the court having reviewed the records and files herein and the argument of counsel, does hereby make the following findings of fact.

I.

On July 21, 2006, the parties, through their respective counsel entered into a valid CR2A Agreement.

II.

The final decree of dissolution of marriage was entered October 13, 2006, approximately three months after the CR2A Agreement was entered into by and between the parties.

FINDINGS OF FACT - Page 1

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ORIGINAL

1 III.

2 The Decree of Dissolution of Marriage provided for division of all of the parties  
3 assets and debts including several thousand PACCAR stock options, a portion of which  
4 were awarded to the petitioner wife as her sole and separate property and a portion of which  
5 were awarded to the respondent husband as his sole and separate property.

6 IV.

7 The final decree of dissolution adopted the CR2A provisions, including, but not  
8 limited to paragraph 8 of Exhibit B of the decree of dissolution of marriage which reads in  
9 pertinent part as follows:

*The wife shall receive one-half of the following community stock options:*

<u>Option Date</u>	<u>Type</u>	<u>Granted</u>	<u>Price</u>	<u>Expiration Date</u>	<u>Wife's Share</u>
4/27/1999	NQ	1,710.00	\$23.9028	4/27/2009	855
1/25/2000	NQ	2,029.0	\$18.5555	1/25/2010	1014
1/24/2001	NQ	1,707.0	\$22.9445	1/24/2011	854
*1/23/2002	NQ	4027.0	\$28.2045	1/23/2012	1510 to wife
1/15/2003	NQ	3513	\$31.4000	1/15/2013	723 to wife
1/15/2004	NQ	1992.0	\$56.9533	1/15/2014	83 to wife

14  
15 *The wife will direct the husband when she wishes to exercise her options. The wife  
16 shall be solely responsible for all costs and taxes associated with exercising her  
17 options. The husband must declare the transfer on his tax return and pay taxes on  
18 the transfer, the wife shall be responsible for the taxes. The husband shall provide  
19 the wife with the information on the taxes on the transfer. If the options are cashed,  
20 the husband shall hold back an amount equivalent to the taxes he expects to pay on  
the transfer. At the time the husband's taxes are filed, he shall provide proof of the  
actual tax consequences and the wife shall either pay any additional amount owned  
or receive a refund from the husband if she overpaid. All remaining stock options  
are the husband's separate property.*

21 V.

22 Immediately prior to the final hearing on entry of the final orders on October 13,  
23 2006, Petitioner's counsel subpoenaed respondent's bank records and discovered that the  
24 respondent had made a deposit of approximately \$491,000 into his bank.

25 VI.

26 At the time of the hearing before the court on October 12, 2006 when this matter  
was brought to the court's attention, the respondent, through counsel advised the court that

1 the above described funds were derived from the respondent's sale of his share of the  
2 PACCAR stock options which were awarded to respondent.

3 VII.

4 The court directed the respondent to produce all of the documentation concerning  
5 the foregoing transaction within seven (7) days of the October 12, 2006.

6 VIII.

7 The respondent failed and refused to comply with the court's directive.

8 IX.

9 On December 18, 2006 on motion by the petitioner, the court entered an order on  
10 petitioner's motion compelling respondent to produce stock option sale documentation, et  
11 al.

12 X.

13 Pursuant to the foregoing order, the respondent was directed to produce:

14 *Produce every document, letter, memorandum, etc. regarding the sale of any and all*  
15 *PACCAR stock options. The documents shall be delivered to Petitioner's attorney*  
16 *within seven (7) days of this order.*

17 XI.

18 The respondent refused to comply with the December 18, 2006 order referred to above.

19 XII.

20 On January 29, 2007 on Petitioner's motion, the court entered an order on motion  
21 for contempt finding the respondent in contempt as a result of his refusal to comply with the  
22 December 18, 2006 order, again ordered the respondent to produce all documentation and  
23 further ordered that the respondent shall further pay sanctions in the amount of \$100 per day  
24 for each day all documentation previously ordered on December 18, 2006 is not delivered to  
25 petitioner commencing January 30, 2007.

26 XIII.

Subsequent to the entry of the decree of dissolution of marriage, on or about  
October 24, 2006, the respondent filed a motion, together with an affidavit, dated October  
24, 2006 wherein the respondent identified and admitted for the first time that the  
respondent had sold all of the parties' PACCAR stock options, not simply the PACCAR

1 stock options which were awarded to him pursuant to the CR2A Agreement as noted in  
2 finding of fact No. III above. In the respondent's declaration he admitted that he had sold  
3 all of the parties' PACCAR stock options in August of 2006 after the parties had entered  
4 into the CR2A Agreement, but prior to the entry of the final decree of dissolution of  
5 marriage on October 13, 2006.

6 XIV.

7 The respondent had no authority from the petitioner or petitioner's counsel directing  
8 him to exercise the stock options which were awarded to the petitioner pursuant to the  
9 parties' CR2A Agreement.

10 XV.

11 The respondent exercised the stock options on August 14, 2006 deriving from the  
12 sale of said stock options the sum of One Million Seventy Thousand Three Hundred One  
13 Dollars and 18/100<sup>th</sup> (\$1,070,301.18) \$625,636.55 was viewed as a combination as the cost  
14 of exercising the stock options and hold back for federal taxes. The remaining \$444,664.63  
15 was deposited into the respondent's bank account. Of that amount, the respondent admitted  
16 having expended approximately \$170,000 for the purchase of real property, leaving a  
17 balance of approximately \$274,664.63. The options were exercised at \$82.476 per share.  
18 The respondent received total option income of \$729,456.46. 37.5% of the gross proceeds  
19 were held back for federal taxes or \$273,546.17. In addition, the stock options were also  
20 subject to FICA and Medicare which amounts to 1.45% of the total distribution or \$10,577.

