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No. 65209-5-I

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**IN THE COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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RAYMOND J. PELLETTI

Respondent - Appellee,

V.

DUTCH VILLAGE MALL

Plaintiff - Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR WHATCOM COUNTY  
HON. IRA J. UHRIG, JUDGE  
No. 10-2-00311-4

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**REPLY BRIEF OF THE APPELLANT**

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JAY LEI, OWNER  
DUTCH VILLAGE MALL  
PO BOX 9324  
TACOMA, WA 98490

ON BEHALF OF DUTCH VILLAGE MALL  
AND HIMSELF

~~X~~  
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COURT OF APPEALS  
DIVISION I  
STATE OF WASHINGTON

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Defendant, Raymond J. Pelletti, filed a Response Brief after the Appellate Court issued a directive.<sup>1, 2</sup> However, the brief did not respond to any arguments advanced by the Plaintiff. The response brief also did not challenge or otherwise respond to any of the facts cited in the Opening Brief. Defendant basically submitted the same motion that had already been submitted before with changes of title and format, and made the same argument, in abstract, that Plaintiff must be denied of self-representation of his limited liability company.<sup>3</sup>

**A. Facts are clear and overwhelming that Defendant manipulated the system and the court erred in its orders and sanctions.**

Plaintiff argued and cited numerous facts in the Opening Brief showing various procedural irregularities in the trial court that led to the two orders. Defendant responded to none of them. The unchallenged facts are verities.

This appeal's underlying case is fairly straightforward. The facts there are also indisputable. From the very beginning, Defendant knew the

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<sup>1</sup> To be consistent with the opening brief, this brief will continue to address the parties as defendant and plaintiff respectively instead of respondent and appellant.

<sup>2</sup> Defendant repeatedly filed the same motion on the merits trying to have the Appellate court dismissed the appeal before it reaches the merits. The court issued a letter ruling, requiring him to file a response.

<sup>3</sup> Defendant changed the name and format of his motions on the merits, but the entire argument section of the brief is exact same verbatim.

case was indefensible,<sup>4</sup> but instead of letting the issue tried on merits or otherwise resolve the issue in good faith, Defendant set up the trap and ambushed Plaintiff. See details in the Opening Brief and the references there. Throughout the cause of the action, Defendant presented misleading documents, handed over the court unserved and unfiled papers, ignored motions and discovery, and used many other unlawful tactics to mislead or manipulate the court. The facts are clear and indisputable that Defendant violated the court rule 12a and 12b. The facts are also clear and overwhelming that Defendant violated the court rule 54(f) (2), court rule 8(b) as well as civil discovery rules and multiple clauses of court rule 11.<sup>5</sup>

These facts are presented in the Opening Brief. Each is specifically noted with reference to the evidence. Some are on CP; some are on VP and other records previous submitted as exhibits. Since this is a reply brief, Plaintiff won't repeat them. Although not all of the evidences are included, those that were presented are of sufficient quantum and are clear and convincing that multiple procedural irregularities occurred in the application of court rules and the trial court erred in its orders and sanctions. Defendant's silence on facts does not hide the truth. Appellate court's review of court rule application is a de novo. Therefore, Plaintiff

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<sup>4</sup> See previous motion filed by Defendant. Defendant finally admitted liabilities. Defendant never admitted any before during the trial court proceedings.

<sup>5</sup> See Opening brief for all of them and evidences referenced there.

respectfully requests that the Appellate court exam the procedural violations.

**B. Constitutional Rights Are Not Exceptions.**

Defendant's brief centered on one argument that all separate legal entities must be represented by counsel. In support of this argument, Defendant stated: "Respondent (Defendant) recognizes that our state Constitution guarantees a person the right to represent himself..., however, this pro se exception to the general rule set forth in RCW 2.48.180 is quite limited and applies only if the layperson is acting solely on his own behalf. "Response brief at 8. After laid down the "general rule", the rest of Defendant's brief flowed from it. Defendant argued it doesn't matter whether a separate legal entity is a corporation or partnership or limited liability company, they all must be represented by counsel since they are all separate legal entities. The brief further argued there is no pro se exception to this general rule in Washington, so even if the owner of an LLC is a sole-owner of the company, he should not be allowed to represent the company. In the end, it concluded that Plaintiff simply should not be heard and no court should condone his continued flaunting of laws and another sanction should be entered against him. Defendant even suggested criminal prosecution.

