

No. 73017-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

GEORGE E. FAILING COMPANY, dba GEFCO, a division of
Blue Tee Corp., a Delaware corporation,

Respondent,

v.

CASCADE DRILLING, INC., a Washington corporation,

Appellant,

BRUCE NIERMEYER,

Aggrieved Non-Party/Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE SUSAN J. CRAIGHEAD

BRIEF OF APPELLANTS

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I. INTRODUCTION

The trial court erroneously found that appellants Cascade Drilling Inc. and its principal Bruce Niermeyer fraudulently represented the source of three failed “pump drive shafts,” a critical machinery piece in drilling rigs. The trial court found the pump drive shafts were not (as Cascade and Mr. Niermeyer represented) from respondent Gefco Inc.’s drilling rig, but from some other unidentified source. Relying on that finding and its inherent equitable powers, the trial court sanctioned Cascade and Mr. Niermeyer by awarding Gefco \$1.6 million in fees and costs, despite also finding that Gefco committed its own bad faith discovery violations, which “concealed from Cascade essential facts that could have established the very allegations that Cascade was leveling against Gefco.”

The trial court’s sanction against Cascade and Mr. Niermeyer is not supported by clear, unequivocal, and convincing evidence. The trial court’s “bombshell” finding that Cascade concealed the replacement of a pump drive shaft rests entirely on its confusion of two distinct machinery components – the pump drive shafts and the hydraulic pumps that are powered by the pump drive shafts. The trial court’s other findings are similarly plagued by confusion of

fundamental facts, are based on abandoned or equivocal expert testimony, and are contradictory in key respects.

The trial court's sanction must be reversed for the additional reason that Gefco lacks "clean hands" and is thus not entitled to equitable relief. In unappealed findings, the trial court found that Gefco concealed "essential facts" from Cascade and from the Court, and that this concealment was in "bad faith." The trial court then erroneously excused Gefco's conduct, calling it "necessary defensive tactics." Washington has long-refused to provide equitable relief to parties like Gefco that act in bad faith, regardless of the opposing party's conduct.

The trial court erred in other respects as well, including making non-party Mr. Niermeyer personally liable for the sanctions, awarding excessive fees, and refusing to set judgment interest at the tort rate. Should this Court decline to reverse the sanctions award, it should at a minimum remand for correction of these errors.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its November 27, 2013, letter decision (Appendix A) and the highlighted portions of

its Findings of Fact and Conclusions of Law in Appendix B. (CP 1465-90)

2. The trial court erred in entering those highlighted portions of its Findings of Fact and Conclusions of Law Supporting an Award of Attorney Fees and Costs in Appendix C. (CP 2304-15)

3. The trial court erred in entering its February 27, 2015, Judgment and Order Correcting Sanctions Judgment. (CP 2472-73)

4. The trial court erred in entering its February 27, 2015, Order Denying Motion for Reconsideration. (CP 2474)

5. The trial court erred in entering its March 31, 2015, Order Amending Judgment to the extent it refused to amend the judgment interest rate. (CP 3281-82)

III. STATEMENT OF ISSUES

1. The central issue on appeal is the trial court's finding that Cascade falsified evidence by misrepresenting that failed "pump drive shafts" came from a drill rig Cascade purchased from Gefco. Does clear, unequivocal, and convincing evidence support that finding where:

- Undisputed evidence establishes that Cascade did not conceal the replacement of a pump drive shaft;

- The trial court repeatedly found that Cascade could have established its counterclaim – that Gefco’s shafts were too soft – with any Gefco shaft, regardless of source, and thus Cascade had no motive to retrieve shafts from another rig;
- The trial court refused to “make any finding as to why” the shafts failed, and thus could not conclude, as Gefco asserted, that had the shafts come from Gefco’s rig, they would have been blue because of overheating and cooling (a claim that was undermined by its own expert’s testimony);
- Gefco’s expert analysis of impressions on the pump drive shafts, positing that the shafts could not have come from its rig because of .05” differences in those impressions, was based on an ordinary ruler and the naked eye;
- The trial court’s inference that Cascade voluntarily dismissed its counterclaims because it had been “found out” conflicts with established law giving a party the absolute right to control litigation, including when they dismiss claims?

2. Was Gefco entitled to equitable relief where, in unchallenged findings, the trial court found that Gefco repeatedly committed “bad faith” discovery violations by concealing “essential facts” from both Cascade and the court?

3. May a non-party, Cascade’s principal Bruce Niermeyer, be held jointly and severally liable for a sanctions award against Cascade, absent findings that he misused the corporate form?

4. Did the trial court err in awarding Gefco fees related to its own discovery violations?

5. Is a judgment for sanctions based on bad faith litigation conduct “founded on . . . tortious conduct” and thus subject to interest at the tort rate under RCW 4.56.110(3)(b)?

IV. STATEMENT OF FACTS

A. In 2008, Cascade Drilling’s efforts to drill a well were plagued by repeated failures of the same Gefco machine part, its “pump drive shaft.”

After two decades working in the drilling industry, Bruce Niermeyer founded Cascade Drilling Inc. in 1992, in Woodinville Washington. (CP 792; RP 516-17)¹ Cascade initially provided drilling services for environmental studies and quickly became one of the largest environmental drilling companies in Washington, soon expanding to Oregon and California. (CP 792; RP 517)

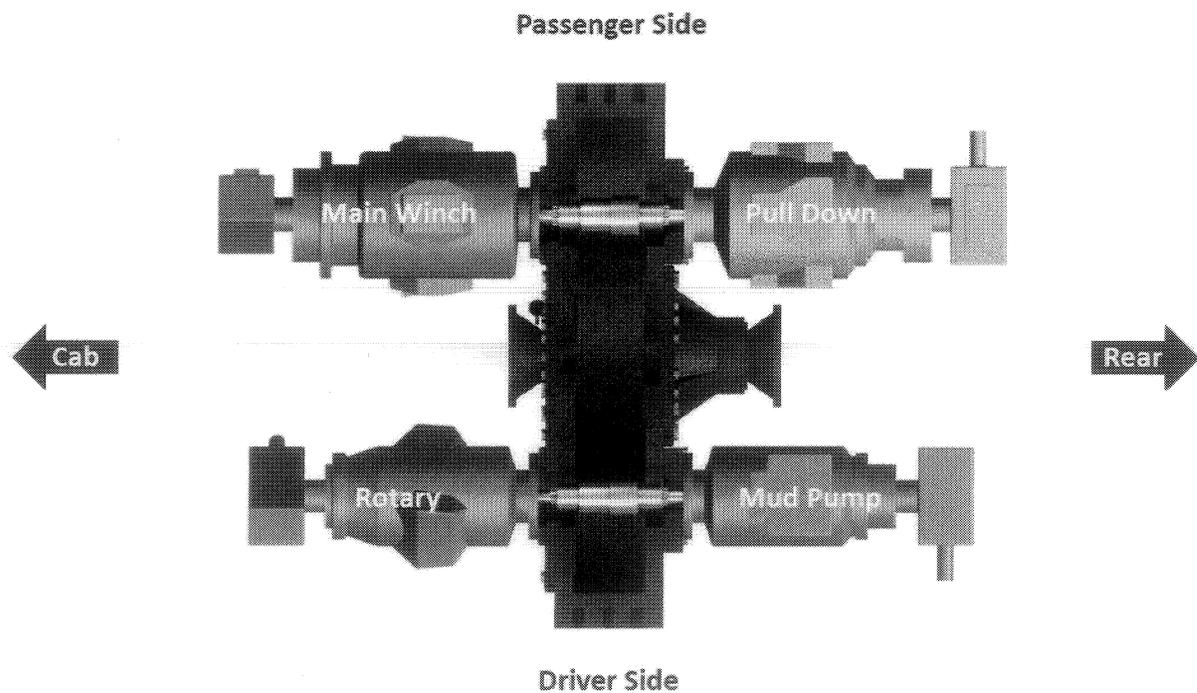
In 2008, Cascade successfully bid on a job to drill a well at a housing development in Wheeler Canyon, California. (FF 6, CP 1475) To drill the well, Cascade deployed a “50K”² drilling rig purchased from Gefco Inc., which manufactures large drilling machinery; the 50K was a large, truck mounted drilling rig. (FF 2, 5, CP 1474-75) The 50K Gefco rig included a “Power Takeoff-Box”

¹ Cascade cites the Report of Proceedings from the evidentiary hearing held from October 29-November 1, 2012, as “RP __,” and to the hearing to address Gefco’s fee application as “3/24 RP __.”

² 50K denotes that this rig was rated to utilize 50,000 pounds of drilling equipment (also called the “string weight”). (RP 555)

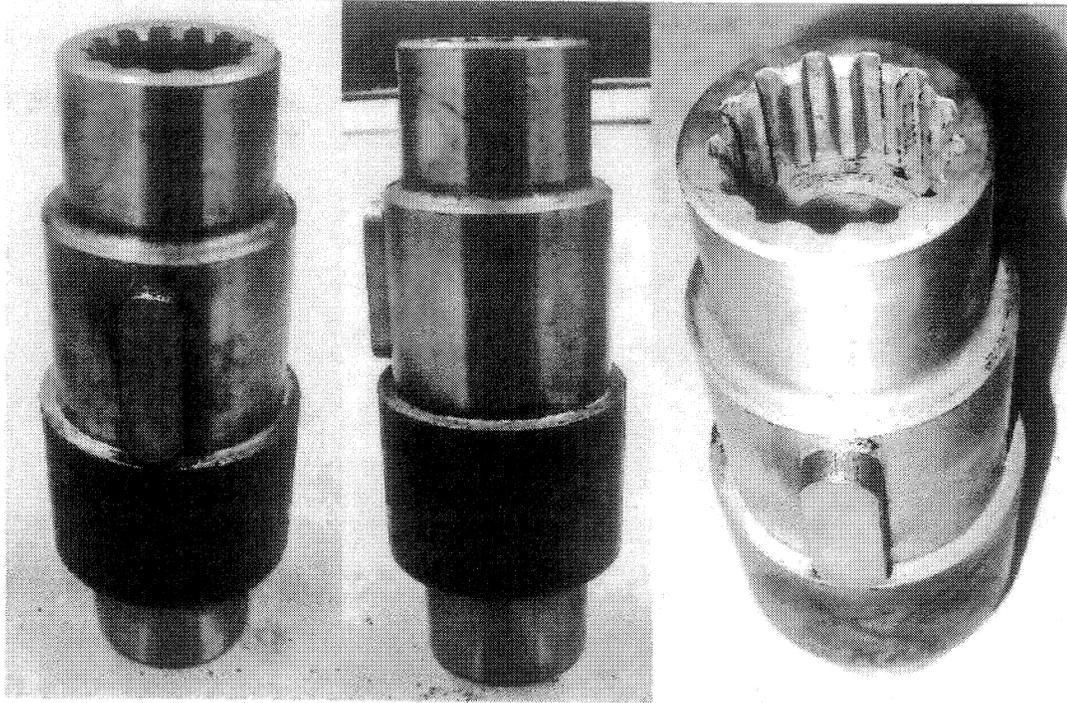
(“PTO”) that sends power from the engine to four hydraulic pumps bolted to the PTO. (FF 5, CP 1475; RP 18) As shown below, each pump drives a different function of the drill rig: 1) rotating the drill bit, 2) powering a winch, 3) removing mud from the hole being drilled (the “mud pump”), and 4) applying downward force on the drill (the “pull-down pump”):

Power Take-Off (PTO) Overview



(Figure 1 – CP 3296; FF 5, CP 1475)

The four hydraulic pumps are attached to the ends of two “pump drive shafts” in the PTO, which are shown below:



(Figure 2 – CP 2340; FF 5, CP 1475) The hydraulic pumps have “male” input shafts that interlock with the “female” ends of the pump drive shafts. (FF 10, CP 1475; CP 1905-07, 2922; Figure 2) A company called Foote Jones manufactured the two original pump drive shafts on the Gefco 50K rig purchased by Cascade. (FF 37, CP 1480; RP 664-65)

Cascade faced a number of challenges at Wheeler Canyon, foremost of which were disruptions caused by repeated failures of

the PTO's pump drive shafts. With each failure the metal ridges of the shafts (aka "splines") that interlock with the male hydraulic pump input shaft "stripped out" (disintegrated). (RP 532-33; *see, e.g.*, CP 2906-07) The first failure occurred on March 5, 2008, at the pull-down pump. (FF 7, CP 1475; CP 323) Cascade did not keep the pump drive shaft from this failure – it believed at the time the shaft failed due to normal wear and tear, and was not anticipating litigation. (FF 9, CP 1475; CP 320, 794; RP 571) Cascade ordered a replacement pump drive shaft from Gefco, which was manufactured for Gefco by a company called Hub City. (FF 3, 37, CP 1474, 1480; RP 567, 572; CP 795)

A second pump drive shaft failed on March 21, 2008, at the mud pump. (FF 8, CP 1475; CP 323) Cascade again ordered a replacement pump drive shaft from Gefco, also manufactured by Hub City. (FF 37, CP 1480; CP 795; RP 567) On April 4, 2008, the replacement pump drive shaft installed at the mud pump failed. (FF 8, CP 1475; CP 323) A fourth failure occurred when the replacement pump drive shaft installed at the pull-down pump failed on June 16, 2008. (FF 8, CP 1475; CP 323)

Wanting to determine the cause of the failures, Mr. Niermeyer instructed Cascade's mechanic, Charles (Chuck) Rider,

to retain parts from the second, third, and fourth failures. (CP 794; RP 611) Mr. Rider retained the pump drive shafts, but not their bearings or the male input shafts of the hydraulic pumps. (FF 10, CP 1475; RP 611) The hydraulic pumps that mated with the failed drive shafts were sent to a company called Western Hydrostatics for repair, which took pictures of the pumps and their input shafts. (CP 1904-07; Ex. 22, excerpts from 9/16/2011 Rider deposition at 112-16)

In 2009, Mr. Rider marked each shaft to identify which shaft was from which failure and shipped the shafts to Cascade's Woodinville office. (CP 1373, 2341-43) When the shafts arrived in Woodinville, they were stamped with identifying numbers so they could be sent out for testing. (CP 795, 2341-43; RP 612) In March 2011 (after this litigation began), Mr. Rider met with the superintendent on the Wheeler Canyon job and a drill operator to confirm which shaft was from which failure. (RP 613, 616; CP 795, 803) Based on their identification, Cascade and Mr. Niermeyer denominated the shafts the "2" shaft (second failure), the "3" shaft (third failure), and the "4" shaft (fourth failure). (CP 803, 2341-43) Although Mr. Rider had marked the "3" shaft with "3-29 2nd Shaft" before sending it to Woodinville, he and the other employees deter-

mined it was in fact the third shaft to fail, not the second. (CP 795, 2342; RP 612-16, 652-53) However, as would later be discovered, Mr. Rider's initial identification of Shaft 3 was correct; it was the second shaft to fail, not the third. (CP 2904-05, 2909; RP 615)³

The following table summarizes the shaft failures:

<u>Shaft #</u>	<u>Failure Date</u>	<u>Failure Location</u>
1 (1 st failure) (shaft not preserved)	March 5, 2008	Pull-down pump
3 (2 nd failure)	March 21, 2008	Mud pump
2 (3 rd failure)	April 4, 2008	Mud pump
4 (4 th failure)	June 16, 2008	Pull-down pump

B. In 2009 Gefco sued Cascade on an outstanding balance. Cascade counterclaimed asserting that the PTO's pump drive shafts were defectively manufactured.