21 XVI.

22 On August 25, 2006, approximately 11 days after all of the stock options were  
23 exercised by the respondent, the respondent forwarded an email to the petitioner which read  
24 as follows:

25 *Just so you can see the history to help you decide. Are you going to cash out the*  
26 *stock or stock options? You might want to read the documents that were sent to*  
*Ken by PACCAR.*

XVII.

On September 7, 2006, approximately three weeks after all of the stock options  
were exercised, the respondent forwarded another email to the petitioner which read as  
follows:

1 As you said early in the separation, we were heavily leveraged with PACCAR stock.  
2 It went as high as \$88.35 per share and now is back down to about \$55. As it was  
3 downgraded again today, you might want to consider what to do with your  
4 "shares." Read the paperwork about options. Once the divorce is final, option  
5 shares are not inheritable for anyone other than my spouse so if anything happened  
6 to me, your options would be gone. Or if I was laid off, you would need to sell  
7 within 30 days. It is public information that the 2007 emissions regulations will be  
8 very tough on truck manufacturers. I think I am going to hold on to the other side  
9 of 2008, but the choice is yours. Hold on with the risk, or sell on the way down. Let  
10 me know.

XVIII.

11 On March 20, 2007, the petitioner filed a motion and declaration for relief from  
12 judgment pursuant to Washington State Superior Court Rule 60(b)(1)(3)(4). The matter was  
13 originally scheduled to be heard on April 2, 2007, but was continued to April 16, 2007 at the  
14 request and for the convenience of respondent and respondent's counsel. Petitioner's  
15 motion referred to above was heard by the court on April 16, 2007 as was respondent's  
16 motion to finalize PACCAR stock, for entry of judgment, to amend decree and for  
17 attorney's fees.

XIX.

18 As a direct and proximate result of the respondent's unauthorized sale of the  
19 petitioner's share of the PACCAR stock options, and the respondent's fraudulent conduct,  
20 the petitioner has been substantially and irrevocably damaged insofar as she is now unable  
21 to exercise the stock options which were awarded to her pursuant to the terms and  
22 conditions of the parties' CR2A Agreement and the Decree of Dissolution of Marriage. All  
23 of the stock options have been exercised and their exercise is final and irrevocable.

XX.

24 Had the petitioner been in a position to exercise the stock options on the day before  
25 each group of stock options expired, petitioner would have been able to realize  
26 approximately \$617,553.00 on future exercises dating from April 26, 2009, to January 13,  
2013, using an estimated Federal tax rate of 35% plus Medicare of 1.56%. The present  
value of the \$617,553 is \$487,325.

XXI.

27 In support of petitioner's motion, petitioner submitted the declarations of Roland T.  
28 Nelson, CPA, CFP, said declarations are dated March 21, 2007 and June 5, 2007.

29 *Submitted declaration of Steven T. Kessler (6/29/07) STRICKEN IN PART BY ORDER  
DATED 9/10/2008*  
30 *PETITIONER SUBMITTED DECLARATION OF ROLAND NELSON  
DATED 9/10/2008*  
31 *FINDINGS OF FACT - Page 5*  
32 *The COHEN, MANNI & THEUNE Law Firm*  
33 *P.O. Box 889*  
34 *Oak Harbor, Washington 98277*  
35 *Phone: (360) 675-9088, Fax: (360) 679-6599*

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XXII.

The respondent did not challenge the findings of Roland T. Nelson by submission of a sworn declaration from any CPA or any similarly qualified professional challenging the assumptions, findings and conclusions of Mr. Nelson.

XXIII.

The court adopts the findings of Roland T. Nelson CPA identified in the document entitled "Declaration of Roland T. Nelson, CPA, CFP", dated March 21, 2007 and the "Supplemental Declaration of Roland T. Nelson, CPA, CFP" dated June 5, 2007, <sup>AND</sup> which findings are incorporated by reference herein as if fully set forth herein. ~~the declaration~~ of Roland Nelson dated 4/10/2008

25  
28

The court finds that the petitioner should be awarded judgment against the respondent as result of the respondent's fraudulent conduct described above. Said judgment should be in the amount of \$487,325.

XXV.

The court finds that the respondent's conduct referred to above was fraud, visited not only upon the court but also upon the petitioner insofar as after the respondent sold all of the parties stock options; the respondent made no less than two attempts to persuade the petitioner to authorize the respondent to sell her shares of the stock options in spite of the fact that all of the stock options had already been exercised by the respondent.

XXVI.

Further, the court finds the respondent's conduct fraudulent because when the deposit of approximately \$444,000 was identified to the court by petitioner's attorney, the respondent lied to the court in advising the court that those sums represented the sale of only the respondent's share of the stock options when in fact those sums represented the net proceeds available from all of the stock options, both the respondent's and the petitioner's.

XXVII.

The court finds that the respondent committed fraud pursuant to Washington Superior Court Civil Rule (b)(4) and that the petitioner is entitled to relief from the decree of dissolution of marriage based upon that provision.

12

1 XXVIII.

2 The court finds that the petitioner is entitled to relief from the provision of the  
3 decree of dissolution of dissolution of marriage prayed for based on Washington Superior  
4 Court Civil Rule 60(b)(1), insofar as the admission that the respondent had sold all of the  
5 PACCAR stock on or about October 24, 2006 constituted "surprise" based upon the  
6 affirmative representation of the respondent made prior to the entry of the decree of  
7 dissolution of marriage.

8 XXIX.

9 The court finds that the petitioner is entitled to relief pursuant to Washington  
10 Superior Court Civil Rule 60(b)(3) insofar as the discovery that the respondent sold all of  
11 the PACCAR stock constituted newly discovered evidence which by due diligence could not  
12 have been discovered in time to move for a new trial under CR59(b).