Here, Defendant admitted on the one hand self-representation is a guaranteed constitutional right, but on the other hand, it is an exception to a "general rule". But a constitutional right cannot be an exception. It is a right to which exceptions may be created. It is not clear how Defendant, without any justification or authorities, downgraded a constitutional right to an "exception" to a "general rule" and elevated an ordinary statute to a level above constitution to become the "general rule". Defendant apparently put the constitution on its head.

In a case that involves Washington State Bar Association and Great Western Union Federal, a majority opinion court did make a statement about "pro se exception". However, the statement was made in an entirely different context and has nothing to do with constitution. *Bar Ass'n v. Great Western Federal*, 91 Wn.2d 48, 586 P.2d 870 (1978). There, the Appellant, Great Western Federal was a savings and loan association. It provided legal closing services to the public and charged fees for its services. In appealing the trial court's judgment that it unlawfully practiced law, the bank argued it was acting as pro se since most of its services involved loan closing to which itself was a party. The court disagreed pointing out the "pro se" exceptions are quite limited and apply only if the layperson is acting solely on his own behalf. The court used quotation on "pro se" indicating the bank was not actually acting pro

se. The court further pointed out the receipt of compensation is conclusive evidence that a lay person is not merely acting for himself.

Clearly, in the Great Western case, the court used the word “pro se exception” to emphasize that the company’s practice was not allowed because they were not merely acting for themselves and there was no exception for them. Here, this case deals with the self-representation by an owner of his own LLC and the LLC is a single person company. No public service is provided and no fee is charge to anyone. Further, no other person is involved other than the owner himself and his wholly owned interest. Defendant recognized self-representation as a constitutional right but regard it only as an exception or secondary to a “general rule” set forth in RCW 2.48.180 and argued against all the owners of single person LLC for self-representation. Defendant put the constitution on its head. It argument is fatally flawed and unpersuasive. The correct and respectful approach to constitutional analysis is ask not what exception exists to grant a constitutional right, but ask what extraordinary reason exists that requires sacrificing a constitutional right.<sup>6</sup>

**C. There is no general rule that all separate legal entities must be represented by counsel. There is a common law tradition that pro se litigant cannot represent another person.**

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<sup>6</sup> RCW 2.48.180 actually does not contain any general rule. It is not even relevant. The statute is long, so no quote is provided here.

Defendant posited in its Response Brief that RCW 2.48.180 set forth the general rule that all separate legal entities must be represented by counsel. RCW 2.48.180 does not actually contain any rule. See above footnote and statute. RCW 2.48.180 is not even relevant. It appears that Defendant, in an effort to convince the court, cloaked a self-posed proposition with the aura of law, and in addition, elevated it above the constitution.

There is no dispute that corporation is a separate legal entity under the corporate laws, and under the most common law jurisdictions corporations are generally required to have attorney representations in the court.<sup>7</sup> But between the separate legal status of a corporation and the requirement of attorney representation lies two hundred years of mystery and misunderstanding. In the old days of the colonial period, corporations were exclusively chartered by the English crown. Those first American corporations, such as Hudson Bay Company, London and Plymouth were largely formed for the purpose of pursuing corporate profits as well as exerting royal controls over the areas of trade, customs and ports. As such, the corporations were monopolistic and powerful and commonly associated with large numbers of people.

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<sup>7</sup> This includes common law jurisdictions of other countries. xxxxxx

One of the earliest court articulation of the nature and form of American corporations were made by the United States Supreme Court in *Dartmouth College v. Woodward*. In *Dartmouth*, the court stated:

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs and to hold property without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities that corporations were invented and are in use.

Underlines added. *Dartmouth College v. Woodward* , 17 U.S. 518 (1819).

Because corporations were traditionally large organizations with large number of people, corporations were commonly represented by attorneys or solicitors in legal matters. There was no need for self-representation, and indeed, self-representation was unheard of among corporations. Years later, the Supreme Court had a direct opportunity to comment on the issue of corporate legal representation in the *Osborn* case. It wrote in dictum:

It is admitted that a corporation can only appear by attorney, and it is also admitted that the attorney must receive the authority of the corporation to enable him to represent it.