On July 2, 2009, Gefco sued Cascade alleging an outstanding balance of \$39,718.22. (CP 1-3) Cascade answered and counterclaimed, asserting claims for product liability, fraud, misrepresentation, breach of warranty, negligence, and violations of the Consumer Protection Act. (CP 9-18) Cascade asserted that the repeated shaft failures were due to defective design (the shafts were too soft), that Gefco knew its shafts were not suited for their

³ The numbers stamped on the shafts when they arrived in Woodinville, which were simply meant to be unique identifiers and not signify the order of failure, added to this confusion as Shaft 2 was stamped with a 2, Shaft 3 with a 3, and Shaft 4 with a 4. (RP 612; CP 2909-10)

intended purpose, and that Gefco had fraudulently represented it had never heard of problems with its shafts. (CP 12-13) Gefco then filed a third-party complaint for indemnity against Hub City, the manufacturer of the replacement shafts. (CP 28-33)

Cascade's counterclaims against Gefco became the focus of the case. (FF 4, CP 1475) In more than twenty years operating over 70 pieces of equipment with similar shafts, Cascade had never had to replace a pump drive shaft, let alone four within a four month period. (CP 793; RP 616-17) Cascade asserted that Gefco's 50K rig pump drive shafts, which were hardened to 37 on the Rockwell C hardness scale ("Rc"), should have been hardened to the industry standard of Rc 55-60. (CP 377, 616)⁴ Gefco had used nearly identical pump drive shafts hardened to RC 58-62 in many rigs since the 1980's, as well as the "Cotta" brand PTO, which has shafts hardened to Rc 55. (FF 86, CP 1487; CP 474, 615) Unlike the softer shafts used in Gefco's 50K rig, these harder shafts did not experience repeated failures. (CP 270; FF 86, CP 1487; RP 585)

Internal Gefco emails revealed that it knew of a problem with its pump drive shafts as early as 2006 (two years before Wheeler

⁴ For example, one hydraulic pump manufacturer, Sundstrand, specified that pump drive shafts used with its pumps be "a minimum hardness of Rc 55." (CP 953)

Canyon), when one of its biggest customers, WDC Exploration and Wells, reported “four out of nine 50K rigs experienc[ed] severe down time and repair expense,” a problem it attributed to the softness of the shafts, asking if “a higher metal hardness [is] available for replacements?” (CP 272) In response, Gefco denied having any specifications for its shafts but nonetheless assured WDC that it hardened its shafts to 60-65 Rc. (CP 270-71) In fact, Gefco did have specifications that required only 37 Rc hardness. (CP 616) When WDC sent Gefco a shaft for testing to confirm Gefco’s claims of hardness, Gefco claimed it accidentally “tossed” it. (CP 291)

In 2008, Gefco’s Service Manager, Richard Mack, recognized Gefco’s pump drive shafts were “wearing prematurely” causing “a rash of these problems.” (CP 450) Mack suggested “possibly chang[ing] our speck on this shaft,” noting that the 21 replacement shafts it had purchased over two years “would be an acceptable number . . . had we . . . been using this box for the last twenty years not the last four.” (CP 450) Mack expressed he was “very leery that if we pulled the pumps back on all the rigs . . . we would find wear on all the spines they just haven’t failed yet.” (CP 450)

As it had with WDC, when confronted by Cascade about the hardness of its shafts, Gefco denied knowledge of any problem or

receiving complaints from other customers; Gefco instead told Cascade only that its shafts “met specifications.” (CP 793; RP 572) Gefco eventually acknowledged “a weak point . . . in the design,” but nevertheless rejected multiple offers from shaft vendors to supply harder shafts (one at the same cost as the softer shafts), based on its belief that “if it ain’t broke, don’t fix it.” (CP 522, 528, 621)

C. After years of contentious discovery, the parties filed cross-motions for discovery sanctions.

1. Gefco failed to disclose all customers who reported problems with its pump drive shafts and changes to the manufacturer of the shafts.

In April 2010, Cascade served discovery requests requiring Gefco to disclose all complaints or reports of problems with its shafts, any change of manufacturer of its shafts, any changes in the design of the shafts (particularly the hardness), and any lawsuits related to its shafts. (FF 65, CP 1484; CP 461-497) In June 2010, Gefco identified four customers (other than Cascade) that reported problems, blaming each failure on its customer’s improper operation of the drill rig or assembly of the PTO. (CP 463-64)⁵ Gefco did not disclose any changes in manufacturer or design, or

⁵ These reports confirm that Gefco knew the softness of its shafts was causing failures before 2008. For example, in May 2007 Gefco authorized a refund for a shaft, noting it “suspect[s] possible soft shaft causing . . . failure.” (CP 827; *see also* CP 823, 825, 829)

lawsuits involving the shafts. (FF 62, 76-78, 81-84, CP 1484, 1486-87; CP 470-72)

In December 2011, Cascade moved to compel disclosure of complaints and other evidence of shaft failure, including invoices for replacement shafts, after it independently discovered knowledge of problems that Gefco had failed to disclose. (FF 72, CP 1485; CP 46-58) On December 20, 2011, King County Superior Court Judge Susan Craighead (“the trial court”) ordered Gefco to produce all invoices for replacement pump drive shafts. (FF 72, CP 1485; CP 126-28)

In May 2012, the trial court bifurcated the case, requiring Cascade to first prove the pump drive shafts were defective, before addressing any other issues or allowing Cascade to contact Gefco customers. (CP 3100-02, 3106) Gefco alleged its reputation would be irreparably harmed if Cascade contacted its customers and that Cascade was improperly pressuring it to “bet the company.” (CP 3067-71, 3101) The trial court agreed, accepting the representation of Gefco’s president and its counsel that it had produced “*all* information it has concerning any complaint or problem of any customer regarding any pump drive shafts” as well as “*all* customers who we found had experienced any

pump drive shaft problems.” (CP 3067-71, 3074-75, 3099-102 (emphasis in original))⁶

On June 18, 2012, Cascade ordered replacement shafts from Gefco. (FF 74, CP 1485; CP 515) Gefco shipped the shafts, but then cancelled the shipment, alleging the cancellation was due to an unspecified “error.” (CP 2221) Through compelled discovery, Gefco revealed the actual reason it canceled the shipment: “MATERIAL TOO HARD.” (FF 74, CP 1485-86; CP 516) Gefco then offered to sell Cascade the replacement shafts if they were not used in this litigation, explaining Gefco had “overcome[] some manufacturing difficulties.” (FF 75, CP 1486; CP 504)

On July 23, 2012, the trial court again ordered Gefco to produce all invoices for replacement pump drive shafts. (FF 73, CP 1485; CP 193) Gefco then produced for the first time an invoice for a replacement shaft (which Cascade would later find out had an increased hardness) that had been ordered nine months earlier, on November 18, 2011, five months prior to Gefco’s president’s sworn statement in April 2012 that Gefco had disclosed “*all*” reports of

⁶ Gefco’s president listed five customers that experienced problems with its pump drive shafts: WDC, Evans Energy, McPherson Drilling, Shawver Well Drilling, and Associated Drilling. (CP 3078) He omitted Zimmerman Drilling, which had repeated problems with Gefco’s shafts, and Gefco produced *all* invoices concerning Zimmerman only under threat of a motion to compel. (CP 88, 900, 2222, 3038)

problems with its pump drive shafts. (FF 74, CP 1485; CP 382, 514, 2221-22, 3074-75)⁷

Despite Cascade's request to disclose any "change[s] of manufacturer," Gefco never disclosed that in April 2009, it had dropped manufacturer Hub City and began making the shafts itself. (FF 77, CP 1486; CP 472) Moreover, Gefco affirmatively stated in June 2010 that the pump drive shafts are "now manufactured by Hub City." (CP 477) In a July 2011 deposition, Gefco's president likewise testified that "Hub City makes those replacement shafts." (CP 561) Cascade only learned that Gefco had started manufacturing the shafts itself in July 2012 after Hub City produced a spreadsheet showing that Gefco had not ordered any replacement shafts since April 2009. (CP 518-19)

2. After Cascade voluntarily dismissed its counterclaims, it discovered that Gefco had failed to disclose other requested information, including a secret lawsuit against Hub City and changes to the design of its shafts.

By the summer of 2012, the burden and expense of the litigation (particularly Gefco's intransigent discovery tactics) was interfering with Cascade's business. (CP 799; RP 623-27) Cascade had lost an opportunity to buy a competitor at a "fire sale" price

⁷ The trial court allowed Gefco to produce the invoice redacted, concealing that it involved yet another undisclosed customer, IPERSA. (CP 514, 2222)

because of the amount of Mr. Niermeyer's time this litigation required. (CP 799; RP 625) Assured by Gefco's new owners that Gefco would start making replacement shafts of proper hardness, Cascade hoped it could return to an amicable relationship with Gefco. (CP 799-800; RP 625-27) On August 17, 2012, Cascade moved to voluntarily dismiss its counterclaims with prejudice and paid Gefco the unpaid invoice on which Gefco originally brought suit (CP 194-96, 264); the trial court granted Cascade's motion the same day. (CP 197) In addition to dismissing its counterclaims against Gefco, Cascade signed a CR 2A agreement with Hub City, in which Cascade agreed not to pursue any claims against Hub City or Gefco. (CP 199-201)

On September 28, 2012, more than a month after Cascade dismissed its counterclaims with prejudice, Cascade learned for the first time that Gefco had sued (but not served) Hub City in April 2012. (FF 61, CP 1484; CP 2549-53) Gefco alleged in that suit it received "numerous demands for replacement of defective PTOs." (FF 68, 79, CP 1485-86; CP 2521, 2526) Gefco never amended its discovery responses to disclose this suit, despite Cascade's April 2010 request requiring it to "[i]dentify all claims [and] lawsuits . . . related to the Pump Shaft." (FF 65, CP 1484; CP 470-71)

In October 2012, Cascade learned (from another Gefco customer) that Gefco had also failed to disclose that it had designed and manufactured a pump drive shaft with increased hardness that was shipped June 14th, 2012,⁸ and that it again redesigned the shafts shipping one of yet another hardness on September 28th, 2012. (FF 83-84, CP 1487; CP 2222, 2954-55) Gefco likewise failed to disclose a design change (an internal spline shoulder) that differentiated original Foote Jones shafts from replacement Hub City shafts. (CP 2627) Gefco also failed to produce any invoices related to an alternate brand of PTOs (Cotta) it had utilized on its drill rigs that used harder shafts and had not experienced repeated failures. (FF 86, CP 1487; CP 270; RP 585) Nor did Gefco disclose complaints received from customers related to parts of the PTO other than the pump drive shafts, *e.g.*, gears, unilaterally asserting they were irrelevant. (FF 80, CP 1485; CP 1193)

3. Gefco accused Cascade of falsifying critical evidence by replacing the shafts from the Wheeler Canyon rig with shafts from an unidentified source.

Gefco leveled its own allegations of discovery misconduct against Cascade. Relying on two experts David Howitt, Ph.D., and

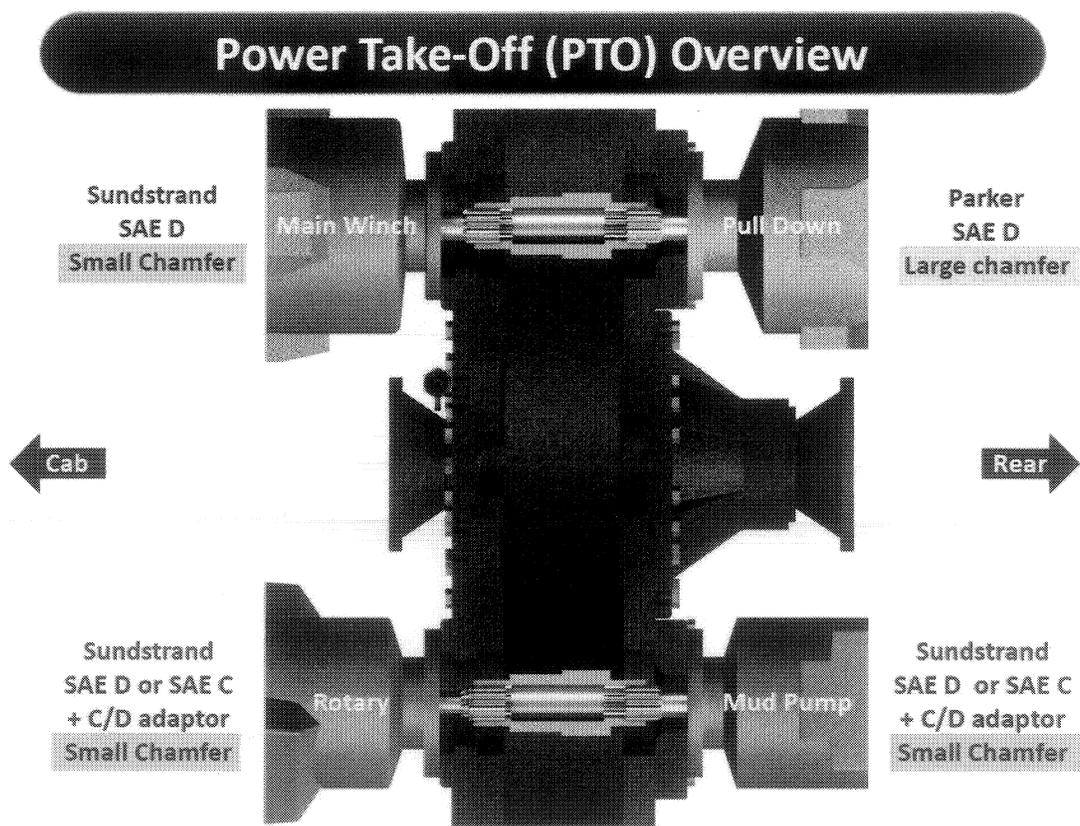
⁸ The design of this shaft likely began before April 2012 (when Gefco's president swore it had fully complied with Cascade's discovery requests), because of the lag time between design and manufacture of a shaft. (CP 2222)

Andrew Milburn, Gefco alleged the failed pump drive shafts presented by Cascade did not come from the rig used at Wheeler Canyon, but from a different, unidentified source. (CP 346-47)

Mr. Milburn and Dr. Howitt claimed the pump drive shafts had not failed at the PTO box locations Cascade represented based on differences of a few hundredths of an inch in the impressions the hydraulic pumps' male input shafts left on the pump drive shafts. (CP 2611-16, 3360-61) They asserted that "chamfers" (angled cuts on the end of the pumps' male input shafts) should have left smaller impressions on the pump drive shafts than they actually did. Specifically, they alleged the failed ends (referred to as the "A" ends)⁹ of Shafts 2 and 3 (which Cascade asserted failed at the mud pump) showed chamfer impressions of .08", which is consistent with failing at the pull down pump where the male input shaft (from a Parker brand pump) has a .08" chamfer. (CP 2611-16, 3360-61) They claimed that had these shafts been attached to the mud pump (as Cascade asserted) the chamfer impression would have been .03", as the male shaft there (from a

⁹ The parties labeled the failed ends of the shafts (*i.e.*, those attached to either the mud pump or pull-down pump on the rear side of the truck) the "A" ends and the intact ends the "B" ends. Thus, for example, "3A" refers to the failed end of Shaft 3. (*See, e.g.*, Figure 6, *infra*)

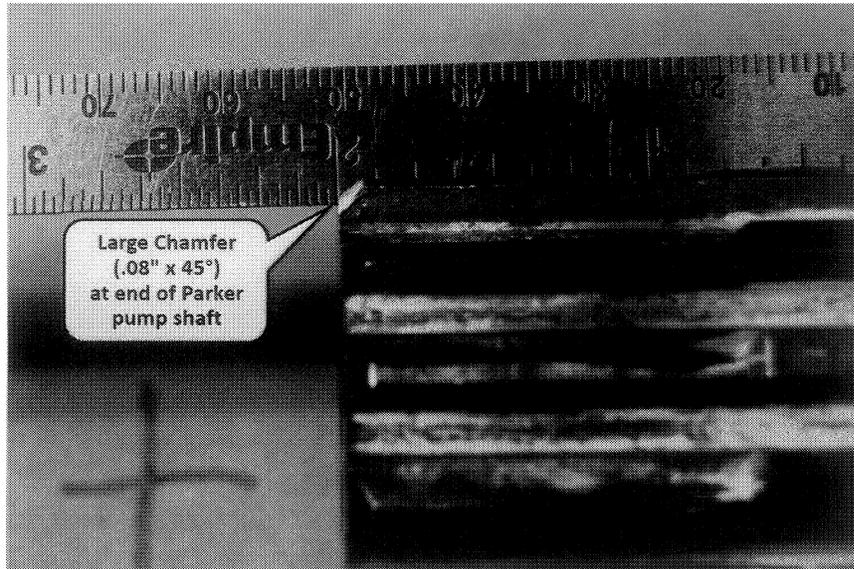
Sundstrand brand pump) has a chamfer of .03”.¹ (CP 2611-16, 3359-61, 3371) Dr. Howitt also opined that the undamaged “B” ends of Shafts 2 and 4 did not have .03” Sundstrand impressions (as they should) and thus could not be from the Wheeler Canyon rig. (CP 3360-61) The following diagram shows the position of the pumps and associated chamfer sizes:



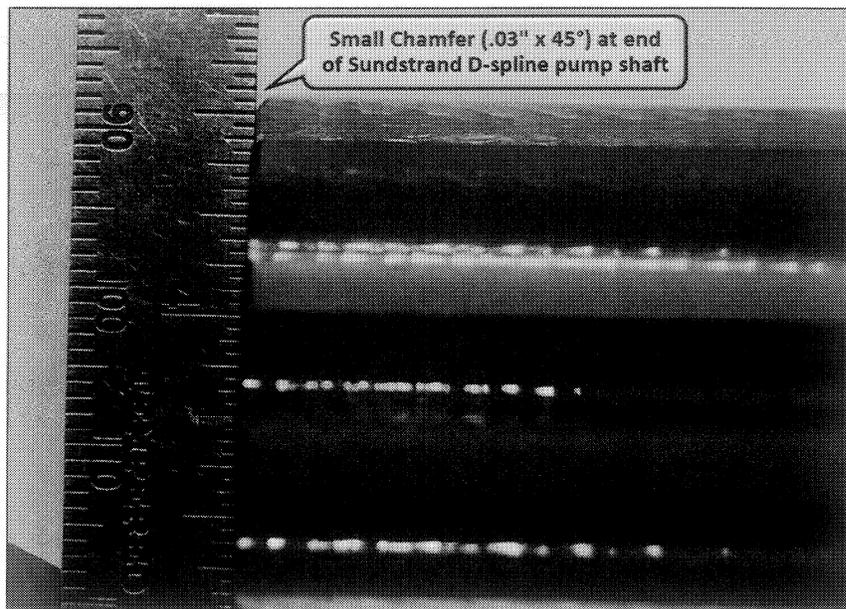
(Figure 3 – CP 3299)

¹ Every location other than the pull-down pump had a Sundstrand brand pump.