13 XXX.

14 The court finds that it is fair and reasonable to award the petitioner attorney's fees  
15 in the amount of \$7750.00 and costs in the amount of \$204400.

16 ~~BASED UPON THE FOREGOING FINDINGS OF FACT, THE COURT ADOPTS~~  
17 ~~THE FOLLOWING CONCLUSIONS OF LAW:~~

18 I.

19 The petitioner is entitled to relief from the portion of the decree of dissolution of  
20 marriage which awards to her PACCAR stock options pursuant to Washington Superior  
21 Court Rule 60(b)(1): surprise.

22 II.

23 The petitioner is entitled to relief from the portion of the decree of dissolution of  
24 marriage which awards to her PACCAR stock options pursuant to Washington Superior  
25 Court Rule 60(b)(3): newly discovered evidence.

26 III.

The petitioner is entitled to relief from the portion of the decree of dissolution of  
marriage which awards to her PACCAR stock options pursuant to Washington Superior  
Court Rule 60(b)(4), fraud, with a heretofore demoninated extrinsic, misrepresentation; or  
other misconduct of an adverse party.

FINDINGS OF FACT - Page 7

The COHEN, MANNI & THEUNE Law Firm

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IV.

It is just, fair and equitable to award to the petitioner judgment against the respondent in the sum of \$487,325.00, said sum representing the amounts which the petitioner would have realized on future exercises of stock options awarded to her pursuant to the terms and conditions of the decree of dissolution of marriage from April 26, 2009 to January 13, 2013 using an estimated federal tax rate of 35% plus Medicare of 1.56%.

V.

It is just, fair and equitable to award to the petitioner 100% of the funds presently maintained in the trust account of Skinner & Saar PS, or under the direction and control of respondent's attorney, Douglas A. Saar. It is just, fair and equitable for the funds described above to be immediately disbursed by the respondent's attorney to the petitioner, the amount of ~~\$120,326.07~~ shall be disbursed within 10 days of the entry of the order on petitioner's relief from judgment.

VI.

It is just, fair and equitable to award judgment to the petitioner <sup>in the amount</sup> ~~for the balance~~ of \$487,325 minus \$ \_\_\_\_\_ or the sum of \$ \_\_\_\_\_. Said judgment will accrue interest at the rate of 12% per annum from the date of this judgment until paid in full.

VII.

It is just, fair and equitable to award judgment to the petitioner for attorney's fees and costs in the amount of \$9794.57 Said judgment shall accrue interest at the rate of 12% per annum from the date of this judgment until paid in full.

DONE IN OPEN COURT this 14 day of April 2008

*Dickie J. Churchill*

JUDGE

Presented by

*Kenneth A. Manni*

Kenneth A. Manni, WSBA #9511  
Attorney for Petitioner

Approved for Entry, Notice Waived

*Douglas Saar*

Douglas Saar, WSBA # 28221  
Attorney for Respondent

FINDINGS OF FACT - Page 8

The COHEN, MANNI & THEUNE Law Firm

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Oak Harbor, Washington 98277  
Phone: (360) 675-9088, Fax: (360) 679-6599

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**FILED**

MAR 22 2007

SHARON FRANZEN  
ISLAND COUNTY CLERK

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SUPERIOR COURT OF WASHINGTON  
COUNTY OF ISLAND

In re:	
TERESA FARMER	NO. 04-3-00086-4
and	DECLARATION OF ROLAND T. NELSON, CPA, CFP
DANIEL J. FARMER	
Respondent.	

PURSUANT TO RCW 9A.72.085, I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT.

Affiant is a a certified public accountant (CPA), licensed in the state of Washington. Affiant is also a certified financial planner. A copy of affiant's curriculum vitae is attached hereto as **Exhibit A** and incorporated by reference as if fully set forth herein.

At the request of counsel for the petitioner, affiant reviewed all of the documents regarding the premature exercise of PACCAR stock options awarded to Teresa Farmer in her divorce from Daniel J. Farmer.

The terms of the stipulated CR2A agreement, dated July 18, 2006 and the decree dated October 13, 2006, provided that Teresa Farmer would determine when her shares of

*DECLARATION OF ROLAND NELSON - Page 1*

ORIGINAL

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The COHEN, MANNI & THEUNE Law Firm  
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Oak Harbor, Washington 98277  
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Mr. Farmer realized a net, after exercise price and taxes of \$444,664. Tax was withheld at 37.5%, plus Medicare tax of 1.45%. It is not possible to determine the correct withholding until a tax return is prepared, so we do not know if the withholding was excessive.

Of the net amount realized, Teresa farmer's share, based on the shares awarded to her is \$173,298 (plus any adjustment for over-withholding of federal income tax).

We have computed that over the last 10 years (March 6, 1997 to March 6, 2007) PACCAR had a rate of return of 20.235% per annum. If Ms. Farmer had held her options until the day before expiration, and the rate of return remained consistent, Ms. Farmer would have realized \$617,553 on future exercises (dating from April 26, 2009 to January 14, 2013) using an estimated federal tax rate of 35% plus Medicare tax of 1.45%.

Attached hereto as **Exhibit B** and incorporated by reference herein as if fully set forth herein are the schedules and affiant's calculations.

All of the opinions expressed in this declaration are made to a reasonable accounting certainty.