Osborn v. Bank of the United States, 22 U.S. 9 Wheat. 738 738 (1824).

The court made this comment in response to Osborn's challenge that no authority was shown that the representative was authorized to represent Bank of the United States, but the court did not explain why corporation could only appear by attorney. In the historical context it appeared the reason was corporation is a body of group of people, it must therefore be represented by an attorney. The comment became stare decisis for corporate representation. The reasoning however remained somewhat mystery. Over nearly two hundred years as it percolated down the history, it's been speculated in many different ways until the court in *Polycon Corp. v. United States*, 43 Fed. Cl. 11 (1999), provided an analysis. After comparing several rationales, the court stated the reason that corporation is "a fictional entity (separate legal entity) that may only appear through human actors acceptable to the court, begs the question. The issue is whether the court should permit a sole-shareholder corporation, in circumstances like plaintiff's (the plaintiff of that case), to be represented by its non-lawyer shareholder". The rationale concerning corporation as a body of people and "the interests of absent shareholders and other affected

persons, is certainly valid and persuasive with respect to corporations and associations with numerous stockholders or members.”

This rationale of corporation as a group of people and must therefore be represented by attorney is consistent with the customary handling of other representation situations in court. For example partnership and associations are not separate legal entities or artificial entities, but must be represented by attorneys in court since partnership and associations both involves more than one persons and individual members cannot represent their organizations without affecting the interest of the others within their organizations.

Thus, there is no general rule that all separate legal entities must be represented by counsel. There is a common law tradition that pro se litigant cannot represent another person. This view is also supported by the Washington case in *Nursing Home Building Corporation v. Phoebe DeHart*. In *Nursing Home*, the court rejected the Appellant’s claim that an estate must pay the corporate debt after the corporate owner died. The court stated: “A corporation's separate identity cannot be preserved at the expense of fostering an obvious injustice”. *Nursing Home Building Corporation v. Phoebe DeHart*, 13 Wn. App. 489 (1975) 535 P.2d 137. It further stated:

Although it cannot be doubted that a corporation's separate legal identity is not lost merely because all of its stock is held

by the members of a single family or by one person and thus the fact of sole ownership does not *of itself* immunize a sole shareholder from liability to the corporation, it is just as firmly established that the corporate entity will be disregarded when justice so requires.

Underlined added. The court went on to cite F. O'Neal, *Close*

*Corporations* § 1.09a (1971) and said:

In spite of a general adherence in theory to the notion that a corporation — whether close or publicly held — is a legal entity, courts frequently disregard a corporation's separate personality.

It is clear the concept of separate legal entity is a flexible concept. It has never been a general rule. But the rule that per se litigant cannot represent another person is a common law tradition and consistent with constitutional right of self-representation. The rule is also supported by majority of case authorities. Separate entity, corporation, was given exceptions from time to time to represent itself when it was shown there is only one owner, but associations or corporations with multiple members and owners were not. See *US. v. Reeves*, 431 F.2d 1187 (9th Cir. 1970); *in Polycon Corp. v. United States*, 43 Fed. Cl. 11 (1999); *In the Matter of Holliday's Tax Services, Inc.*, 417 F. Supp. 182 (E.D.N.Y. 1976); *Willheim v. Murchison*, 206 F. Supp. 733 (S.D.N.Y. 1962); *Advocatesfor Responsible Dev. v. W. Wash. Growth Mgmt. Hearings Bd*, 155 Wn. App.

479, 230 P.3d 608 (2010); *Willapa Trading Co., Inc. v. Muscanto, Inc.*, 45 Wn. App. 779, 727 P.2d 687 (1986).

**D. Corporations and Limited Liability Companies are fundamentally different and the rule that corporation must be represented by counsel should not be extended to single-personal limited liability companies.**

Corporations and limited liability companies are fundamentally different. Following are the main differences for the purpose of this discussion:

1. Corporation is a fix-structured businesses created solely for large numbers of people organized for a common purpose; Limited Liability company on the other hand is a flexible business structure created mainly for the purpose of giving business flexibility and promote economic activities. It is a fit-all. An individual can register to form a LLC. A corporation can also register itself and become a member of a limited liability company, so can a partnership or another LLC, or a combination of all of these entities to form another LLC.