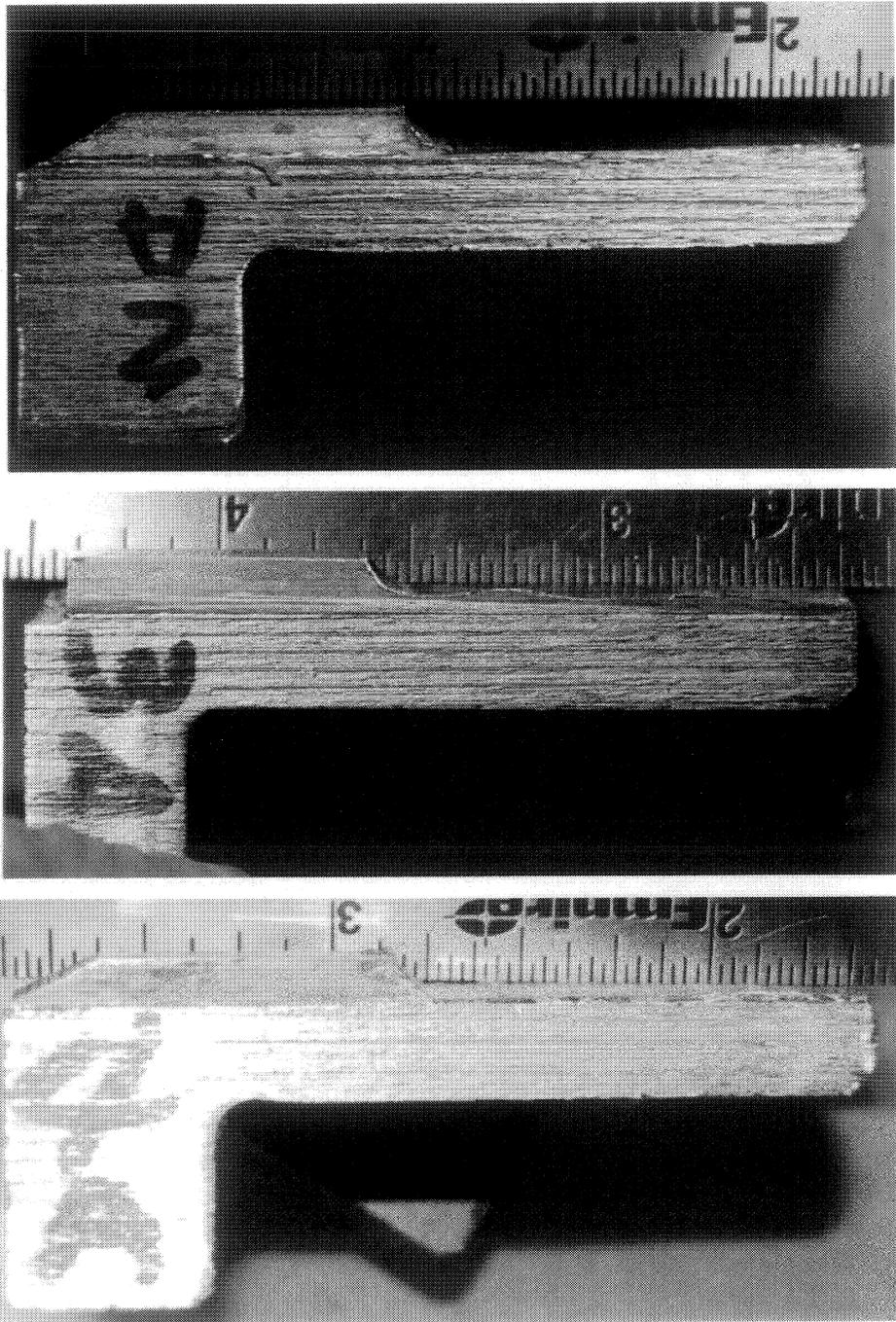
Mr. Milburn's and Dr. Howitt's measurements relied on the naked eye and a ruler with $1/32$ (.03125) inch increments:



(Figure 4 – Parker pump chamfer, CP 3301)



(Figure 5 – Sundstrand pump chamfer, CP 3303)



(Figure 6 – Chamfer impression marks on A ends, Ex. 14)

Gefco also alleged that Cascade violated its discovery obligations by failing to produce records showing that it had purchased replacement hydraulic pumps for the 50K rig in 2006 and 2007. (CP 354) Gefco's drilling expert, Larry Rottman, obtained invoices reflecting replacement of the rotation and mud pumps after contacting Western Hydrostatics, which supplied the pumps to Cascade. (FF 15, CP 1476; CP 341-42, 2650-52; RP 31-32, 622) Cascade then produced accounts payable and payroll records confirming replacement of the hydraulic pumps, obtained after an exhaustive search of its records, including records in archived databases that had previously gone undiscovered. (CP 797-98; RP 622-23) The invoices and Cascade's records showed that two hydraulic pumps, *but not the PTO's pump drive shafts*, had been replaced prior to the Wheeler Canyon job. (CP 341-42; RP 80, 95; Ex. 22, excerpts from 8/14/2012 Rider deposition at 60)

D. Over one year after a four-day evidentiary hearing, the trial court found that both parties had committed bad faith discovery violations.

1. The trial court found that Cascade had "defiled" "the very temple of justice" by fabricating the shafts and required it to pay \$1.6 million of Gefco's fees and costs.

The trial court held a four-day hearing from October 29 to November 1, 2012, to address Gefco's allegations that Cascade

falsified the pump drive shafts. Gefco presented testimony from Mr. Rottman and Dr. Howitt¹¹, while Cascade presented testimony from Mr. Niermeyer and its experts Paul Diehl and Randy Kent.¹² On the first day of the hearing, Dr. Howitt testified “there were no splines from a mud pump present” (*i.e.*, Sundstrand pump) with “no exceptions,” affirming the conclusion in his report that the undamaged “B” ends of Shafts 2 and 4 did not have Sundstrand impressions (RP 157, 197); however he admitted the next day he was wrong and that the impressions on the “B” ends were consistent with the Sundstrand pumps on the Wheeler Canyon rig. (RP 245-46, 262-67) After these concessions, the only impressions at issue were those on the failed “A” ends of Shafts 2 and 3, which Dr. Howitt continued to assert could not have been made by the mud pump on the Wheeler Canyon rig because the impressions did not match the .03” chamfer of a Sundstrand pump. (RP 245)

Mr. Rottman and Dr. Howitt provided two other reasons the shafts could not have come from the Wheeler Canyon rig. First, Mr. Rottman alleged that Cascade improperly installed the shafts without enough clearance for the bearings, that the shafts would

¹¹ Gefco also submitted the report of Mr. Milburn. (Ex. 17)

¹² Gefco presented numerous excerpts from depositions (Ex. 22) and Cascade presented counter-designations. (CP 1383-1462)

have overheated as a result, and thus the failed shafts and adjoining components should have shown, but did not, evidence of “blueing” (literally turning blue) after overheating and cooling. (RP 25-27, 49, 93-95, 165-66, 284-85, 309-11) Second, Dr. Howitt testified Shaft 3, an original shaft manufactured by Foote Jones, could not have come from the rig because the chamfer impression showed it failed at the pull-down pump and the original shaft that failed at the pull-down pump (the first shaft to fail) was not kept by Cascade. (RP 158-59, 172-73, 207-10)

The trial court took the case under advisement for more than a year after the evidentiary hearing before issuing a decision. On November 27, 2013, the trial court concluded “that Cascade and Mr. Niermeyer fabricated the evidence upon which Cascade’s counterclaims were based” (CL 1, CP 1488), issuing a letter ruling and Findings of Fact and Conclusions of Law. (CP 1465-90) The trial court relied on Dr. Howitt’s testimony that the impression evidence did not match, that there was no evidence of “blueing” on the shafts, and that Shaft 3 could not have been an original Foote Jones shaft from the Wheeler Canyon rig. (FF 35-41, CP 1480-81)

The trial court rejected Cascade’s explanation that Shaft 3 was in fact the first shaft to fail at the mud pump (and thus would

be an original Foote Jones shaft) and that Cascade had simply mislabeled the first mud pump failure as “Shaft 3” and the second mud pump failure as “Shaft 2” at a time when it had no reason to falsify evidence. (FF 42, CP 1481) The trial court characterized Dr. Howitt’s admission that he “made a mistake in his written report” regarding the impressions on the undamaged “B” ends of the shafts as “candid.” (FF 30, CP 1479) The trial court rejected the testimony of Mr. Rottman, calling him a paid “advocate,” rather “than a dispassionate expert.” (FF 23, CP 1477)

The trial court particularly relied on the Western Hydrostatics invoices showing the hydraulic pumps at the rotation and mud pump locations on the rig’s PTO had been replaced prior to Wheeler Canyon. The trial court called these invoices a “bombshell” because they showed “that Wheeler Canyon was not the first time a shaft on the PTO box on this 50k rig had failed. Importantly, the mud pump had been replaced before” and thus “the shaft at the mud pump location that failed at Wheeler Canyon was not . . . original equipment installed by Gefco.” (CP 1466; FF 16-17, CP 1476; *see also* FF 39, CP 1481)

The trial court also found that Mr. Niermeyer had “a motive to falsify evidence” (FF 51, CP 1482), listing among other reasons,

that “he had the opportunity to sell part of Cascade to Water Development; the deal fell through at least in part because of the Wheeler Canyon fiasco and Mr. Niermeyer lost \$10 million.” (FF 21, CP 1477; CP 1469, 1471) It also inferred from Cascade’s voluntary dismissal of its claims against Gefco that Cascade had been “found out” falsifying evidence. (CP 1471)

The trial court concluded that “[b]ad faith on this level exceeds any conduct described in Washington case law.” (CL 1, CP 1488; *see also* CP 1472 (Cascade’s conduct was “invidious”)) It relied on federal case law authorizing the imposition of sanctions where “an act affects the integrity of the court” and where “the ‘very temple of justice has been defiled’ by the sanctioned party’s conduct.” (CL 2, CP 1488-89 (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991))) The trial court concluded that “Cascade’s conduct in this case rises to this level.” (CL 3, CP 1489) As a sanction, the trial court required Cascade to pay Gefco \$1.6 million in attorney’s fees, expert witness fees, and litigation costs. (CL 4, CP 1489; CP 2304-15) Cascade moved for reconsideration, which the trial court denied. (CP 2474) The trial court entered judgment against Cascade and Mr.

Niermeyer personally at 12% interest under RCW 4.56.110(4). (CP 2472-73)

2. **The trial court found Gefco acted in bad faith by concealing essential facts that could have established Cascade's counterclaims, but required it to only pay a \$10,000 sanction.**

The trial court also found that Gefco had engaged in bad faith discovery violations by failing “to seasonably refresh its answers by disclosing its lawsuit against Hub City until after the counterclaims were dismissed” and finding that its assertion that its PTOs were not defective, “cannot be squared” with its assertion in that lawsuit that it received “numerous demands for replacement of defective PTOs.” (FF 65, 79, CP 1484, 1486) The trial court also found that Gefco failed to disclose it had designed and manufactured “harder shafts . . . despite interrogatories that sought information concerning hardness, design, manufacturing, and its shaft manufacturers” and that “Gefco failed to respond to requests for production regarding the design specifications it gave to Hub City.” (FF 76, 81-84, CP 1486-87) The trial court further found that Gefco failed to disclose that it had started manufacturing the shafts itself in April 2009. (FF 77-78, CP 1486) In short, “Gefco concealed from Cascade essential facts that could have established

the very allegations that Cascade was leveling against Gefco until it was too late for Cascade to have done anything about it.” (CP 1470)

The trial court concluded “Gefco’s omissions were in bad faith.” (FF 88, CP 1487) It found that Gefco’s omissions “directly influenced this court’s ruling bifurcating Cascade’s counterclaims” by “withholding critical information from the opposing party and the Court” because Gefco falsely insisted there was “no real evidence that any other customer had reported problems with their 50k rigs.” (FF 90-91, CP 1487-88) However, the trial court excused Gefco’s omissions, stating that “in any other case the Court would be stunned by Gefco’s failure to disclose that the shafts were now being made out of a harder material and that Gefco stopped using Hub City shafts in 2009” (CP 1472), but that “Gefco’s efforts to protect itself are understandable if not appropriate” “[i]n light of the litigation strategy and conduct of Cascade.” (FF 88, CP 1487; *see also* CL 5, CP 1489 (“under these circumstances they were perhaps necessary defensive tactics”)) The trial court sanctioned Gefco \$10,000 for its bad faith discovery violations. (CL 6, CP 1489)

Cascade appeals the trial court’s sanctions. (CP 2457-58, 2475-76, 3283-87) Gefco did not cross-appeal.

V. ARGUMENT

- A. **The trial court’s finding that Cascade fabricated evidence cannot be sustained in light of its fundamental misunderstanding of the evidence and the extraordinarily high burden for establishing misconduct that “defiles the very temple of justice.”**

The trial court’s finding that Cascade purposefully and fraudulently presented false evidence, disregarding the “basic commitment to the truth” that underlies our justice system (CP 1472), is not supported by the requisite clear, unequivocal, and convincing evidence. The trial court’s “bombshell” finding demonstrates a critical misunderstanding of the evidence. The trial court found that a pump drive shaft had been replaced before Wheeler Canyon, when the undisputed evidence showed hydraulic pumps, not a shaft had been replaced. This is just one of many errors that fatally undermine the trial court’s finding that Cascade falsified evidence.

1. **A court may find that a party has committed a fraud on the court by presenting false evidence only on clear, unequivocal, and convincing evidence.**

Washington follows the “American rule,” which requires “that each party in a civil action will pay its own attorney fees and costs.” *Berryman v. Metcalf*, 177 Wn. App. 644, 656, ¶ 24, 312 P.3d 745 (2013), *rev. denied*, 179 Wn.2d 1026 (2014). As an exception to

the American rule, a trial court may award attorney's fees as a sanction under its "inherent equitable powers" based on a party's bad faith. *State v. Gassman*, 175 Wn.2d 208, 211, ¶ 4, 283 P.3d 1113 (2012). Washington adopted this exception from federal jurisprudence, and Washington courts have repeatedly looked to federal cases to define bad faith. *Gassman*, 175 Wn.2d at 211, ¶ 5; *State v. S.H.*, 102 Wn. App. 468, 475, 8 P.3d 1058 (2000); *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 928, 982 P.2d 131 (1999), *rev. denied*, 140 Wn.2d 1010 (2000) (both citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) (cited at CP 1488)).

Federal cases consistently hold that "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." *Chambers*, 501 U.S. at 44; *see also Lipsig v. Nat'l Student Mktg. Corp.*, 663 F.2d 178, 180 (D.C. Cir. 1980) ("Not surprisingly, then, the standards for bad faith are necessarily stringent, and the fee-shifting sanction is invocable only for some dominating reason of justice.") (citations and footnotes omitted) (cited with approval in *Rogerson*). Thus, federal law allows an award of fees for bad faith only in the most egregious circumstances, such as when "a court finds that fraud has been

practiced upon it, or that the very temple of justice has been defiled.” *Chambers*, 501 U.S. at 46 (quotation omitted); *see also Union Elevator & Warehouse Co. v. State ex rel. Dep’t of Transp.*, 152 Wn. App. 199, 211, ¶ 29, 215 P.3d 257 (2009) (“The definition of ‘bad faith’ is narrow and places a significant burden on the party claiming fees”), *rev’d on other grounds* 171 Wn.2d 54, 248 P.3d 83 (2011).

A charge that a party has fabricated evidence is tantamount to a fraud on the court and, as with any other allegation of fraud, must be proved by clear, unequivocal, and convincing evidence. *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 538 F.2d 180, 195 (8th Cir. 1976) (“A finding of fraud on the court is justified only by the most egregious misconduct directed to the court itself, such as . . . fabrication of evidence . . . and must be supported by clear, unequivocal and convincing evidence.”), *cert. denied*, 429 U.S. 1040 (1977). Clear and convincing evidence is that which shows the ultimate fact at issue to be highly probable. *Matter of Marriage of Schweitzer*, 132 Wn.2d 318, 329, 937 P.2d 1062 (1997). When findings that must be established by clear and convincing evidence are appealed, they will

be affirmed only if there is substantial evidence to support them “in light of the ‘highly probable’ test.” *Schweitzer*, 132 Wn.2d at 329.