Dated at Bellevue, WA on this \_\_\_ day of March 2007

see attached signature

Roland T. Nelson, CPA, CFP

...PENALTY OF PERJURY I state that  
I have delivered a copy of this document  
to the attorney for Respondent on the  
21 day of March, 2007  
R. Nelson

DECLARATION OF ROLAND NELSON - Page 2

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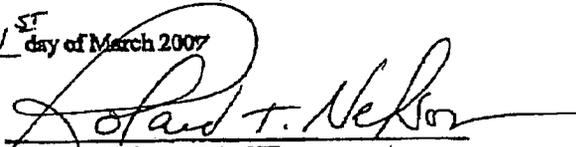
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Attached hereto as Exhibit B and incorporated by reference herein as if fully set forth herein are the schedules and affiant's calculations.

All of the opinions expressed in this declaration are made to a reasonable accounting certainty.

Dated at Bellevue, WA on this 21<sup>ST</sup> day of March 2007

  
Roland T. Nelson, CPA, CFP

DECLARATION OF ROLAND NELSON - Page 2

The COHEN, MANNI & THEUNE Law Firm  
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# **ROLAND T. NELSON, CPA/PFS, CFP**

## **ABRAMSON PENDERGAST & COMPANY CERTIFIED PUBLIC ACCOUNTANTS**

3000 Northup Way – Suite 100

Bellevue, Washington 98004

Phone (425) 828-9420

Fax (425) 827-6884

rnelson@apccpa.com

## **CURRICULUM VITAE**

### **EDUCATION**

St. John's University, New York – BBA (Accounting) 1956

New York University – Graduate Business School – Major Federal Taxation

### **CURRENT EMPLOYMENT**

Principal – Abramson Pendergast & Company, CPA's

President – Nelson & Nelson CPA's, P.S., Seattle, Washington.

Practice limited to

- Litigation support services
- Domestic relations
- Valuation of closely held businesses and professional practices for dissolutions, estate and gift tax returns, S Corporation elections, and purchases and sales of closely held businesses
- Settlement conferences
- Lost wages analyses
- Commercial claims
- Buy-Sell Agreements – valuations
- Present value calculations for defined benefit pension plans
- Stock option and 401(k) plan analyses
- Tracing for separate property issues

### **PROFESSIONAL AFFILIATIONS**

- American Arbitration Association
- American Institute of Certified Public Accountants
- Business Valuation Certificate of Educational Achievement (AICPA)
- Certified Financial Planner – 1988
- Certified Public Accountant – Washington – 1965
- National Association of Certified Valuation Analysts

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Exhibit A

**ROLAND T. NELSON, CPA/PFS, CFP**

Curriculum Vitae

Page 2

- Personal Financial Specialist (AICPA)
- Washington State Society of CPA's Litigation Services Committee
- Washington State Society of CPA's Advisory Council 2003-2004

**SPEECHES ON BUSINESS VALUATION TECHNIQUES AND ISSUES**

- American Society of Women Accountants
- East King County Bar Association
- IRS/WSCPA Seminar – Estate and Gift Tax Evaluation
- King County Bar Association – Family Law Institute
- Legal Education Institute, Inc.
- National Association of Personal Financial Advisors, Vancouver, B.C.
- National Business Institute – Business Valuations and Divorce Taxation
- Pierce County Bar Association – Professional Valuations
- Seattle-King County Bar Association
- Seattle University – School of Law
- The National Lawyers Guild
- WSCPA Litigation Services Conferences
- Women Lawyers of Snohomish County

**PROFESSIONAL EXPERIENCE**

- Nelson & Nelson, CPA's, P.S. (1980 - present)
- Roland T. Nelson, CPA (1975 - 1979)
- Founding partner – Nelson, Eliason, Bennett & Hammack, CPA's (1967 - 1974)
- Controller – Jack A. Benaroya Company (1964 - 1967)
- Peat, Marwick, Mitchell & Co., CPA's, New York

**QUALIFIED AS EXPERT WITNESS**

- Benton, Franklin, Island, Jefferson, King, Kitsap, Pierce, San Juan and Snohomish counties
- Federal Bankruptcy Court

**HONORS AWARD**

- Washington State Bar Association – Family Law Section – Professional of the Year Award 2003-2004

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**Teresa Farmer and Daniel J. Farmer Dissolution**

**Estimate of loss to Teresa Farmer due to options being exercised prematurely**

<u>Grant Date</u>	<u>Total Number of Options at Dissolution</u>	<u>Awarded To Wife</u>	<u>% To Wife</u>	<u>Wife's 3 for 2 split adjusted</u>	<u>Split Adj. Exercise Price</u>	<u>Selling Price</u>	<u>Net Am Realized share - 8</u>
4/27/99	1710	855	50%	1283	\$15.9352	54.984	\$30,5
1/25/00	2029	1014	50%	1521	12.3703	54.984	39,5
1/24/01	1707	854	50%	1280	15.2963	54.984	30,9
1/23/02	4027	1510	37%	2265	18.8030	54.984	49,2
1/15/03	3513	732	21%	1098	20.9333	54.984	22,9
1/15/04	<u>1992</u>	<u>83</u>	4%	<u>125</u>	37.9700	not sold	<u>0</u>
	14978	<u>5048</u>		<u>7572</u>			<u>\$173,</u>
Less not exercised	<u>-1992</u>						
	<u>12986</u>						
Split Adjusted	<u>19477</u>						

Total # shares sold by husband on 8/14/2006

**Teresa Farmer and Daniel J. Farmer Dissolution**

**Estimate of loss to Teresa Farmer due to options being exercised prematurely**

<u>Grant Date</u>	<u>Wife's 3 for 2 split adj.</u>	<u>Split Adj. Exercise Price</u>	<u>Expiration Date</u>	<u>Projected price at day before Expiration (1)</u>	<u>Gross Selling amount</u>	<u>Exercise Cost</u>	<u>Estimate Tax (</u>
4/27/99	1283	\$15.9352	4/27/09	\$102.21	\$131,135	\$20,445	\$40,3
1/25/00	1521	12.3703	1/25/10	117.26	178,352	18,815	58,1
1/24/01	1280	15.2963	1/24/11	140.92	180,378	19,579	58,6
1/23/02	2265	18.8030	1/23/12	169.35	383,578	42,589	124,2
1/15/03	1098	20.9333	1/15/13	202.85	222,729	22,985	72,8
1/15/04	<u>125</u>	37.9700	1/15/14	Not sold			
	7572						

Based on projected rate of return of 20.235% per annum from March 6, 2007

35% Federal income tax and 1.45% Medicare tax

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SUPERIOR COURT OF WASHINGTON  
COUNTY OF ISLAND

In re the Marriage of:

TERESA FARMER,

Petitioner,

and

DANIEL J. FARMER,

Respondent.