2. Corporation ownership is determined by shares; Limited liability company ownership is determined by member agreement and totally flexible.

3. Corporation shareholders own corporation assets; limited liability company members do not own company assets, in stead, their shares of the company are personal properties and can be attached.

4. Corporation issues shares and ownership can change anytime without re-registration or change of business format; Limited liability Company member(s) must buy or sell their shares of the company through membership agreement or through separate negotiation. Once the internal structure changes, for example a single owner LLC sold 50% of his ownership, the company must re-register with the secretary of state corporate division, and company structure and characteristics change with multiple legal implications.

Because of these fundamental differences, a limited liability company, despite it shares one common feature of artificial entity with corporation, is in fact a vast array of different type of businesses. It is not one fixed form of business. The LLC's real business structure is determined by its specific internal organizational structure and not by the certificate of registration as LLC. For example, if two corporations joint venture a project and register under an LLC, the business is simply a new corporation and should not be treated any differently than the parent corporations, but if a sole proprietorship registered as an LLC, he is simply a sole proprietor because he is still a single member of the

business, and he owns the business property as personal property, not separate business asset, and he cannot readily transfer his business through selling shares or changing his business format.

Because an LLC is a vast array of different types of businesses, it is not appropriate to treat it with a fit-all formula. It is logical and wise for court to develop different means for different types of LLC. Treating a single person LLC as a sole proprietor and allowing owner pro se representation is consistent with its personal business nature and consistent with the constitutional right accorded to pro se litigant. Also, because there is no stare decisis in LLC self-representation by a single-person LLC owner and there is no other person's interests involved, it is not in conflict with any precedent case law authorities and the public interest for preventing the innocent is well served.

Corporate laws were developed more that two hundred years ago. LLC statute is a relatively new law. Indifferentiably requiring all LLC owners to have counsel representation may cause difficulties and absurdities in the future as LLC stature becomes increasingly popular, and more and more small businesses starting to make the shift from proprietorship to LLC.<sup>8</sup> The court is respectfully urged to develop means

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<sup>8</sup> Some examples of absurdities were already given in the Opening Brief, like cleaning an LLC's own office bathroom or doing one's own bookkeeping. If the separate legal entity of the LLC statute (unintended for these purposes) are interpreted literally, all LLC owners are violating the laws on daily basis since all of these activities require licenses.

to deal with it. Additionally, since the only difference between a single person LLC and a sole proprietor is that the LLC carries an artificial legal entity status, treating them differently in court access as a class will create a constitutionally dilemma.<sup>9</sup>

**E. Plaintiff prosecutes the case responsibly and faithfully only to find its access to the court blocked.**

The facts of this case demonstrate that the Plaintiff was responsible, faithful and extremely fair with the Defendant throughout this cause of this case. He registered the business as an LLC four years ago, not knowing there would be a litigation today. He did not intend to register a business and then start suing anyone. He did not know there might be an impact today. When this litigation became unavoidable as can be seen from the Defendant's lease cancellation letter and his state of the mind at that time (record submitted and referenced in opening brief), Plaintiff tried to contact Defendant and Defendant's attorney in an effort to avoid the litigation. It was only after the Defendant ignored him that he brought this action (the evidences in the form of emails are referenced in Opening brief and submitted before).

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<sup>9</sup> The implication is due process and equal protection clauses may be violated. Because many owners of these small businesses are living in poverty and cannot afford to hire attorneys, yet because of their separate legal status, the assistance that are available to indigent litigant are not available to them

Defendant however ambushed him on the issue of LLC!

This is a case of first impression. Despite Defendant's claim it is very clear, even the Court was not sure when Defendant brought up the LLC issue. Following is a relevant part of the conversations from the verbatim report:

Mr. Shropshire: ... I direct the court's attention to it regarding representation of a corporation or limited liability company in this case... attorney must represent an entity. An owner cannot.

The court: That's part of my question. I know what the law is clearly for corporations. For limited liability company is the rule the same and is that the case that says that?