2. No clear, unequivocal, and convincing evidence supported the finding that Cascade fabricated the pump drive shafts.

Undisputed evidence refutes several of the trial court’s findings that underlie its conclusion that Cascade deliberately presented false evidence, including its “bombshell” finding that a pump drive shaft had been replaced before Wheeler Canyon. The trial court’s findings also contradict themselves on several key points, underscoring its confusion.

a. Undisputed evidence refutes the trial court’s “bombshell” finding that Cascade replaced a pump drive shaft before Wheeler Canyon. (FF 16-17, CP 1476; CP 1466)

The trial court confused pump drive shafts with the hydraulic pumps that mate with the shafts in its “bombshell” finding that Cascade concealed it had replaced a pump drive shaft before Wheeler Canyon. No evidence supports its findings “that Wheeler Canyon was not the first time a shaft on the PTO box on this 50k rig had failed” and thus “the shaft at the mud pump location that failed at Wheeler Canyon was not . . . original equipment installed by Gefco.” (FF 16-17, CP 1476 (emphasis added); CP 1466; *see also* FF 39, CP 1481 (“the mud pump had been

replaced before Wheeler Canyon, so it could not have been a Foote Jones spline”) (emphasis added))¹³

Rather, undisputed evidence shows that Cascade replaced hydraulic pumps, not a PTO pump drive shaft.¹⁴ The invoices ordering the replacement pumps make no mention of a replacement PTO pump drive shaft. (CP 2650-52) The trial court itself states that the invoices are “for rotation and mud pumps.” (FF 15, CP 1476 (emphasis added)) Moreover, Gefco was the only source for replacement shafts, so had Cascade or Western Hydrostatics (the company from which Cascade ordered replacement pumps) ordered new shafts, Gefco’s records would have reflected the purchase, yet Gefco produced no such records. (CP 795) Likewise, Cascade’s accounts payable and payroll records

¹³ The trial court repeatedly confused the hydraulic pumps with the pump drive shafts. (*See, e.g.*, CP 1466 (“Cascade alleges in its counter-claim that the pump failures”; “The only thing everyone agrees on is that the pumps did fail”; “three of the pumps that failed at Wheeler Canyon were not what they purported to be.”); *see also* FF 15, CP 1476 (confusing pumps as replacement “parts for the PTO box”)) The trial court also confused splines (the ridges on the shafts that interlock with the hydraulic pumps to transmit torque), with the shafts. (FF 38-39, CP 1480-81)

¹⁴ As explained in § IV.A, the hydraulic pumps draw power from the PTO via the pump drive shafts. When Cascade replaced the hydraulic pumps, new pumps were simply inserted into the existing pump drive shafts where the old pumps had been removed. The pump drive shafts are akin to a power outlet – unplugging a broken appliance to plug in a new one does not require replacing the outlet.

reflect the replacement of pumps, not shafts. (CP 2653-55)¹⁵ Cascade's mechanic confirmed "these pumps were replaced because there was a hydraulic failure, not because there was any part of a shaft replacement." (Ex. 22, excerpts from 8/14/2012 Rider deposition at 60) Gefco's expert agreed there was no evidence that a pump drive shaft had been replaced before Wheeler Canyon, stating the "particular hydraulic pump that powers the mud pump failed in 2007," not the shaft. (RP 80, 95; *see also* RP 504, 513-14) Because the trial court's erroneous "bombshell" finding is the linchpin for its sanctions, this error alone warrants reversal. *Darrin v. Gould*, 85 Wn.2d 859, 875, 540 P.2d 882 (1975) (reversing where key finding "ignores . . . undisputed evidence").

b. Neither Cascade nor Mr. Niermeyer had a motive to falsify the shafts because the shafts from the 50K rig would have established the counterclaims, as the trial court itself found. (FF 51, CP 1482)

The trial court repeatedly (and correctly) found that Cascade could prove its counterclaims alleging Gefco's pump drive shafts were too soft with any shaft, including those from Wheeler Canyon, refuting its finding that Cascade and Mr. Niermeyer had "a motive

¹⁵ Mr. Niermeyer did not "stumble[] upon" these records. (FF 18, CP 1477) He discovered them in an archived database after an exhaustive search prompted by the discovery of the Western Hydrostatics invoices. (CP 797-98; RP 621-23)

to falsify evidence.” (*Compare* CP 1467 (“whether a shaft . . . was even from the same 50k rig was immaterial – they were all too soft”), FF 53, CP 1483 *with* FF 51, CP 1482)¹⁶ Plainly and simply, why would Cascade or Mr. Niermeyer undertake the extraordinary (and fraudulent) effort to obtain shafts from another source¹⁷ when, as the trial court found, Cascade could establish its counterclaims with the shafts from Wheeler Canyon? Cascade had nothing to gain and everything to lose. The trial court’s finding that Cascade and Mr. Niermeyer engaged in a surreptitious scheme to falsify evidence when Cascade already had at its fingertips the proof that established its counterclaims simply does not make sense.

When the shafts failed in 2008, Cascade was not contemplating a lawsuit and thus was not concerned with the exacting “chain of custody” the trial court faulted it for not maintaining. (CP 794; RP 571) After Cascade’s mechanic correctly identified Shaft 3 as from the second failure, the same mechanic and other Cascade employees mislabeled it years later. (CP 795, 1373, 2341-42, 2904-05, 2909; RP 612-16) Mr. Niermeyer did no

¹⁶ These same findings refute the trial court’s related finding that Cascade’s counterclaims “would never have been filed [or] would have been dismissed” if it “acknowledged that it could not associate specific shafts with related failures.” (FF 52, CP 1483)

¹⁷ Gefco never produced any evidence establishing where Cascade obtained the purportedly false shafts.

more than rely on his employees' explanation of which shafts were which. (RP 613) That Cascade's mislabeling was an innocent mistake, rather than fraud, is further supported by the fact that Hub City – the party that made Shafts 2 and 4 – failed to notice for years it had not manufactured Shaft 3, the original Foote Jones shaft.

Moreover, Dr. Howitt's testimony supported Cascade's assertion that it simply mixed up Shafts 2 and 3. Dr. Howitt testified that Shaft 3 (the first mud pump failure) "probably saw more than one [hydraulic] pump shaft." (RP 304) That would be the case if, as Cascade asserted, the hydraulic pumps on each side of the pump drive shaft – but not the pump drive shaft itself – was replaced before Wheeler Canyon, because the new pumps would have made the different marks on the original Foote Jones shaft Dr. Howitt observed. The trial court's finding that Shaft 3 showed "wear patterns that suggest they were old and had seen not only a lot of use but more than one pump shaft" is much more logically explained by Cascade's mix-up of the shafts from the first and second mud-pump failures than by a complicated and nonsensical campaign to falsify evidence. (CP 1469; *see also* FF 40, CP 1481)

The trial court's indictment of Mr. Niermeyer's motives also ignores its findings that his grievances against Gefco were justified. Mr. Niermeyer believed that Gefco, aware of a problem with its shafts, went to great lengths to conceal that problem from customers who had PTO shaft failures even when they made repeated inquires. He was right. As early as 2006, Gefco learned that its shafts were failing at an alarming rate, yet it falsely told anyone that inquired that its shafts were hardened to the industry standard or that they "meet specifications." (CP 271, 450, 793; RP 572) That campaign of concealment continued in this litigation, where "Gefco concealed from Cascade *essential facts* that could have established the very allegations that Cascade was leveling against Gefco until it was too late for Cascade to have done anything about it." (CP 1470 (emphasis added)) Mr. Niermeyer's justifiable grievance with Gefco gave him every incentive to ensure the viability of Cascade's counterclaims, not actively undermine them by fabricating shafts when he already had three failed shafts.

The trial court’s finding that Mr. Niermeyer was not credible (based on her misunderstanding of basic facts)¹⁸, even if sustained, cannot support its crippling sanctions award. “[M]any if not most trials turn upon which party is the most credible.” *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 930, 982 P.2d 131 (1999). In *Rogerson*, the appellate court reversed the trial court’s imposition of attorney’s fees for bad faith, finding that the trial court erred in imposing those fees based on its finding that a corporation’s principal was not credible. 96 Wn. App. at 930. Here, as in *Rogerson*, a finding of non-credibility is not enough to support sanctions, particularly in light of Gefco’s own “stunning” lack of candor. (CP 1472)

The evidence supports – at most – a finding that Cascade innocently mislabeled two of its shafts years after they failed. Indeed, the trial court itself repeatedly equivocated, acknowledging that Cascade may have done nothing more than “carelessly

¹⁸ The trial court’s one year delay before reviewing the evidence and entering a decision resulted in confusion over other basic facts underlying its finding that Mr. Niermeyer was not credible. For example, the trial court wrongly found that Mr. Niermeyer lost \$10 million because he was unable to *sell* Cascade, rather than that Cascade was unable to *buy* a competitor. (Compare FF 21, CP 1477; CP 1466 with CP 799; RP 625) The trial court also wrongly found that “Cascade was replaced on the [Wheeler Canyon] job . . . mean[ing] that Cascade was not paid” when in fact Cascade successfully completed a well that pumped 150 gallons per minute and obtained a judgment for its work at Wheeler Canyon. (Compare CP 1466 with CP 2207-08, 2210; RP 637)

preserve[] evidence.” (CL 3, CP 1489; *see also* CP 1469 (acknowledging that evidence “at best” showed that Cascade “could not accurately identify” the shafts); 3/24 RP 22 (shafts “could have been” from a different rig); Fee CL 1, CP 2314); *Gassman*, 175 Wn.2d at 210 (trial court erred in awarding sanctions where it “descri[bed] the State’s behavior as ‘careless’”) The trial court’s \$1.6 million sanction for perpetrating a “bad faith” fraud on the court is not supported by the requisite clear and convincing evidence.

c. No evidence supported Gefco’s “blueing” theory. (FF 35-36, CP 1480)

The trial court’s finding that the shafts were falsified because they lacked evidence of “blueing” also cannot withstand scrutiny. As the trial court recognized, Gefco’s theory established fraud if – and only if – the shafts failed because of improper installation and overheating. (CP 1468 (recognizing there would have been no blueing if “the steel was never overheated”)) But finding the evidence equivocal at best, and again confusing the hydraulic pumps and the pump drive shafts, the trial court expressly refused to make any findings “as to why the pumps failed.” (CP 1466; FF 36, CP 1480 (acknowledging evidence of cause of failure conflicted); 3/24 RP 23 (“I didn’t make any findings about how the rig was

used”)) Nevertheless, the trial court stated “had the second mud pump actually been collected from the Wheeler Canyon rig, it would have evidenced ‘blueing’ because of the short time it would have been in operation before the failure – and yet the shaft in evidence does not show blueing.” (CP 1471)¹⁹ The trial court’s findings cannot be squared; its refusal to resolve why the shafts failed makes its reliance on Gefco’s blueing theory error.

Regardless, the record is devoid of evidence supporting Gefco’s blueing theory. The hydraulic pumps attached to the shafts, which Western Hydrostatics photographed when Cascade sent them in for repairs, show no blueing. (CP 1904-07) The maintenance records from Wheeler Canyon do not mention bearing failure or damage to the PTO’s case, which Gefco’s experts acknowledged would happen if overheating sufficient to cause blueing occurred. (RP 26, 93, 513-14) None of Cascade’s employees at Wheeler Canyon, including Mr. Rider and even disgruntled former employees, saw blueing of the shafts or other equipment.²⁰

¹⁹ This finding again confuses the pumps and pump drive shafts.

²⁰ A 2012 inspection of Cascade’s 50K rig revealed a nearly completely failed pump drive shaft that was installed in the same purportedly improper manner as those that failed at Wheeler Canyon, yet neither it nor its bearings showed any evidence of blueing. (RP 284)

Indeed, Dr. Howitt himself explained in response to the trial court's questioning that he would not expect to see blueing from the failures at Wheeler Canyon:

THE COURT: I have a few questions. Yesterday we heard some testimony about too much stress . . . too much stress being placed on the pull-down shaft and the winch Is that the kind of stress that could cause the overheating and the bluing?

THE WITNESS: Probably not, no, I don't think so. I don't think -- the problem there is that the shaft just cannot drive. It's just offering too much resistance in the motor, so you wouldn't see shaft bluing from that.

(RP 333-34) Ignoring Dr. Howitt's testimony, the trial court again confused the evidence by finding that blueing could result from the rig being "misused and worked too hard." (FF 36, CP 1480) But Gefco tied its blueing theory specifically to its allegation that Cascade improperly installed the bearings used with the pump drive shafts at "zero clearance," not its separate allegations of "misuse." (RP 26-27, 44, 93, 309, 315-16)²¹ Moreover, Gefco's bluing theory was put forth by its expert Mr. Rottman, (RP 26-27, 49-50, 93-94), who the trial court found was an "advocate," rather "than a dispassionate expert." (FF 23, CP 1477) The trial court erred in

²¹ Gefco's experts conflicted with each other, asserting both that Cascade installed the bearings too tightly and too loosely. (See CP 2623)

accepting Gefco's blueing theory as clear and convincing evidence of fraud after finding facts that expressly refute the factual underpinning of that theory.

d. Five hundredths of an inch differences in “chamfer” impressions – measured with a ruler and the naked eye – are not clear and convincing evidence of fraud. (FF 38, 40, 53, CP 1480-81, 1483)

The trial court also relied on minuscule differences in “chamfer” impressions on the pump drive shafts to find that Cascade fabricated the pump drive shafts. Gefco's chamfer analysis is rife with problems and nowhere near clear or convincing.

Gefco's assertion that chamfer impressions left by the hydraulic pumps on the pump drive shafts establish fraud has morphed significantly over time. Gefco's expert, Dr. Howitt, initially asserted that the impressions on the undamaged “B” ends of Shafts 2 and 4 did not match the Sundstrand pumps on the Wheeler Canyon rig. (CP 3360-61)²² Dr. Howitt affirmed that position on the first day of the hearing stating that with “no exceptions” there were no shafts that showed impressions from a mud pump (*i.e.*, Sundstrand pump). (RP 157, 197) Just a

²² Dr. Howitt's initial report contradicted itself, stating both that the undamaged end of Shaft 4 is “not consistent with . . . a Sundstrand pump” and then stating its “end wear impressions [are] consistent with a mud pump,” *i.e.*, a Sundstrand Pump. (*See* CP 3361-62)

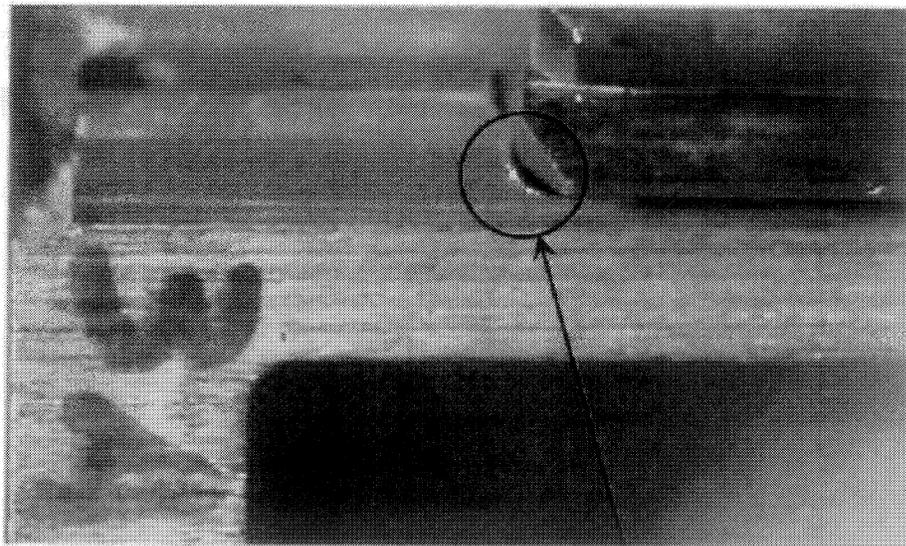
day later, Dr. Howitt stated he had in fact realized months earlier that he “made a mistake” that resulted in a “pretty big difference” in his opinion and that the impressions on the undamaged ends of all the shafts matched the Sundstrand pumps on the Wheeler Canyon rig. (RP 245-46, 262-67)²³ Inexplicably, the trial court found Dr. Howitt’s concession that he failed to correctly analyze the B ends of the shafts (which would be easier to analyze because they were still intact) was a badge of credibility, rather than confirmation of his sloppy work. (FF 30, CP 1479)²⁴

After Dr. Howitt’s concessions, the “clear and convincing” evidence of fraud boiled down to five hundredths of inch differences in impressions on the damaged “A” ends of Shafts 2 and 3, which Gefco’s experts measured *with the naked eye and an ordinary ruler with 1/32 inch increments*. (See, e.g., Figures 4-6) This evidence would not even be *admissible* under ER 702, let alone

²³ Dr. Howitt stated he changed his mind on the B ends of Shafts 2 and 4 at the deposition of Cascade’s expert, months before the evidentiary hearing. Gefco never disclosed that change and it was revealed only when Dr. Howitt reversed himself on the second day of testimony.