NO. 04-3-00086-4

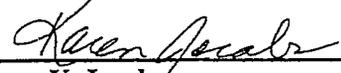
GR17 AFFIDAVIT RE: Declaration of  
Roland T. Nelson, CPA, CFP

Affidavit of facsimile pursuant to GR 17:

Pursuant to RCW 9A.72.085, I certify under penalty of perjury under the laws of the state of Washington that the following is true and correct.

I, Karen Y. Jacobs, am secretary for Kenneth A. Manni who is the attorney of record for Teresa Farmer, petitioner herein. I received the foregoing document from Roland T. Nelson by facsimile. I further declare that prior to signing this affidavit, I did examine the document, determined that it consisted of 7 pages, including this affidavit page, and that the document was complete and legible.

SIGNED at Oak Harbor, Washington this 21 day of March, 2007

  
\_\_\_\_\_  
Karen Y. Jacobs  
Post Office Box 889  
Oak Harbor, Washington 98277  
Telephone: 360-675-9088  
Facsimile: 360-679-6599

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The COHEN, MANNI & THEUNE Law Firm  
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Oak Harbor, Washington 98277  
Phone: (360) 675-9088. Fax: (360) 679-6599

**FILED**

JUN 08 2007

SHARON FRANZEN  
ISLAND COUNTY CLERK

SUPERIOR COURT OF WASHINGTON  
COUNTY OF ISLAND

In re:

TERESA FARMER

and

DANIEL J. FARMER

Petitioner,

Respondent.

NO. 04-3-00086-4

SUPPLEMENTAL DECLARATION OF  
ROLAND T. NELSON, CPA, CFP

PURSUANT TO RCW 9A.72.085, I CERTIFY UNDER PENALTY OF PERJURY  
UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE  
FOLLOWING IS TRUE AND CORRECT.

Affiant is a certified public accountant (CPA), licensed in the state of Washington.  
Affiant is also a certified financial planner.

I have previously provided this court with a sworn declaration concerning the  
calculation of the net after tax loss suffered by Ms. Teresa Farmer. My prior declaration  
concerning the calculation of that loss is dated March 21, 2007.

I have been requested to calculate the present value of the future net after tax loss  
suffered by Ms. Teresa Farmer. I have calculated the present value utilizing a 6% per  
annum discount figure to determine the present value of the future net after tax loss  
suffered by the petitioner.

*DECLARATION OF ROLAND NELSON - Page 1*

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The following is the schedule for the calculation. The net present value of the future \$617,553 loss has been determined to be \$487,325.

Expiration Date	Present Value Date	Future Net After Tax	May 10, 2007 Present Value
4/27/2009	5/10/2007	\$70,344	\$62,723
1/25/2010	5/10/2007	\$101,386	\$86,535
1/24/2011	5/10/2007	\$102,187	\$82,294
1/23/2012	5/10/2007	\$216,698	\$164,662
1/15/2013	5/10/2007	\$126,938	\$91,111
Totals:		\$617,553	\$487,325

Dated at Bellevue, WA on this 5 day of June 2007

see attached signature  
Roland T. Nelson, CPA, CFP

DECLARATION OF ROLAND NELSON - Page 2

The COHEN, MANNI & THEUNE Law Firm

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JUN. 5. 2007 12:28PM

COHEN MANNI & THEUNE

NO. 172 P. 3

1 The following is the schedule for the calculation. The net present value of this  
2 future \$617,553 loss has been determined to be \$487,325.

Expiration Date	Present Value Date	Future Net After Tax	May 10, 2007 Present Value
4/27/2009	5/10/2007	\$70,344	\$62,723
1/25/2010	5/10/2007	\$101,386	\$86,535
1/24/2011	5/10/2007	\$102,187	\$82,294
1/23/2012	5/10/2007	\$216,698	\$164,662
1/15/2013	5/10/2007	\$126,938	\$91,111
Totals:		\$617,553	\$487,325

10 Dated at Bellevue, WA on this 5<sup>th</sup> day of June 2007

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 13 Roland T. Nelson, CPA, CFP

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26 DECLARATION OF ROLAND NELSON - Page 3

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SUPERIOR COURT OF WASHINGTON  
COUNTY OF ISLAND

In re the Marriage of:

TERESA FARMER

Petitioner,

and

DANIEL J. FARMER

Respondent.

NO. 04-3-00086-4

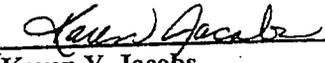
GR 17 DECLARATION  
Document: Declaration of Roland T.  
Nelson, CPA, CFP

Affidavit of facsimile pursuant to GR 17:

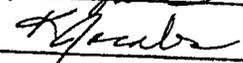
Pursuant to RCW 9A.72.085, I certify under penalty of perjury under the laws of the state of Washington that the following is true and correct.

I, Karen Y. Jacobs, am secretary for Kenneth A. Manni who is the attorney of record for Teresa Farmer, petitioner. I received the Declaration of Roland T. Nelson, CPA, CFP by facsimile. I further declare that prior to signing this declaration, I did examine the document, determined that it consisted of 3 pages, including this declaration page, and that the document was complete and legible.