March 12, 2010 Verbatim Report at 7.

March 12, 2010 was the day for motion for Defendant's default. That day, the issue was brought up but nobody was sure about this unsettled law including the court. Defendant simply used the issue. However, the court denied Plaintiff's factual motion for default and entered a CR 11 sanction on the same day. While CR 11 is an appropriate rule for lack of attorney signature when a corporation is clearly required to

have an attorney sign the pleading, it is not appropriate for this case when the attorney representation is not even determined (not even discussed. It was just brought up on the side of the motion issue). See *Biomed Comm, inc.* 146 Wn. App at 938. Even in corporation case, the time to cure defect is normally given. *Id*

Despite Plaintiff's disagreement with the court decision and the procedural issues, Plaintiff respectfully followed the law and withdrew the case within the time given by the court. Plaintiff believed the right thing to do is not to take the law in his own hand, but to appeal the issue while obeying the order. In order to fully comply with the order and avoid confusion, Plaintiff went further and canceled LLC registration with the Secretary of State,<sup>10</sup> which was not required, and in all the new pleadings in the Appellate Court, removed the "llc" letters.

The facts demonstrate Plaintiff was responsible. He did not burden the court.

This is an unusual case. Despite strong merits of the underlying case, Plaintiff was blocked access to the trial court on an unsettled legal issue. Plaintiff is the owner of the LLC. He is also the owner of the property. He has a standing to take the action either as an owner of the

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<sup>10</sup> Documents included as exhibits. These documents show that Appellant's business is a one person LLC and further demonstrate Plaintiff cancelled LLC and his sincerity to resort to the law to resolve issues. Defendant also checked Plaintiff's record including with the WBA. He told this to the trial court.

LLC (if the representation is determined) or as the owner of the property. Plaintiff did not have to take this action under the LLC, nor did he insist on doing so. He tried in good faith to move forward and have the issue resolved on merits. He also suggested to the trial court to voluntarily withdraw the case if the LLC issue stands in the way to no success. Plaintiff has been blocked justice for about a year. This is a senseless. A year's time has been wasted. Much of the court's resources have been wasted. This is an extreme case. Plaintiff is saddened by the extreme abuse of the judicial system.

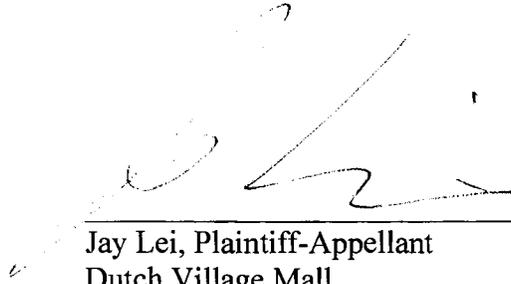
#### **F. Conclusion**

Plaintiff, Jay Lei, again respectfully requests that the CR 11 sanction against Plaintiff be reversed; that the cause be allowed to go forward under the right caption without further delay.

Plaintiff further requests that CR 11 terms and RAP 18.9 terms be awarded to Plaintiff; and that Plaintiff be awarded reasonable court costs and fees incurred in this unnecessary lengthy cause.

Plaintiff petitions this court to uphold the constitutional right of the thousands of sole owners of limited liability companies in handing their own businesses including legal business.

Dated this 6th day of January, 2011



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Jay Lei, Plaintiff-Appellant  
Dutch Village Mall

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STATE OF WASHINGTON  
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IN THE COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

DUTCH VILLAGE MALL,

Petitioner,

v.

RAYMOND J. PELLETTI,

Respondent.

No. 65209-5-1

DECLARATION OF SERVICE

I Alexander Kim am a resident of the State of Washington, over the age of eighteen years and not a party to the above entitled action.

On the date set forth below, I delivered via first class U.S. mail postage prepaid a true and correct copy of the following documents to the Defendant's attorney of record Steven L. Shropshire at the address of Shropshire Law Firm, PLLC, 1223 Commercial Street, Bellingham, WA 98225:

1. Reply Brief of the Appellant
2. Declaration of Service

I declare under the penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 6 day of February 2011, in Tacoma, WA

  
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