²⁴ The trial court’s finding that Dr. Howitt was candid and “did not dodge the questions or excuse the error” ignores his actual testimony. (FF 30, CP 1479; CP 1468) Dr. Howitt attempted to excuse his error by claiming he did not have access to high quality photographs, but then conceded that prior to writing his report he “personally view[ed] each of these pieces” and “had the opportunity to have photographs taken at whatever angle” he wanted. (Compare RP 253 with RP 269)

meet the clear, unequivocal, and convincing standard of proof. *See, e.g., Parvin v. State*, 113 So.3d 1243, 1250 (Miss. 2013) (reversing conviction where pathologists' trajectory measurements "using only his naked-eye observations . . . and a protractor" "fell woefully short of the requirements for admissibility."); *Hunt-Watkins v. Darden Restaurants, Inc.*, No. 208-CV-02539-JPM-TMP, 2010 WL 1780130, at *3 (W.D. Tenn. Apr. 30, 2010) ("The Court is not convinced, however, that Rice's engineering training gives him the skill to examine a photograph and estimate elevation differentials within a fraction of an inch with his naked eye."). One need only look at the pictures relied on by Gefco's experts to see that the impression evidence is not as Gefco represented or the trial court found:



(Figure 7 – Purported “match” between failed end of Shaft 3 and

Parker Pump. Notice the gap between the chamfer and pump drive shaft. (Ex. 17, Figure 8))

In contrast, Cascade's expert explained that the impressions on the "A" ends were consistent with the pumps on the Wheeler Canyon rig after measuring them with a digital microscope, which can measure within ten thousandths of an inch, not 1/32. (RP 432, 443-47, 450-51) Indeed, the measurements with a digital microscope showed that the impression on Shaft 2 measured .0469", and thus could not have been made by the .08" chamfer Gefco alleged made the impression. (CP 977; RP 456-58; Ex. 20)²⁵ Cascade's experts also explained that the hydraulic pumps would not leave exact "fingerprints" the size of the chamfer because movement of the shafts and misalignment of the hydraulic pump and pump drive shaft would increase the size of the impression.²⁶ (RP 359-60, 401-02, 423, 441-42; CP 975; Ex. 20) Thus, the actual

²⁵ Cascade's experts also explained that the chamfer on the Parker pump shaft was in fact .113", not .08", and that Gefco's experts erroneously measured the length of the chamfer vertically or horizontally, ignoring that the chamfer is angled. (See Figures 4-5) Thus, even if the impressions were .08", the .113" Parker pump chamfer could not have made them. (RP 454-59)

²⁶ The trial court provided no explanation for why it rejected this testimony, stating only that Cascade's expert "analyzed whether the failure would have happened had the steel been harder" (FF 46, CP 1482), ignoring this testimony and the rebuttal reports addressing Gefco's claims regarding the chamfer impressions. (CP 970-78; Ex. 20)

.0469” impression reflects the wear to be expected from a .03” chamfer, not a larger .08” chamfer.

The fatal errors in Gefco’s impression analysis also refute the trial court’s finding that Shaft 3, an original shaft manufactured by Foote Jones, could not have come from the Wheeler Canyon rig because the chamfer impression showed it failed at the pull-down pump and the original shaft that failed at the pull-down pump was not kept by Cascade. (FF 38, CP 1480) After testifying that the 50K rig only came with one Foote Jones shaft (RP 159), Dr. Howitt conceded that the rig in fact came with two Foote Jones shafts – one at the mud pump location and another at the pull-down – and thus if Shaft 3 was the first to fail at the mud pump, as Cascade represented, it would be a Foote Jones shaft. (RP 208)

Moreover, the trial court (again) demonstrated its fundamental misunderstanding of the evidence in describing the chamfers as “an angled cut in the edge of the opening of the shaft where it fits with the male-end pumps.” (FF 13, CP 1476; CP 1466; *see also* RP 249 (trial court: “I’m still a little unclear about what the word chamfer means.”)) The chamfers relied on by Gefco’s experts were not on the “opening” of the female pump drive shafts – they were on the end of the male hydraulic pump shafts. (Figures 4-5)

The trial court could not have understood Gefco's impression evidence, let alone find it clear and convincing evidence of fraud, if it did not know what made the impressions.

The "clear and convincing" evidence of fraud on the court consists of the largely abandoned testimony of an expert and a determination that the same expert, using his naked eye and a ruler with 1/32" increments, is more credible (even after he admitted mistakes) than another expert using a digital microscope with accuracy to ten-thousandths of an inch. A finding that a party deliberately fabricated evidence must be based on more.

e. The trial court erroneously relied on Cascade's decision to dismiss its counterclaims as evidence of fraud. (CP 1471)

The trial court's speculation that Cascade dismissed its claims because it had been "found out" (CP 1471) conflicts with the policies and principles underlying our Civil Rules, which give a party the right to control their claims and encourage the expeditious resolution of claims. CR 41 allows a party to voluntarily dismiss its claims for any or no reason in light of the well-established policy that a party has an absolute right to control its claims. *See Burnett v. State Dep't of Corr.*, 187 Wn. App. 159, 172, ¶ 35, 349 P.3d 42 (2015). When a party dismisses claims under CR

41, “[n]o substantive issues are resolved” and no party is deemed to be the prevailing party on those claims. *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 492, ¶ 22, 200 P.3d 683 (2009).

The law encourages parties to turn to courts to resolve their disputes, and to decide for themselves when it is in their interest to do so. Parties should not be compelled to pursue claims to completion, lest their voluntary dismissal be construed as “evidence” their claims lack merit and warrant sanctions. Courts should be exceptionally loathe to impose sanctions on the ground that meritorious, non-frivolous claims are asserted in bad faith based upon a party’s decision to voluntarily dismiss them.

The trial court improperly penalized Cascade for dismissing its claims for legitimate reasons, and not to hide a “fraud.” No evidence supports the trial court’s finding that Cascade dismissed its counterclaims for reasons other than the ones it gave, foremost of which was that this litigation – over a \$40,000 invoice – had become too burdensome, expensive, and time-consuming, particularly in light of Gefco’s repeated discovery abuses. (CP 799; RP 623-27) While its leadership was wrapped-up in fighting through Gefco’s refusal to produce basic evidence, Cascade missed the opportunity to buy a competitor at a “fire sale” price, a purchase

that would have taken Cascade to a “whole new size of company.” (CP 2222-23; RP 625) Cascade also (naively) hoped that it could return to amicable terms with Gefco because of Gefco’s new ownership. (CP 799-800; RP 625-27)

Moreover, the trial court’s determination that Cascade’s counterclaims were frivolous (CP 1471) is undermined by its findings that Cascade’s claims may have been meritorious. In fact, the trial court refused to evaluate the merits of Cascade’s counterclaim that Gefco’s shafts were too soft and that Gefco fraudulently concealed that defect. (CP 1466 (“This Court has been very clear with the parties that it will not make any finding as to why the pumps failed.”) (emphasis in original)) Nor could the trial court have fairly evaluated Cascade’s counterclaims given Gefco’s bad faith discovery violations concealing “essential facts.” The trial court erred in relying on Cascade’s decision to cut its losses and move on.

B. The trial court’s crippling sanction against Cascade cannot stand in light of Gefco’s unclean hands.

A court’s decision to award fees as a sanction for bad faith is an exercise of its “inherent equitable powers.” *Gassman*, 175 Wn.2d at 211, ¶ 4. Gefco’s own violations and unclean hands preclude its recovery of sanctions on the equitable ground of bad

faith. While the trial court hammered Cascade based on acts it conceded may have been mere mistakes, it slapped Gefco on the wrist after finding that it had intentionally and in bad faith violated its own discovery obligations, reasoning that “Gefco’s efforts to protect itself are understandable if not appropriate” “[i]n light of the litigation strategy and conduct of Cascade.” (FF 88, CP 1487; *see also* CL 5, CP 1489 (“under these circumstances they were perhaps necessary defensive tactics”))

It is a fundamental principle of justice that “[t]wo wrongs cannot make a right.” *Braseth v. Farrell*, 176 Wash. 365, 369, 29 P.2d 680 (1934). It is likewise “a well-known maxim that a person who comes into an equity court must come with clean hands.” *Income Investors v. Shelton*, 3 Wn.2d 599, 602, 101 P.2d 973 (1940). Thus, “[e]quity will not interfere on behalf of a party whose conduct in connection with the subject-matter or transaction in litigation has been unconscientious, unjust, or marked by the want of good faith, and will not afford him any remedy.” *Shelton*, 3 Wn.2d at 602

The trial court erred in awarding Gefco’s \$1.6 million in fees despite its unchallenged finding that “Gefco concealed from Cascade essential facts that could have established the very

allegations that Cascade was leveling against Gefco until it was too late.” (CP 1470) Gefco concealed (among other things) that it had sued Hub City making the same allegations as Cascade regarding the quality of its shafts and that it had received “numerous” complaints regarding “defective” PTOs (not the few it actually disclosed). (FF 68, 79, CP 1485-86; CP 2521, 2526) It further failed to disclose when it redesigned the pump drive shafts to increase their hardness – precisely as Cascade alleged it should. (FF 76, 81-84, CP 1486-87) And rather than disclose design changes that would have clarified the mislabeling of Shafts 2 and 3 early in this litigation, Gefco concealed those changes, revealing them only when it could use them as support for its sanctions motion. (CP 2627 (disclosing design change that distinguished Foote Jones and Hub City shafts))

These “omissions were in bad faith.” (FF 88, CP 1487) Gefco concealed and misrepresented evidence not only to Cascade (as well as other customers), but also “with[e]ld[] critical information from ... the Court,” which “directly influenced th[e] Court’s ruling bifurcating Cascade’s counterclaims” because Gefco falsely insisted there was “no real evidence that any other customer had reported problems with their 50k rigs.” (FF 90-91, CP 1487-88) The trial

court admitted it would have been “stunned” by Gefco’s bad faith violations “in any other case,” but erroneously reasoned that Cascade’s alleged violations somehow excused Gefco’s conduct. (CP 1472)²⁷ Rather than punishing Gefco’s bad faith, the trial court rewarded it with a \$1.6 million fee award (less the \$10,000 “sanction” it paid), ignoring its own admonition that a court has a duty to sanction conduct that “if left unchecked, would encourage future abuses.” (CL 2, CP 1488)

The trial court’s undisputed and unappealed findings of Gefco’s bad faith establish that it lacked the clean hands required for equitable relief. *Shelton*, 3 Wn.2d at 602 (“coming into a court of equity and asking relief after wilfully concealing, withholding, and falsifying books and records, is certainly not coming in with clean hands”); *In re Recall of Lindquist*, 172 Wn.2d 120, 136, ¶ 28, 258 P.3d 9 (2011) (“omitting material portions of documentary evidence constitutes procedural bad faith”). This is true regardless of what Cascade may or may not have done. *Precision Inst. Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 814, 65 S.Ct. 993, 997, 89 L.Ed. 1381 (1945) (equitable relief cannot be

²⁷ The trial court’s reasoning that Gefco’s actions “were perhaps necessary defensive tactics” (CL 5, CP 1489) also ignores that Gefco’s concealment and fraudulent representations predates by years any concern about the provenance of the shafts.

given regardless of “however improper may have been the behavior of the” opposing party), *petition denied*, 325 U.S. 843 (1945).

The trial court’s \$1.6 million fee award also ignores that the purpose of a court’s inherent sanctions power is to protect the court – not to compensate parties. “The proper use of sanctions that are within the court’s inherent power is to protect the court so it may adequately dispense justice.” *Mark Indus., Ltd. v. Sea Captain’s Choice, Inc.*, 50 F.3d 730, 733 (9th Cir. 1995) (citing *Chambers*, 501 U.S. at 43, 111 S.Ct. at 2132). Thus, “the amount of an inherent powers sanction is meant to do something very different than provide a substantive remedy to an aggrieved party. An inherent powers sanction is meant to vindicat[e] judicial authority.” *Mark Indus.*, 50 F.3d at 733 (9th Cir. 1995) (quotation omitted). Unchallenged findings establish Gefco’s bad faith – that it repeatedly and knowingly concealed “essential facts” that would have established “the very allegations that Cascade was leveling.” Its unclean hands require reversal of the \$1.6 million windfall fee award.

C. The trial court erroneously made non-party Mr. Niermeyer personally liable for the sanction.

The trial court erred in making non-party Mr. Niermeyer personally liable for sanctions without piercing the corporate veil. A corporation is a distinct legal entity, separate from its officers or

stockholders. *Truckweld Equip. Co. v. Olson*, 26 Wn. App. 638, 644, 618 P.2d 1017 (1980). The separate corporate entity can be disregarded only after finding 1) the corporate form was intentionally used to violate or evade a duty and 2) disregard is necessary and required to prevent unjustified loss to the injured party. *Norhawk Investments, Inc. v. Subway Sandwich Shops, Inc.*, 61 Wn. App. 395, 399, 811 P.2d 221 (1991).

In *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 982 P.2d 131 (1999), the court reversed a bad faith attorney fee sanction entered against the sole shareholder of a corporation for “a pattern of disregard for the separation of corporate entities.” 96 Wn. App. at 929. The appellate court reversed the sanctions because although the trial court did not believe the shareholder’s assertions regarding which of his corporations owned the property at issue, the “issue . . . was hard fought” and ultimately came down to the trial court’s finding that the shareholder “simply [was] not believable on the principal issue.” 96 Wn. App. at 930. Allowing a fee award on that basis would allow a fee award in virtually every case, because “many if not most trials turn upon which party is the most credible.” 96 Wn. App. at 930. Here, as in *Rogerson*, the provenance of the shafts was hard fought

and ultimately boiled down to the trial court not believing Mr. Niermeyer (based on the errors outlined above). *Rogerson* precludes a fee award on that basis.

Mr. Niermeyer, Cascade's principal, was not a party to this litigation and could not be personally liable without findings piercing the corporate veil. *Cornish Coll. of the Arts v. 1000 Virginia Ltd. P'ship*, 158 Wn. App. 203, 232, ¶ 61, 242 P.3d 1 (2010) (trial court erred by "simply disregard[ing] the liability implications of the business structures" "[w]ithout piercing the corporate veil"), *rev. denied*, 171 Wn.2d 1014 (2011); *Rogerson*, 96 Wn. App. at 924 ("The first element requires a *finding* of an abuse of the corporate form") (emphasis added). The trial court made no findings that Mr. Niermeyer abused Cascade's corporate form to violate a duty owed to Gefco, nor that disregard was necessary to prevent an unjustified loss to Gefco, whom the trial court found engaged in its own bad faith conduct. It simply disregarded Cascade's corporate form. (CP 1489, 2472) That was error.

D. The trial court erred in awarding Gefco's counsel \$1.6 million in fees much of which was related to its own bad faith discovery violations.

The trial court also made numerous errors in its assessment of the reasonableness of Gefco's fees. Gefco's initial fee application

sought \$3 million in attorney's fees, costs, and expert expenses, with the majority of entries block-billed in half-hour increments. (CP 2747-49) The trial court ordered Gefco to remove, among other things, work related to its discovery violations and unsuccessful defense of Cascade's sanctions motion. (Fee FF 2, 26, CP 2304-05, 2313; 3/24 RP 59-60) Gefco then represented it "adhered to the court's instruction." (CP 3113)

That was a lie. For example, Gefco failed to remove an entry for "prepar[ing] discovery responses" and "[c]orrespondence to [Cascade's counsel] re discovery." (CP 2807) It also failed to remove charges for "giving [Cascade] stats on complaints about PTOs" – statistics the trial court found Gefco falsified. (CP 2763) Another entry concerned "[a]ttention to recent discovery requests from Cascade regarding shaft issues with Gefco customers." (CP 2791)

There are hundreds of disallowed entries that Gefco failed to remove. (CP 2750) The trial court nevertheless awarded Gefco these fees, accepting Gefco's bald statement "Gefco complied with the Court's request," when Gefco's own records demonstrated the falsity of that statement. (Fee FF 26, CP 2313-14) A trial court cannot "simply accept unquestioningly fee affidavits from counsel."