SIGNED at Oak Harbor, Washington this 5 day of June 2007.

  
\_\_\_\_\_  
Karen Y. Jacobs  
Post Office Box 889  
Oak Harbor, Washington 98277  
Telephone: 360-675-9088  
Facsimile: 360-679-6599

UNDER PENALTY OF PERJURY I state that  
~~mailed/faxed~~ delivered a copy of this document  
to attorney for Respondent on the  
7 day of June, 2007

  
\_\_\_\_\_

GR 17 Declaration- Page 1

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**FILED**

APR 14 2008

SHARON FRANZEN  
ISLAND COUNTY CLERK

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR ISLAND COUNTY**

In the Matter of the Marriage of	)	NO. 04-3-00086-4
	)	
TERESA FARMER,	)	
	)	DECLARATION OF ROLAND T. NELSON,
Petitioner,	)	CPA, CFP
and	)	
	)	
DANIEL J. FARMER,	)	
	)	
Respondent.	)	
	)	
	)	

PURSUANT TO RCW 9A.72.085, I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT.

Affiant is a certified public accountant (CPA), licensed in the state of Washington. Affiant is also a certified financial planner.

I have previously provided this court with a sworn declaration concerning the calculation of net after tax loss suffered by Ms. Teresa Farmer. My prior declaration concerning the calculation of that loss is dated March 21, 2007. In that declaration I identified the value of Ms. Farmer's loss to be \$617,553.

I have also previously provided the court with a sworn declaration concerning the present value of the future net after tax loss suffered by Ms. Teresa Farmer. That declaration is dated June 5, 2007.

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ORIGINAL 21

1 In that declaration I identified the present value using a 6% per annum discount figure to determine the  
2 present value of net after tax loss suffered by the petitioner to be \$487,325.

3 I have reviewed the June 29, 2007 report of Steven J. Kessler Re: Net Present Value of Stock  
4 Options. I am mindful that on September 10, 2007 the court entered an order striking portions of the  
5 report of Steven J. Kessler including the following:

- 6 1. All of the exhibits identified on page 1.
- 7 2. All of the section entitled "Critique of Roland Nelson Damage Analysis" contained on page 2  
8 and page 3.
- 9 3. All of the section entitled "Mitigation of Damages" contained on page 4.
- 10 4. Each of the exhibits identified as Exhibit I through Exhibit VIII which were attached to Mr.  
11 Kessler's report.

12 The only sections which the court retained in the Kessler report were the following:

- 13 1. Page 1 identifying Mr. Kessler's background, the documents he reviewed and significant facts
- 14 2. Page 1 "Information Relied On" through page 2 with the words "My findings are as follows"
- 15 3. Page 3 and 4, "Critique of Roland Nelson Present Value Analysis"
- 16 4. Page 5 "Conclusion"

17 The purpose of this declaration is to provide the court with a reply to that portion of the Kessler  
18 report identified as follows:

19 *Critique of Roland Nelson Present Value Analysis [contained on pages 3, 4 of Kessler report]*

20 By way of background, the court identified in the September 10, 2007 oral ruling on petitioner's  
21 motion to strike portions of the Kessler report, the following:

22 *I am striking the critique in the declaration of Mr. Kessler. I am striking the entire paragraph  
23 or paragraphs on Critique of Roland Nelson, Damage Analysis...I am leaving in the Critique of  
24 Roland Nelson, Present Value Analysis, which is what I asked for.*

25 *The concern I had was that there would be a present value calculation and that it really  
26 depended on the discount rate that was used and I allowed that additional information. I did not  
allow any other additional information because the time had passed for that.*

Mr. Kessler states the following in connection with his critique of my present value analysis:

*I disagree with his use of a 6% discount rate...In this case, I do not believe any investor would  
accept a 6% discount rate for a stock investment. [emphasis added]*

The information upon which Mr. Kessler relies for this conclusion all relates to factors which are not

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1 pertinent to this case:

2 *The discount rates typically apply to different types of companies show significant*  
3 *changes[emphasis added]*

4 *Startups*  
5 *Early startups*  
6 *Late startups*  
7 *Mature companies*

8 *Beta: the measurement of how a company's stock price reacts to a change in the*  
9 *market.[emphasis added]*

10 *In the case of a stock investment such as PACCAR there are several risks to consider.*

11 *There is market risk as the overall stock market could decline or even collapse.*

12 *There is a specific risk because PACCAR could fail to be competitive.*

13 *I personally believe there is significant risk in the market.*

14 *I do not believe any investor would accept a 6% discount rate for a stock investment.*

15 In the final analysis, Mr. Kessler utterly and entirely misses the point. The point is, that the court has  
16 already determined the financial loss of the petitioner to be \$617,553. The loss will ultimately be  
17 expressed in the form of a judgment, having a guaranteed rate of return by statute. A judgment is not a  
18 "stock investment". A judgment is not subject to "market risk". A judgment is not subject to "market  
19 decline". A judgment is not an investment in any type of company (startup, early startup, late startup, or  
20 mature company). A judgment is not subject to reduced marketability, limited number of investors  
21 willing to invest, high risks or optimistic forecasts by enthusiastic founders. A judgment is simply a  
22 fixed number established by the court which bears a fixed interest established by statute. There is no  
23 risk, there is no company. There is no market analysis. A court judgment is the functional equivalent  
24 of a certificate of deposit. Interestingly, Mr. Kessler acknowledges:

25 *Today in the case of a CD a 6% discount may be appropriate...*

26 Virtually all of Mr. Kessler's "critique" of my analysis of a 6% discount rate is based upon Mr.  
Kessler's attempt to attack the damage analysis. The issues he raises have nothing whatsoever to do  
with present value analysis because a judgment is not an investment in stock. However, his criticisms  
have everything to do with an attack on the damage analysis. The court has already ruled on the

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1 measure of damages and accordingly all of Mr. Kessler's critique of my discount rate analysis is  
2 incorrect.