Berryman v. Metcalf, 177 Wn. App. 644, 657, ¶ 27, 312 P.3d 745 (2013), *rev. denied*, 179 Wn.2d 1026 (2014), quoting *Mahler v. Szucs*, 135 Wn.2d 398, 434–35, 957 P.2d 632, 966 P.2d 305 (1998).

The trial court also erred in shifting the burden to Cascade in multiple instances to *disprove* the reasonableness of Gefco’s fees. For example, the trial court stated it would “not comb the spreadsheets to find” additional examples of inappropriate billing by partner-level attorneys because “Cascade was unwilling to do so.” (Fee FF 12, CP 2306) The trial court likewise refused to “comb through the records to find” inappropriately redacted time entries because “Cascade does not specify all of the redacted items.” (Fee FF 25, CP 2313)²⁸ It was Gefco’s burden to prove the reasonableness of its fees and costs, not Cascade’s burden to disprove them. *Berryman*, 177 Wn. App. at 657, ¶ 25 (“The burden of demonstrating that a fee is reasonable is upon the fee applicant.”). Even should this Court affirm the trial court’s sanctions against Cascade, it should remand for redetermination of the fee award.

²⁸ Cascade pointed out numerous redacted entries, and the trial court could have easily found the rest via a keyword search for “Redacted” in the billing spreadsheets.

E. The trial court erroneously imposed a 12% interest rate.

Liability arising from a party's bad faith sounds in tort. *Miller v. Kenny*, 180 Wn. App. 772, 819-20, ¶ 117, 325 P.3d 278 (2014) (judgment against insurer for bad faith sounds in tort); *Woo v. Fireman's Fund Ins. Co.*, 150 Wn. App. 158, 170, ¶ 28, 208 P.3d 557 (2009) (same), *rev. denied*, 167 Wn.2d 1008 (2009); *see also Cherberg v. Peoples Nat. Bank of Washington*, 88 Wn.2d 595, 605, 564 P.2d 1137 (1977) (landlord's bad faith refusal to repair premises was tortious). RCW 4.56.110(3)(b) requires that "judgments founded on the tortious conduct of individuals or other entities . . . shall bear interest from the date of entry at" 5.25% as of February 2015. The trial court entered judgment based on its conclusion that Cascade Drilling and Mr. Niermeyer had acted in bad faith. That sounds in tort. Accordingly, the tort interest rate of 5.25% in RCW 4.56.110(3)(b) should apply to the judgment, not the catch-all interest rate in RCW 4.56.110(4).

F. Cascade – not Gefco – is entitled to its attorney's fees based on Gefco's unchallenged bad faith discovery violations.

Cascade did not fabricate evidence. (§ V.A.2) In contrast, Gefco repeatedly violated its discovery duties by engaging in a purposeful campaign to withhold "essential facts" from Cascade and

the trial court. (CP 1470) Upon reversing the sanctions against Cascade, this Court should award Cascade its fees incurred on this appeal based on Gefco's undisputed and unchallenged bad faith conduct and should remand to the trial court for award and calculation of Cascade's attorney's fees below. RAP 18.1; *State v. S.H.*, 102 Wn. App. 468, 475, 8 P.3d 1058 (2000) ("conscious disregard of . . . discovery obligations" supports fee award).

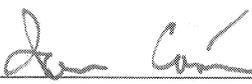
VI. CONCLUSION

This Court should reverse the trial court's sanctions award. It should also award Cascade its attorney's fees on appeal and remand for award of Cascade's attorney's fees incurred below.

Dated this 18th day of September, 2015.

SMITH GOODFRIEND, P.S.

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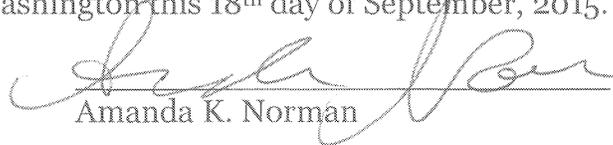
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on September 18, 2015, I arranged for service of the foregoing Brief of Appellants to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-File
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Michael B. King Jason W. Anderson Carney Badley Spellman, P.S. 701 5 th Avenue, Suite 3600 Seattle, WA 98104	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

DATED at Seattle, Washington this 18th day of September, 2015.


Amanda K. Norman

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2015 SEP 21 PM 12:00

APPENDIX A

Superior Court for the State of Washington
in and for the County of King

SUSAN J. CRAIGHEAD
Judge

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November 27, 2013

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RE: George E. Failing Company v. Cascade Drilling, Inc. et al 09-2-25097-9 SEA

Counsel,

First, let me begin with a profound apology. The administrative demands of my job as well as my personal responsibilities became very taxing shortly after the hearing on sanctions in this matter and it has been difficult for me to carve out the time I needed to go back over all of the testimony (using the rough real-time transcripts), the exhibits, the reports and all of my notes. I know how important these issues are to everyone and I did not want to make a mistake.

Before the Court are cross-motions for sanctions. Cascade accuses Gefco of discovery violations that undermined its enterprise claim against Gefco. Gefco accuses Cascade of falsifying evidence. The bulk of the testimony at the hearing on these sanctions concerned Gefco's claims against Cascade. Cascade Drilling is in the business of drilling water wells at different construction sites, for example, housing developments under construction. Gefco manufactures very large machinery used to drill the wells. Hub City, Inc. makes parts for the drilling rigs. This case started out as an apparently ordinary commercial dispute when Gefco instituted a collection action against Cascade. Cascade counter-claimed, alleging that Gefco supplied Cascade with a defective drilling rig because it failed four times in a short period of time during a project drilling wells at Wheeler Canyon in California in 2008. Cascade attempted to broaden the lawsuit to allege that Gefco supplied defective rigs to other drillers but, after extensive litigation, this Court determined that those allegations should be bifurcated to allow a jury determination as to whether the failures at Wheeler Canyon resulted from a defective rig or its parts. The case involved a great deal of hard-fought discovery and vigorous motions practice. Cascade alleges that only after its counterclaims were dismissed did Gefco disclose problems it had encountered with other rigs. At that time it was also learned that Gefco had sued Hub City, alleging that the replacement parts it provided were defective.

Gefco's Allegations Against Cascade

The issues in this case were highly technical. Power for the drill comes from a Power Take-Off (PTO) Box mounted on the back of a large truck. The PTO uses hydraulics to push the drill into the well-hole and bring mud back up to the surface. It has two shafts with a total of four pumps mounted at the ends of the shafts. One shaft is connected to the winch and the pull down pump, and the other to the rotary and mud pump. Cascade alleges in its counter-claim that the pump failures occurred because the steel they were made from should have been harder than it was. Gefco alleged that the problem was not the steel, but the manner in which Cascade used the drill rig. This Court has been very clear with the parties that it will not make any finding as to why the pumps failed.

The only thing everyone agrees on is that the pumps did fail and, ultimately, Cascade was replaced on the job. This meant that Cascade was not paid for this work at Wheeler Canyon just as the economy went into free fall. The failure at Wheeler Canyon might also have negatively affected a pending sale of part of the company worth about \$10 million.

In August 2012 Cascade abruptly settled, dismissing its claims against Gefco and Hub City and paying the full amount due to Gefco. Cascade dismissed its claims against these companies after expert witnesses for Gefco and Hub City determined that the pumps that had been produced by Cascade and represented to be three of the pumps that failed at Wheeler Canyon were not what they purported to be. Cascade contends that, at worst, lay people failed to maintain a careful chain of custody and two of these pumps were mislabeled. Gefco believes more sinister motives were afoot.

Early on in the case, Gefco took Mr. Niermeyer's deposition, and he identified three of the four shafts that, he testified, failed at Wheeler Canyon. No identifying marks were stamped into the metal. To a layperson, the shafts appeared to be what he said they were and discovery proceeded on that basis. These shafts were the only physical evidence in existence. Cascade discarded all evidence of the first failure because there was no reason to believe that this was anything other than a worn-out piece of equipment. With respect to the subsequent three failures, Cascade failed to save any of the male-end hydraulic pumps that mated with the allegedly defective shafts, or any of the bearings. Mr. Niermeyer testified that he was not, at least initially, contemplating litigation, so there would be little point in saving these items. Their absence interfered with the experts' ability to do thorough failure analyses, but no one attributed any bad motive to Cascade's failure to keep the materials.

The first failure at Wheeler Canyon occurred on March 5, 2008 and involved the pull down hoist. This was alleged to have been the first failure of the PTO box on this 50k rig. The second failure occurred on March 21, 2008 and involved the mud pump location. The third failure occurred April 4, 2008 and also involved the mud pump location. The fourth failure occurred on June 16, 2008 and involved the pull down location. This was the information provided to the experts. It should be noted that these shafts are very heavy and not easily transported so they could not be easily shared among the experts. These experts took different approaches to their forensic examinations of the shafts, but in essence they were looking at wear patterns on the metal and the "chamfer" on each shaft. A chamfer is an angled cut in the edge of the opening of the shaft where it fits with the male-end pumps. The size and the angle of the chamfer helps determine what type of pump it was attached to.

Throughout the litigation, Gefco and Hub City vigorously requested documents from Cascade including all maintenance records for this PTO box. Cascade represented that it had provided all that it could find. However, in August, 2012 Gefco's drilling expert, Larry Rottman, obtained from Western Hydrostatics copies of invoices for rotation and mud pumps dating from 2006-2007 that were replacements for the parts on the 50k rig. These documents established that Wheeler Canyon was not the first time a shaft on the PTO box on this 50k rig had failed. Importantly, the mud pump had been replaced before. This was a bombshell. This meant that the shaft at the mud pump location that failed at Wheeler Canyon was not

“OEM,” or original equipment installed by Gefco. At this point, Cascade produced its maintenance records that confirmed this shaft had been replaced. Mr. Niermeyer claims that he stumbled upon these records after diligent search in response to discovery requests and the timing was simply coincidental.

The parties at this stage re-deposed Cascade’s chief mechanic, Chuck Rider. In September 2011, Mr. Rider had testified that all the shafts to “the best of [his] knowledge,” came from the 50 k rig at Wheeler Canyon. There was no mention of a prior failure of the rig. However, on August 12, 2012, Mr. Rider testified that Mr. Niermeyer had now brought to his attention the fact that prior to Wheeler Canyon he had replaced the rotary pump and the mud pump. He was confronted with documents showing that the rotation pump had been replaced in March 2006 and the mud pump has been replaced in October, 2007 with pumps purchased from Western Hydrostatics. The Court noticed that Mr. Rider became visibly uncomfortable when he was questioned on the video deposition about how and when he had been asked to collect records regarding maintenance on the 50k rig. At the August 2012 deposition, Mr. Rider was asked in much more detail about how he collected each failed shaft, where he put them, and how he could tell which came from which failure. The upshot of his testimony was that Mr. Rider did not know which shaft came from which failure and that he explained this to both Mr. Niermeyer and Cascade’s attorneys. He assumed that Mr. Niermeyer was the person who designated the shafts as having come from failures 1, 2, and 3.

From Mr. Niermeyer’s point of view, precision about numbering the shafts may not have seemed important. Early on, he had reached the conclusion that Gefco’s equipment was faulty because the steel was not hard enough. If, indeed, he was right, then whether a shaft had failed first or third or was even from the same 50k rig was immaterial – they were all too soft. The problem is, of course, that from Gefco and Hub City’s point of view, there could be many other reasons the shafts could have failed and knowing which shaft was which was of critical importance. From their point of view, the failures occurred because of misuse of the equipment—the shorter the span of time between failures, the more likely the cause was the misuse of the equipment. The failure to produce maintenance records of the 50k rig made everyone think that (1) the mud pump was OEM equipment and (2) that it failed after a long time in use. In actuality, it was not original equipment and it failed after only six months in use. To Mr. Niermeyer, these might have seemed distinctions without a difference, but obscuring the actual age and manufacturer of the shafts and the length of time they were in operation was of critical importance. It appears to the court that Mr. Niermeyer must have realized the importance of this information by the time the counterclaims were filed because he did not produce the key maintenance records for the 50k rig until Gefco found them independently.

Mr. Niermeyer played a central role in this case and one not often played by an executive in a commercial dispute. In most commercial cases, the goal is to resolve the dispute using the least amount of resources to achieve a reasonable resolution. By his own admission, Mr. Niermeyer became extremely angry with Gefco because he believed they knew there was a problem with their 50k rigs and they refused to acknowledge or fix it (Cascade’s motion for sanctions asserts that Gefco hid its awareness of problems with the PTO boxes in its rigs until after the counterclaims in this case were dismissed). He went to a trade show early in this litigation and offered a free television to anyone who had information regarding a defective Gefco rig. During the sanctions hearing, he was very involved with his attorney’s cross-examination of Gefco’s metallurgical expert, passing notes and engaging in frequent conferences. On the stand, he appeared to seethe with anger at Gefco and had great difficulty controlling narrative testimony. Wheeler Canyon was the largest single project loss in Cascade’s history. During and soon after the Wheeler Canyon job, he had the opportunity to sell part of Cascade to Water Development. The deal fell through, at least in part, because of the Wheeler Canyon fiasco, and Mr. Niermeyer lost \$10 million. For all of these reasons, the court does not find Mr. Niermeyer to be a credible witness.

Gefco’s drilling expert, Larry Rottman, was paid \$200,000 over the course of this litigation (during a time when business was extremely slow due to the recession) and he appeared on the stand to be disgusted

with the manner in which Cascade used the rig. He came across to the Court as more of an advocate than a dispassionate expert; for that reason, the Court does not rely significantly on his testimony. On the other hand, the Court was very impressed by the objectivity and detailed analysis of Gefco and Hub City's metallurgical and engineering experts. The Court heard extensive testimony from Professor David Howitt of the University of California at Davis, a Ph.D. level metallurgist who had undertaken relevant academic research related to firearms identification. Dr. Howitt's academic credentials are impeccable. Dr. Howitt came across as candid. For example, Dr. Howitt readily admitted on the stand that he had come to realize that he had made a mistake in his written report. He did not dodge the questions or excuse the error. He was thoroughly cross-examined, but it was telling to the Court that most of the cross-examination related to Cascade's theory regarding the hardness of the shafts, which was beside the point.

Dr. Howitt's testimony established to the Court's satisfaction that, at minimum, Cascade failed to disclose that it could not be certain which shaft was which. At worst, Cascade obtained one or more of the shafts from rigs other than the 50k at Wheeler Canyon. Dr. Howitt explained that the friction between the male ends of the shafts and the female ends of the pumps creates what is known as "fretting" wear. Pumps manufactured by different companies wear differently from one another but this would not be obvious to the naked or untrained eye. The longer a particular shaft and pump remain mated, the greater the fretting wear. This is one of the reasons that knowing the actual length of time each failed pump had been in operation is important.

Dr. Howitt's analysis of the fretting wear on the two mud pump shafts lead him to conclude that the shafts had been attached to pumps manufactured by a company known as Sundstrand.¹ There was no doubt in his mind that fretting wear caused the pumps attached to these shafts to fail. However, Dr. Howitt was not convinced that the shafts he examined came from the 50k rig used at Wheeler Canyon – in other words, he believes they most likely came from another rig entirely. He questioned the origin of the shafts for three reasons none of the shafts showed (1) evidence of "blueing;" (2) the manufacturer of the shafts; (3) "impression evidence," or fretting wear.

"Blueing" occurs in the early stages of heating steel when the metal oxidizes and turns a shade of blue as it cools. Dr. Howitt took the position that the most likely reason that pumps failed after short periods of operation was that they were made to work too hard, which would have caused overheating. Cascade disputes that this was the cause of any of the failures. However, from Dr. Howitt's point of view, it was suspicious that none of the shafts produced by Cascade showed evidence of blueing. It is notable that Larry Rottman, a driller and peer of Mr. Niermeyer, was well aware that misuse of drilling equipment causes overheating, which causes blueing. This evidence can be read two ways – either there was no blueing because the steel was never overheated or else Cascade substituted other shafts so there would be no evidence of blueing.

Dr. Howitt's second point relates to the manufacturers of the shafts and pumps at issue. When Gefco purchased the 50k rig, it came with parts in the PTO box manufactured by a Chicago company known as Foote Jones. Replacement parts were all made by Hub City. The very first failure, evidence of which Cascade did not keep, was at the pull down location. When it was repaired, it had to have been replaced by a shaft made by Hub City. Yet the evidence included a Foote-Jones spline that supposedly came from the second failure (the first at the mud pump location), yet the impression evidence is inconsistent with mud pump location and is consistent with the pull-down location. It could not have come from the 50k rig because Cascade only ever had one Foote-Jones spline for the pull-down location. Moreover, we know that the mud pump had been replaced before Wheeler Canyon, so it could not have been a Foote Jones spline. This led Dr. Howitt to conclude that the Foote Jones spline was obtained from another rig entirely.

¹ This was the subject about which Dr. Howitt changed his mind between drafting his report and testifying at the hearing. He explained that he had enjoyed a second opportunity to handle the shafts during a deposition that occurred after he wrote his report and at that point concluded that both were worn by Sunstrand pumps.

Dr. Howitt's final point was that the fretting wear evidenced by the three shafts was inconsistent with Cascade's account of what happened at Wheeler Canyon. Fretting wear occurs slowly over time. Dr. Howitt pointed to Exhibits 4 and 9, which consist of splines that purportedly came from the second mud pump failure. This failure occurred very soon after the first mud pump failure, and yet Exhibits 4 and 9 show fretting wear patterns that suggest they were old and had seen not only a lot of use but more than one pump shaft.

Based on all of these observations, Dr. Howitt concluded that the evidence had been "falsified."

Cascade offered two experts, Paul Diehl and Randy Kent. Both of these experts were told by Cascade's attorneys that there had been a "marking error," and that the shaft previously thought to be the first mud pump failure (known as "2a") was really from the second mud pump failure and vice versa (the one known as 3a was really the first failure). Mr. Diehl testified, tellingly, that Cascade's attorney had explained this to him a few days before the hearing and that "to make the story come out right they have to be reversed."

Mr. Kent is a forensic metallurgical engineer, who analyzes all manner of equipment failures and he holds a Bachelor's Degree in engineering. He contended that the sequence of failures was not very important to the analysis of the failures at Wheeler Canyon. He was not shown the maintenance records discovered in August 2012. He used an electron microscope to determine that the wear patterns on the shafts on the second and third failures were both consistent with pumps made by a company called Sundstrand and inconsistent with pumps made by another company called Parker. On cross-examination, he acknowledged that before he was made aware of the "marking error," he relied more heavily on his analysis of the shaft marked "3a." However, in testimony at the hearing after learning that this shaft was really from the first mud pump failure, he relied more heavily on the shaft marked "2a." This testimony did not undercut Dr. Howitt's testimony at all. Mr. Kent's professed lack of interest in the sequence of the failures suggests to the Court that he did not perform a true failure analysis, but rather analyzed whether the failure would have happened had the steel been harder. That is an important distinction.

Mr. Diehl had 46 years of experience with failure analysis, as an independent engineer since 1966, and before that as an engineer with General Electric. When Mr. Diehl testified, he explained that he and Mr. Niermeyer had met recently in Mr. Diehl's living room when they came up with the idea of reversing two pieces of the shaft/pump interface to demonstrate that the shafts attached to the mud pumps fit Sundstrand pumps. Exhibit 13. Overall, the Court concludes that Mr. Diehl's testimony was simplistic and heavily influenced by his communications with Mr. Niermeyer.

The Court's analysis of the evidence leads to very serious conclusions. Cascade failed to disclose the repairs from before Wheeler Canyon and the Court does not credit Mr. Niermeyer's explanations for this omission. Cascade failed to admit candidly that there was no way to be sure which shaft came from which failure. Mr. Niermeyer appears to have embarked on some sort of vendetta against Gefco, undercutting his credibility and giving him a motivation to falsify evidence. Cascade worked very hard to try to make this case about all of Gefco's 50k rigs, distracting attention from the Wheeler Canyon failures and forcing Gefco to contemplate whether the damage Cascade could cause to its reputation was too great for it to challenge Cascade's assertions about the Wheeler Canyon failures. The Court resolved this dilemma by bifurcating the two issues, requiring one trial about Wheeler Canyon and then, if Cascade prevailed, another one about Gefco's product line. In hindsight, the decision to bifurcate seems prescient. Neither this Court, nor any of the experts or lawyers for Gefco and Hub City imagined that a party would, effectively, initiate a lawsuit with (at best) evidence it could not accurately identify or (at worst) evidence that was wholly falsified. But that is exactly what appears to have occurred here.

In any case, it is difficult for the Court to conclude that Cascade's counter claims would ever have gone anywhere had Cascade been forthright about not knowing which shaft was which. The counterclaims

never should have been filed had counsel been aware that the evidence gathered from other rigs. Either way, Gefco spent more than \$2 million defending itself against Cascade's counterclaims, and it should be reimbursed its reasonable attorney's fees and costs as a sanction for this behavior.

Cascade's Motion for Attorney Fees

Cascade argues that Gefco failed to respond to critical discovery requests and made misrepresentations to the Court regarding the existence of the information Cascade sought. Cascade sought documents that would have substantiated its claims that Gefco had experienced other failures with its shafts on the 50k rig and that it had remedied those problems by making the shafts harder. In July 2012, Gefco warranted to the Court that no customer other than Cascade had received replacement shafts. However, Cascade contends, there was another customer. Moreover, even though Cascade requested replacement shafts, Gefco did not offer to sell any replacements until shortly after Cascade's counter-claims were dismissed with prejudice. Additionally, Gefco failed to disclose that it had not ordered any replacement shafts from Hub City since 2009 despite a relevant discovery request. Evidence discovered after Cascade's counterclaims were dismissed established that Gefco was manufacturing its rigs with different shafts made by a different manufacturer – itself. For example, in 2010 Gefco answered an interrogatory about whether and how there had been a change in manufacture of the PTO unit and that the unit was “now” being manufactured by Hub City. As recently as 2011, Gefco's President testified that Hub City “makes” those replacement shafts.

Cascade contends that Gefco's most stunning is the fact that Gefco failed to disclose that it had filed a declaratory judgment action against Hub City in Oklahoma in April 2012. Cascade argues that the action was filed in connection with this case, but in fact the Oklahoma action was not amended to include this case until September 2012. In April 2012, Gefco sought resolution of contract disputes with Hub City. The lawsuit was not served on Hub City until September 2012, after a dismissal of the claims against Gefco had been obtained. In the amended lawsuit, Gefco alleged that it had “received numerous demands for replacement of defective PTOs from additional non-litigant parties.” Similarly, Cascade learned in September 2012 that Gefco began using harder shafts as of April 2012, information that was not timely provided to Cascade. In other words, Gefco concealed from Cascade essential facts that could have established the very allegations that Cascade was leveling against Gefco until it was too late for Cascade to have done anything about it.

Gefco, for its part, explains that Hub City adopted a litigation strategy that was hostile to Gefco, refusing to accede to Gefco's request for a collaborative defense effort in this lawsuit. Gefco contends it filed its action against Hub City in Oklahoma to beat Hub City to the courthouse in South Dakota. In July 2012, Gefco and Hub City finally negotiated a joint defense agreement. Gefco argues that the declaratory judgment action was not in the nature of the lawsuits Cascade inquired about, which concerned liability for defective shafts. In August 2012, Cascade and Hub City settled and, from Gefco's point of view, Hub City resumed its hostile campaign against Gefco. On September 24 2012, Hub City demanded a release from any responsibility for PTO units, or else it would sue Gefco. At that point, Gefco served its lawsuit on Hub City.

The Court does not doubt that the relationship between Gefco and Hub City was complicated, from both a business and litigation perspective. But these complications do not justify concealing from another party information properly requested through discovery and, indeed, essential to the case. The Court is particularly troubled by Gefco's failure to respond fully and accurately to Cascade's discovery demands because this Court relied on Gefco's representations when it decided to bifurcate the claim regarding Wheeler Canyon from the rest of Cascade's counterclaims. The basis for that decision was that there was little evidence that there was a product liability problem with Gefco's rigs and Cascade's request for customer information threatened to destroy Gefco's business relationships without any evidence that the

PTO box was flawed at Wheeler Canyon. While hindsight has illuminated the wisdom of the Court's decision, the Court was nonetheless misled by Gefco's representations and misrepresentations.

Sanctions:

What happened in this case is not readily captured by the term "frivolous" or by Fisons' characterization of discovery violations. Yes, Cascade's counterclaims were frivolous and yes, Gefco failed to answer interrogatories accurately and completely. What happened here strikes at the heart of our civil justice system. The Court believes that in these circumstances it has the inherent authority to impose sanctions on the parties. Chambers v. NASCO, Inc., 501 U.S. 32 (1991); Roadway Express, Inc. v. Piper, 227 U.S. 752 (1980); State v. S.H., 102 Wn. App. 468 (2000). The Supreme Court approved reliance on the court's inherent authority to impose sanctions when a party has abused the court process. "The imposition of sanctions in this instance transcends a court's equitable power concerning relations between the parties and reaches a court's inherent power to police itself, thus serving the dual purpose of 'vindicating judicial authority without resort to the more drastic sanctions available for contempt of court and making the prevailing party whole for expenses caused by his opponent's obstinacy.'" Chambers, 501 U.S. at 46, *citations omitted*.

Cascade's counterclaims drove this lawsuit. As set forth above, at best these counterclaims were initiated in reliance upon evidence that could not be accurately identified or, at worst, evidence that was wholly falsified. It is difficult for the Court to conclude that Cascade's counterclaims could have gone anywhere had Cascade been forthright about not knowing which shaft is which. Had counsel been aware that evidence was gathered from other rigs, the counterclaims never should have been filed. It is apparent that until this Court put a stop to it, Cascade was attempting to force Gefco to "bet the company" by generating claims by multiple customers when there was no real evidence that the 50k rig had failed at Wheeler Canyon. It was reasonable for Gefco to expend significant attorney fees and costs to fight this prospect, although not necessarily fees and costs of the magnitude that Gefco now claims.

The Court is unmoved by Cascade's defense that its mechanic, Mr. Rider, simply made errors regarding the order in which shafts were removed from the 50k rig's PTO box. Certainly he was not instructed to be careful. Mr. Rider's appearance in his second video deposition does not inspire confidence in his credibility. More to the point, this Court finds that it is very likely that the shafts in evidence were gathered from other rigs. Mr. Niermeyer was convinced that the shafts should have been harder and that this was the cause of the Wheeler Canyon failures. From his point of view, if his theory were right, it would not matter which rig the shafts came from – they were all too soft. He neglected to consider the possibility that from the point of view of Gefco and Hub City, each failure had to be analyzed independently. Mr. Niermeyer did, in fact, solicit evidence against Gefco at a trade show; later he scoured shops to find shafts for Mr. Diehl to work with. He failed to produce the critical documentary evidence that the mud pump had been replaced before the Wheeler Canyon job was ever commenced. This evidence was obtained by Gefco's drilling expert in August 2012. The Court finds it very difficult to believe that neither Mr. Niermeyer nor his lead mechanic was aware of this repair. The Court is persuaded that had the second mud pump actually been collected from the Wheeler Canyon rig, it would have evidenced "blueing" because of the short time it would have been in operation before the failure – and yet the shaft in evidence does not show blueing. Finally, Mr. Niermeyer's antipathy toward Gefco is palpable and significantly undermines his credibility. The Court does not find credible Cascade's assertion in its pleadings that it only dismissed its counterclaims at the 11th hour because the litigation had become too expensive. It is apparent that the dismissal occurred when Cascade realized that it had been found out. For all of these reasons, the Court is prepared to believe that Cascade and Mr. Niermeyer fabricated the evidence upon which its counterclaims were based. Had Gefco not found the invoices from Western Hydrostatics at the last minute, this case could have become a battle of the experts.

Bad faith on this order is far beyond "frivolous." It is invidious. Our justice system depends on a basic commitment to the truth that appears to have been lacking here. Gefco spent more than \$2 million defending itself against Cascade's counterclaims and it should be reimbursed its reasonable attorney's fees and costs as a sanction for this behavior.

Cascade also seeks sanctions against Gefco for its discovery violations. As set forth in detail in the Findings of Fact, Gefco both failed to respond accurately and completely to interrogatories and requests for production as well as this court's discovery orders. While these discovery violations were not on the same foundational level as Cascade's, in any other case the Court would be stunned by Gefco's failure to disclose that the shafts were now being made out of a harder material and that Gefco stopped using Hub City shafts in 2009 and began manufacturing them itself. Gefco does not dispute these omissions, but rather simply tries to explain why the company felt it necessary to answer interrogatories incompletely or to fail to seasonably refresh its previous answers. The Court understands these reasons, but discovery violations of this magnitude cannot be left unsanctioned. The Court is particularly troubled by Gefco's failure to respond fully and accurately to Cascade's discovery demands because this Court relied on Gefco's representations when it decided to bifurcate the claim regarding Wheeler Canyon.

It does not appear appropriate in this case to order Gefco to reimburse Cascade for attorney's fees given the nature and extent of Cascade's transgressions and the fact that it could not have been prejudiced since it would not have had a case had it clarified the provenance of the shafts. However, it is nonetheless appropriate to impose sanctions on Gefco to punish its lack of candor to the tribunal. The Court concludes that a sanction of \$10,000 payable to the court's drop in child care center at the MRJC is appropriate.

Sanctions against the parties in this case punish, recompense, and deter others from engaging in conduct such as this. It is the best this Court can do in this very complicated and troubling situation.

Enclosed are Findings and Conclusions to support these sanctions. The Findings and Conclusions incorporate by reference the detailed analysis supplied in this letter ruling.

Sincerely,



Susan J. Craighead

Judge, King County Superior Court

Cc: Legal file

APPENDIX B

FILED

2013 NOV 27 PM 3: 57

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

HON. SUSAN CRAIGHEAD

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

GEORGE E. FAILING COMPANY, dba
GEFCO, a division of Blue Tee Corp., a
Delaware company,

Plaintiff/Counterclaim Defendant,

v.

CASCADE DRILLING, INC., a Washington
corporation,

Defendant/Counterclaimant.

No. 09-2-25097-9 SEA

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND
ORDER**

Before the Court are cross-motions for sanctions. The Court has reviewed the following:

- Gefco's Pre-Hearing Memorandum In Support of Gefco's Omnibus Motion for Sanctions;
- Declaration of Richard Siefert in Support of Gefco's Omnibus Motion for Sanctions;
- Cascade Drilling, Inc.'s Opposition to Gefco's Omnibus Motion for Sanctions;
- Declaration of Expert Randy Kent in Support of Cascade Drilling, Inc.'s Opposition to Gefco's Omnibus Motion for Sanctions;
- Declaration of Expert Pail Diehl in Support of Cascade Drilling, Inc.'s Opposition to Gefco's Omnibus Motion for Sanctions;

- 1 ▪ Declaration of M. Bruce Niermeyer in Support of Cascade Drilling, Inc.'s Opposition to Gefco's
2 Omnibus Motion for Sanctions;
3 ▪ Gefco's Reply In Support of Motion for Sanctions Against Cascade Drilling, Inc.;
4 ▪ Cascade Drilling, Inc.'s Motion for Sanctions Against Gefco;
5 ▪ Declaration of Tobin Dale in Support of Cascade Drilling, Inc.'s Motion for Sanctions Against
6 Gefco;
7 ▪ Gefco's Opposition to Cascade's Motion for Sanctions;
8 ▪ Cascade Drilling, Inc.'s Reply in Support of Its Motion for Sanctions Against Gefco;
9 ▪ Declaration of M. Bruce Niermeyer in Support of Cascade Drilling Inc.'s Reply in Support of its
10 Motion For Sanctions Against Gefco;
11 ▪ Cascade Drilling, Inc.'s Supplemental Memorandum to Motion for Sanctions Against Gefco;
12 ▪ Declaration of Tobin Dale in Support of Cascade Drilling Inc.'s Supplemental Memorandum to
13 Motion for Sanctions Against Gefco.

14 The Court heard testimony on October 29, 2012; October 30, 2012; October 31, 2012; and November
15 1, 2012. The Court has also reviewed the exhibits admitted at the hearing. The Court now makes the
16 following Findings of Fact:

18 FINDINGS OF FACT WITH RESPECT TO GEFCO'S MOTION FOR SANCTIONS

- 19 1. Cascade Drilling is in the business of drilling water wells at construction sites, for example,
20 housing developments under construction. Cascade is a Washington company. Mr. Bruce
21 Niermeyer was Cascade's founder and President.
22 2. Gefco manufactures very large machinery used to drill the wells. It is based in Oklahoma, but
23 does business throughout the country.
24 3. Hub City, Inc. makes parts for the drilling rigs. It is based in South Dakota. By the time of the
25 Sanctions hearing, Hub City had settled with Cascade.