3 In virtually every case that I am associated with, pensions and all other things of this type, the  
4 court always accepts a 6% discount rate back to a present cash number and again the theory is that if  
5 you had that amount of dollars you could invest them and with safety get a 6% yield and that would  
6 bring you up in the future to the judgment number. I have provided expert testimony in connection with  
7 this matter for a number of years, typically in connection with pensions. I typically testify between 20 -  
8 30 times a year on pensions. A pension is a future "sum certain". For instance, when a retiree hits 65  
9 he is going to get \$1,000 a month for lifetime. If he is going to receive \$1,000 for his life, what is the  
10 present value? We always use a 6% discount rate. Mr. Kessler uses the same 6% discount in that type  
11 of case when he has a sum certain in the future. I have been involved in many cases where Mr. Kessler  
12 has either used or has agreed that a 6% discount rate is appropriate in connection with ascertaining  
13 present value of a "sum certain". In point of fact, Mr. Kessler and I dominate the present value  
14 calculations for defined benefit pensions in the Seattle market. I personally do over 400 pensions a  
15 year, defined benefit, present value calculations, and every one, without exception, is at a 6% discount.  
16 Everyone that I have seen that Mr. Kessler has done has been at a 6% discount. There are exceptions,  
17 for instance under President Carter when the prime rate was 14% we were not using a 6% discount  
18 because you could buy a 5 year CD and get 13%. That is no longer the case and has not been the case  
19 for many years. Statistically, over the last 5 - 6 years I can advise the court with certainty that I have  
20 used 6% present value discount rate when I have a sum certain and I am bringing that back to a sum  
21 today to establish present value.

22 In connection with the affidavit which I provided to the court dated June 5, 2007, the discount  
23 was calculated by using an analysis of the expiration date for the various stock options. The earliest  
24 being April 27, 2009 and the latest January 15, 2003. Each of those needed to be determined separately  
25 because of the difference in the expiration date of the options. Starting with the future net after tax  
26 value of each of those groups of stock options, I applied the appropriate discount rate (6%) to arrive at  
the present value as of May 10, 2007. Those 5 values were aggregated to arrive at the overall present  
value of the \$617,553 loss to be \$487,325. I certify under penalty of perjury that that is the net present  
value as of May 10, 2007 of the \$617,553 loss sustained by the petitioner.

Even Mr. Kessler's calculations with regard to the entirely unsupported discount rates that he  
uses (between 15% and 25%) are incorrect. He states.

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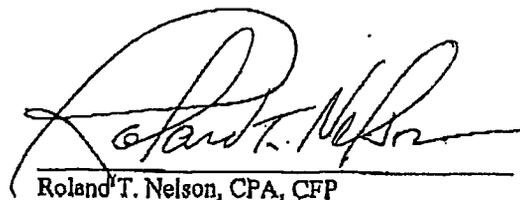
I provide the court with Mr. Nelson's calculated loss of \$487,325 using various discount rates as follows: (emphasis added.)

Even this calculation is wrong. The calculated loss is not \$487,325. The "calculated loss" is \$617,553. It appears that what Mr. Kessler did is to take the discounted loss of \$487,325 and then apply his various discount rates between 15 and 25 percent to my present value which was already discounted using a 6% discount rate. The analysis is entirely incorrect.

In summary, Mr. Kessler's critique of my present analysis entirely misses the mark. The court's determination of the petitioner's loss in the amount of \$617,553 is not a stock investment, an investment in a company, subject to risks for reduced marketability, or limited numbers, nor is it subject to market risks or risks because PACCAR could fail to be competitive. None of these apply to the sum certain calculation for loss which is the functional equivalent of a certificate of deposit. The court's judgment is not subject to any of the factors identified by Mr. Kessler. Mr. Kessler's critique is simply a backdoor attempt to attack the damage calculation. The 6% discount rate is used and has been used for many years in connection with "sum certain" assets. A 6% discount rate is applicable here.

Finally, Mr. Kessler has incorrectly calculated the discount by discounting the \$487,325 figure used in my June 5, 2007 declaration which in fact is the discounted value of the \$617,553 loss. Mr. Kessler has in effect discounted my present value analysis which is already discounted from the \$617,553 loss.

Dated: April 10, 2008



Roland T. Nelson, CPA, CFP

DECLARATION OF ROLAND T. NELSON -5

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR ISLAND COUNTY

In re the Marriage of:

TERESA FARMER

and

DANIEL FARMER

Petitioner,

Respondent.

NO. 04-3-00086-4

Gr17 Affidavit Re: Declaration of  
Roland T. Nelson, CPA, CFP

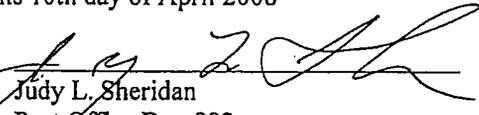
Affidavit of facsimile pursuant to GR 17:

Pursuant to RCW 9A.72.085, I certify under penalty of perjury under the laws of the state of Washington that the following is true and correct.

I, Judy L. Sheridan, am secretary for Kenneth A. Manni who is the attorney of record for Teresa Farmer, petitioner. I received the foregoing document from Roland T. Nelson the above named declarant by facsimile. I further declare that prior to signing this affidavit, I did examine the document, determined that it consisted of 5 pages, including this affidavit page, and that the document was complete and legible.

SIGNED at Oak Harbor, Washington this 10th day of April 2008

UNDER PENALTY OF PERJURY I state that I have faxed/delivered a copy of this document to attorney for RESPONDENT on the 10 day of APRIL, 2008



Judy L. Sheridan  
Post Office Box 889  
Oak Harbor, Washington 98277  
Telephone: 360-675-9088  
Facsimile: 360-679-6599



DEC- 1

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26

Excerpt of hearing on October 12, 2006 – Farmer – Farmer

In Re The Marriage of Farmer, 04-3-00086-4

**Judge:** The court set this hearing to see if we could resolve some of the dissolution matters. I have received a memorandum from Mr. Manni and have reviewed that, as well as all of the information that was attached. Do you wish to say anything at this point? I know that Mr. Manni is requesting further time to determine further the deposit into the Premier account (or Bank of America, whatever) has any community funds, or that has anything to do with ..should we continue this?

**McPherson:** I don't believe there is any need to continue it, under the CR2A there is specific provisions if this happens so if there one issue on one account that needs to be resolved at a later date, then I would certainly say let's resolve that one issue at a later date, but I believe ...

**Judge:** Mr. Manni, go ahead.

**Manni:** The court can see this is a substantial problem as far as we are concerned, we have indicated repeatedly that there have been problems with disclosure of financial information and bank records. In the previous declarations, we have provided the court with copies of the request for production of documents and follow up letters and each time we come to court we are blamed for not acknowledging the yeoman's efforts made by Mr. Farmer to scrupulously supply all of these documents, yet we see here after having ourselves gone out and subpoenaed Bank of America documents from the same financial institution which incidentally maintains the Farmer Children's Trust, we find that \$491,000 has been deposited into Mr. Farmer's account. We don't believe that that is a small or insignificant issue and we would like to have an opportunity to determine what that distribution came from. There was also a \$180,000 expenditure that went out. These are significant issues that should have been disclosed by Mr. Farmer and were not.

**McPherson.** This is not something new. When we settled the agreement in July, we had a settlement agreement and Mr. Manni and I had a discussion about exercising stock options and gave the parties the opportunity to exercise the stock options because there was going to be a split in stock and Mr. Manni was well aware that my client was looking into exercising some of his options that he would be awarded and that is where that money came from. It came after we had a division of property, after we had an agreement and after I had had a discussion with Mr. Manni regarding that. So this isn't something new. He didn't receive \$400,000 of income or anything else and they are aware of that. They are simply asking for delay. I don't know why they want a delay, but ...repeatedly supplied...they are not in the best of form because they were broken down to get ready for trial. I also have the .....

**Judge Churchill:** On the other issues, Mr. Manni, is that it?

**Manni:** The only other aspect your honor that we have identified is the business involving the \$491,000 that showed up in Mr. Farmer's bank account and we ask the court for an opportunity to investigate that to determine whether it represents income or separate property or perhaps even community property. We don't know the answer to that.

**McPherson:** Mr. Farmer is here--you want to ask him now?...

**Judge:** Do you wish to place him under oath?

**Manni:** No I wish to get the documentation from the bank to find out exactly what happened.

**Judge:** o.k.

**McPherson:** Your honor, we would ask that the court conclude this matter. Obviously they are trying to drag it out for some reason.

**Judge:** I think I can conclude some of the matters. And I am going to do so.

.....

**Judge:** And I am not putting any non-modifiable language in there that would have to have been in the CR2 agreement, but the percentage stays the same, however, because of the health insurance there is some change in that amount--- it changes somewhat. As to the tax exemptions, there is an extraordinary amount of child support being paid here and I am going to award two of the tax exemptions, the two older children to the dad and the youngest exemption, the youngest child to the mother. I think it is better not to get into the moving around of these exemptions. That means that the mother will have one exemption longer than you will Mr. Farmer, but that is just the way it is going to be. I would also put something in there that provide that he is current on his child support obligations.

As to the family home, the argument is that the CMA valued the family home at \$685,000—but there is a certified appraisal done on February 2006 which is valid for six months at \$600,000 value. I am going to value the house at \$600,000 value. It is a certified appraisal. The CMAs —are a dream figure—not necessarily the amount you would actually get if you sell the house so I find that the certified appraisal, especially since it is valid for six months seems to be more credible than a CMA which is usually done for purposes of getting you to list your house with someone.

As to the North Carolina property. It was appraised for \$43,500. You are asking the court to decide if North Carolina is like the state of Washington, the conditions are the same for property, I can't do that. All I can say is this is what the appraisal was \$43,500.

The SIP account value, I believe, --the wife gets 55% of the community part of the SIP account and I find that the amount that he put in after separation are his own separate contributions so therefore the court will accept the values provided by Ms. McPherson.

The IRAs, I believe you have both included—Mr. Manni has included those IRAs in his list of assets—Mr. Farmer's IRA was \$4,616.76. Mrs. Farmer's was \$5,531.46. So I am not going to argue about that. The fact that they weren't disclosed or didn't know about them—now they are disclosed—now we know about them.

The Penn Mutual Insurance. Mr. Farmer had that since 1984, four years prior to the marriage, there is a law, I believe it is under penalty of perjury, but in any event there is a letter from Penn Mutual that there hasn't been any deposits since 1984 so that is his separate property.

The 2005 tax, I have already indicated that the father will be able to claim two exemptions and the mother will be able to claim one.

Mr. Farmer will disclose under penalty of perjury the money that was deposited in the Premier account and also provide supporting documentation for that and that doesn't mean that Mr. Manni on behalf of Mrs. Farmer can't find out on his own, but I do want that to be provided to the court.

Mr Manni. Do we have a time frame on that?

Judge: Let me think, what would be reasonable here to get that information?

McPherson: About a week.

Judge: Alright, in a week.