- 1 4. This litigation was commenced by Gefco to collect on a debt owed by Cascade. Cascade's
2 counterclaims against Gefco became the focus of this litigation.
- 3 5. The "50k" drill at issue in this case is enormous. It is attached to large truck. Power for the drill
4 comes from a Power Take-off (PTO) Box mounted on the back of the truck. The PTO uses
5 hydraulics to push the drill into the well-hole and bring mud back up to the surface. It has two
6 shafts with a total of four pumps mounted at the ends of the shafts. One shaft is connected to the
7 winch and the pull down pump, and the other to the rotary and mud pump.
- 8 6. In 2008, Cascade entered into a contract with a housing developer in California to drill water
9 wells. This project, known as the Wheeler Canyon job, was the largest Cascade had ever
10 undertaken. It is safe to say that the job did not go well, and eventually Cascade was asked to
11 leave the site.
- 12 7. There were four failures of the PTO box on the Wheeler Canyon job. The first failure occurred on
13 March 5, 2008 and involved the pull-down hoist. Cascade alleged that this was the first failure of
14 the PTO Box on this 50k rig.
- 15 8. The second failure occurred on March 21, 2008 and involved the mud pump location. The third
16 failure occurred April 4, 2008 and also involved the mud pump location. The fourth failure
17 occurred on June 16, 2008 and involved the pull down location.
- 18 9. No parts were saved from the first failure because Cascade's mechanic, Chuck Rider, assumed
19 that this was caused by normal wear and tear and no litigation was contemplated.
- 20 10. With respect to the subsequent three failures, Cascade failed to save any of the male-end
21 hydraulic pumps that mated with the allegedly defective shafts, or any of the bearings.
- 22 11. Mr. Niermeyer testified that he was not, at least initially, contemplating litigation, so there would
23 be little point in saving these items. Their absence interfered with the experts' ability to do
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25

1 thorough failure analyses, but until recently no one attributed any bad motive to Cascade's failure
2 to keep the materials.

3 12. Early on in the case, Gefco took Mr. Niermeyer's deposition and he identified three of the four
4 shafts that, he testified, failed at Wheeler Canyon. He identified them specifically as the second,
5 third, and the fourth shaft to fail. No identifying marks were stamped into the metal. To a
6 layperson, the shafts appeared to be what he said they were and discovery proceeded on that
7 basis. These shafts were the only physical evidence in existence.

8 13. This was the information provided to the experts. It should be noted that these shafts are very
9 heavy and not easily transported, so they could not be easily shared among the experts. These
10 experts took different approaches to their forensic examinations of the shafts, but in essence they
11 were looking at wear patterns on the metal and the "chamfer" on each shaft. A chamfer is an
12 angled cut in the edge of the opening of the shaft where it fits with the male-end pumps. The size
13 and the angle of the chamfer helps determine what type of pump it was attached to.

14 14. Throughout the litigation, Gefco and Hub City vigorously requested documents from Cascade
15 including all maintenance records for this PTO box. Cascade represented that it had provided all
16 that it could find.

17 15. However, in August, 2012 Gefco's drilling expert, Larry Rottman, obtained from Western
18 Hydrostatics copies of invoices for rotation and mud pumps dating from 2006-2007 that were
19 replacements for the parts for the PTO box on the 50k rig.

20 16. These documents established that Wheeler Canyon was not the first time a shaft on the PTO box
21 on this 50k rig had failed. Importantly, the mud pump had been replaced before.

22 17. This meant that the shaft at the mud pump location that failed at Wheeler Canyon was not
23 "OEM," or original equipment installed by Gefco.
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- 1 18. Shortly after this discovery, Cascade produced its maintenance records that confirmed this shaft
2 had been replaced. Mr. Niermeyer claimed that he stumbled upon these records after diligent
3 search in response to discovery requests and the timing was simply coincidental.
- 4 19. Mr. Niermeyer played a central role in this case. By his own admission, Mr. Niermeyer became
5 extremely angry with Gefco because he believed they knew there was a problem with their 50k
6 rigs and they refused to acknowledge or fix it (Cascade's motion for sanctions asserts that Gefco
7 hid its awareness of problems with the PTO boxes in its rigs until after the counterclaims in this
8 case were dismissed). He went to a trade show early in this litigation and offered a free television
9 to anyone who had information regarding a defective Gefco rig.
- 10 20. During the sanctions hearing, he was very involved with his attorney's cross-examination of
11 Gefco's metallurgical expert, passing notes and engaging in frequent conferences. On the stand,
12 he appeared to seethe with anger at Gefco and had great difficulty controlling narrative testimony.
- 13 21. Wheeler Canyon was the largest single project loss in Cascade's history. During and soon after
14 the Wheeler Canyon job, he had the opportunity to sell part of Cascade to Water Development;
15 the deal fell through at least in part because of the Wheeler Canyon fiasco, and Mr. Niermeyer
16 lost \$10 million.
- 17 22. For all of these reasons set forth above, the court does not find Mr. Niermeyer to be a credible
18 witness.
- 19 23. It should be noted that the court relies on very little of the testimony of Larry Rottman, Gefco's
20 drilling expert. He was paid \$200,000 over the course of this litigation (during a time when
21 business was extremely slow due to the recession) and he appeared on the stand to be disgusted
22 with the manner in which Cascade used the rig. He came across to the Court as more of an
23 advocate than a dispassionate expert; for that reason, the Court does not rely significantly on his
24 testimony.
25

- 1 24. After the maintenance records came to light, Gefco and Hub City re-deposed Mr. Rider,
2 Cascade's chief mechanic. In September, 2011, Mr. Rider had testified that all the shafts to "the
3 best of [his] knowledge," came from the 50 k rig at Wheeler Canyon. There was no mention of a
4 prior failure of the rig. However, on August 12, 2012, Mr. Rider testified that Mr. Niermeyer had
5 now brought to his attention the fact that prior to Wheeler Canyon he had replaced the rotary
6 pump and the mud pump. He was confronted with documents showing that the rotation pump had
7 been replaced in March 2006 and the mud pump has been replaced in October 2007 with pumps
8 purchased from Western Hydrostatics.
- 9 25. At the August, 2012 deposition Mr. Rider was asked in much more detail about how he collected
10 each failed shaft, where he put them, and how he could tell which came from which failure. The
11 upshot of his testimony was that Mr. Rider did not know which shaft came from which failure,
12 and that he explained this to both Mr. Niermeyer and Cascade's attorneys. He assumed that Mr.
13 Niermeyer was the person who designated the shafts as having come from failures 1, 2, and 3.
- 14 26. The Court noticed that during the video deposition Mr. Rider became visibly uncomfortable when
15 he was questioned on the video deposition about how and when he had been asked to collect
16 records regarding maintenance on the 50k rig.
- 17 27. At about the same time that these critical maintenance records were discovered, expert reports
18 were produced by Gefco and Hub City that determined that the shafts that the experts had
19 examined were not the shafts that failed at Wheeler Canyon.
- 20 28. In August 2012, Cascade abruptly settled, dismissing its claims against Gefco and Hub City with
21 prejudice and paying the bill it owed Gefco in full.
- 22 29. At the sanctions hearing, to support its contention that the shafts allegedly collected by Mr. Rider
23 were not, in fact, the shafts that failed at Wheeler Canyon, Gefco presented testimony from
24 testimony from Professor David Howitt of the University of California at Davis. Professor Howitt
25

1 is a Ph.D. level metallurgist who had undertaken relevant academic research related to firearms
2 identification. Dr. Howitt's academic credentials are impeccable.

3 30. Dr. Howitt came across to the Court as candid. For example, Dr. Howitt readily admitted on the
4 stand that he had come to realize that he had made a mistake in his written report. He did not
5 dodge the questions or excuse the error. He was thoroughly cross-examined, but it was telling to
6 the Court that most of the cross-examination related to Cascade's theory regarding the hardness
7 of the shafts, which was beside the point.

8 31. Dr. Howitt's testimony established to the Court's satisfaction that, at minimum, Cascade failed to
9 disclose that it could not be certain which shaft was which.

10 32. At worst, Dr. Howitt believed Cascade obtained one or more of the shafts from rigs other than the
11 50k at Wheeler Canyon.

12 33. Dr. Howitt explained that the friction between the male ends of the shafts and the female ends of
13 the pumps creates what is known as "fretting" wear. Pumps manufactured by different companies
14 wear differently from one another, although this would not be obvious to the naked or untrained
15 eye. The longer a particular shaft and pump remain mated, the greater the fretting wear. This is
16 one of the reasons that knowing the actual length of time each failed pump had been in operation
17 is important.

18 34. Dr. Howitt's analysis of the fretting wear on the two mud pump shafts lead him to conclude that
19 the shafts had been attached to pumps manufactured by a company known as Sundstrand. This
20 was the subject about which Dr. Howitt changed his mind between drafting his report and
21 testifying at the hearing. He explained that he had enjoyed a second opportunity to handle the
22 shafts during a deposition that occurred after he wrote his report and at that point concluded that
23 both were worn Sundstrand pumps.
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- 1 35. There was no doubt in Dr. Howitt's mind that fretting wear caused the pumps attached to these
2 shafts to fail. However, Dr. Howitt was not convinced that the shafts he examined came from the
3 50k rig used at Wheeler Canyon – in other words, he believes they most likely came from another
4 rig entirely. He questioned the origin of the shafts for three reasons (1) none of the shafts showed
5 evidence of “blueing;” (2) the manufacturer of the shafts; (3) “impression evidence,” or fretting
6 wear.
- 7 36. “Blueing” occurs in the early stages of heating steel when metal oxidizes and turns a shade of
8 blue as it cools. Dr. Howitt believed that the most likely reason that these pumps failed was that
9 they were made to work too hard, a point with which Cascade disagrees. Evidence was presented
10 through witnesses who had worked on the job that the 50k rig had been misused and worked too
11 hard, but Cascade also presented evidence that the cause of the failure was the softness of the
12 steel. These are not mutually exclusive propositions. Had they been made to work too hard then
13 there would have been evidence of blueing.
- 14 37. Dr. Howitt's second point relates to the manufacturers of the shafts and pumps at issue. When
15 Gefco purchased the 50k rig, it came with parts in the PTO box manufactured by a Chicago
16 company known as Foote Jones. Replacement parts were all made by Hub City.
- 17 38. The very first failure (in which Cascade did not keep the parts involved) was at the pull down
18 location. When it was repaired, it had to have been replaced by a shaft made by Hub City. Yet
19 the evidence included a Foote-Jones spline that supposedly came from the second failure (the first
20 at the mud pump location), yet the impression evidence is inconsistent with mud pump location
21 and is consistent with the pull-down location; it could not have come from the 50k rig because
22 Cascade only ever had one Foote-Jones spline for the pull-down location.
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- 1 39. Moreover, the mud pump had been replaced before Wheeler Canyon, so it could not have been a
2 Foote Jones spline. This lead Dr. Howitt to conclude that the Foote Jones spline was obtained
3 from another rig entirely.
- 4 40. Dr. Howitt's final point was that the fretting wear evidenced by the three shafts was inconsistent
5 with Cascade's account of what happened at Wheeler Canyon. Fretting wear occurs slowly over
6 time. Dr. Howitt pointed to Exhibits 4 and 9, which consist of splines that purportedly came from
7 the second mud pump failure. This failure occurred very soon after the first mud pump failure,
8 and yet Exhibits 4 and 9 show fretting wear patterns that suggest they were old, had seen not only
9 a lot of use but more than one pump shaft.
- 10 41. Based on all of these observations, Dr. Howitt concluded that the evidence had been "falsified."
- 11 42. Cascade offered two experts, Paul Diehl and Randy Kent. Both of these experts were told by
12 Cascade's attorneys that there had been a "marking error," and that the shaft previously thought
13 to be the first mud pump failure (known at "2a") was really from the second mud pump failure,
14 and vice versa (the one known as 3a was really the first failure).
- 15 43. Mr. Diehl testified, tellingly, that Cascade's attorney had explained this to him a few days before
16 the hearing and that "to make the story come out right they have to be reversed."
- 17 44. Mr. Kent is a forensic metallurgical engineer, who analyzes all manner of equipment failures; he
18 holds a Bachelor's Degree in engineering.
- 19 45. Mr. Kent contended that the sequence of failures was not very important to the analysis of the
20 failures at Wheeler Canyon. He was not shown the maintenance records discovered in August
21 2012.
- 22 46. On cross-examination, he acknowledged that before he was made aware of the "marking error,"
23 he relied more heavily on his analysis of the shaft marked "3a," but then in testimony at the
24 hearing after learning that this shaft was really from the first mud pump failure, he relied more
25

1 heavily on the shaft marked "2a." This testimony did not undercut Dr. Howitt's testimony at all.
2 Mr. Kent's professed lack of interest in the sequence of the failures suggests to the Court that he
3 did not perform a true failure analysis, but rather analyzed whether the failure would have
4 happened had the steel been harder. That is an important distinction.

5 47. Mr. Kent used an electron microscope to determine that the wear patterns on the shafts on the
6 second and third failures were both consistent with pumps made by a company called Sundstrand,
7 and inconsistent with pumps made by another company called Parker.

8 48. Mr. Diehl had 46 years of experience with failure analysis, as an independent engineer since
9 1966, and before that as an engineer with General Electric. When Mr. Diehl testified, he
10 explained that he and Mr. Niermeyer had met recently in Mr. Diehl's living room when they
11 came up with the idea of reversing two pieces of the shaft/pump interface to demonstrate that the
12 shafts attached to the mud pumps fit Sundstrand pumps. Exhibit 13. Overall, Mr. Diehl's
13 testimony appeared to the Court to be simplistic and heavily influenced by his communications
14 with Mr. Niermeyer.

15 49. After considering all of the testimony and exhibits, I find that Cascade failed to disclose the
16 repairs from before the Wheeler Canyon job, and I do not credit Mr. Niermeyer's explanation for
17 this omission.

18 50. I find that Cascade failed to admit candidly that there was no way to be sure which shaft came
19 from which failure (assuming that the shafts all came from the 50k rig) and that it was Mr.
20 Niermeyer who determined how to designate the shafts. He had no personal knowledge of which
21 shaft was which.

22 51. I find that serious credibility issues undermine Mr. Niermeyer's testimony. He appears to have
23 embarked on some sort of vendetta against Gefco and his antipathy toward Gefco gave him a
24 motive to falsify evidence.
25

1 52. I find that had Cascade acknowledged that it could not associate specific shafts with related
2 failures, its counterclaims either would never have been filed, would have been dismissed or, at
3 best, would have led to a jury instruction on spoliation.

4 53. I further find merit in Prof. Howitt's theory that the shafts came from rigs other than the 50k rig
5 used at Wheeler Canyon. Given Mr. Niermeyer's contention that the shafts failed because they
6 were too soft, where the shafts came from was immaterial to him. Clearly, counsel for Cascade
7 never would have filed the counterclaims had they been aware that the evidence was gathered
8 from other rigs.

9 54. Finally, it appears to the Court that Cascade's litigation strategy attempted to deflect attention
10 from the particular failures at Wheeler Canyon by trying to expand the lawsuit to all 50k rigs
11 manufactured by Gefco. Had the Court permitted Cascade to have done so, Gefco would have
12 faced a great deal of pressure to settle in order to protect its business. Cascade could have
13 prevailed without ever having to establish the cause of the failures at Wheeler Canyon.

14 55. I thus find that Cascade engaged in bad faith litigation.

15
16 FINDINGS OF FACT WITH RESPECT TO CASCADE'S MOTION FOR SANCTIONS

17 56. Cascade moved for sanctions against Gefco at essentially the same time Gefco made its motion,
18 however no testimony or oral argument was entertained on its motion because it was not of the
19 same technical nature.

20 57. As set forth above, Cascade's counterclaims against Gefco were premised on the theory that the
21 Gefco pump shafts were too soft. Various manufacturers harden the steel in such pumps to
22 varying degrees of "Rockwell hardness." The essence of Cascade's case claim was that the 50k
23 rig shafts were hardened to only 37 Rc (Rockwell hardness C scale), but they should have been
24 hardened to the alleged industry standard of Rc 55-60. Had they been hardened properly, the
25 shafts would not have failed.

1 58. Cascade learned from other sources in the industry and from what it calls a "smoking gun" e-mail
2 that Gefco was aware that it had problems with shafts wearing out prematurely and that at least
3 one other company was hardening its shafts to 55 Rc.

4 59. Based on this information, Cascade asserted fraud and product liability counterclaims against
5 Gefco.

6 60. As alluded to above, this matter settled abruptly September 19, 2012. Gefco was paid in full and
7 Cascade dismissed its counterclaims with prejudice.

8 61. On September 28, 2012, Cascade learned that Gefco had filed (but not served) a lawsuit on Hub
9 City in April 2012. This lawsuit revealed that a dispute existed since April 2009 between Gefco
10 and Hub City.

11 62. Gefco never disclosed anything about this dispute with Hub City in response to any of Cascade's
12 discovery requests attempting to learn about problems with the PTO boxes that were
13 manufactured by Hub City.

14 63. The April 2012 lawsuit was a declaratory judgment action seeking to sort out the rights and
15 obligations of Gefco and Hub City. Gefco wanted to stake out jurisdiction in Oklahoma before
16 Hub City sued Gefco in South Dakota. In the initial petition, Gefco did not mention the Cascade
17 litigation.

18 64. Up until a joint defense agreement was negotiated in July 2012, Hub City adopted a litigation
19 strategy hostile to Gefco in this case and Gefco explains that this was the reason it felt it
20 necessary to file the action in Oklahoma.

21 65. In the April 2010 Interrogatories, Cascade asked Gefco to identify all lawsuits related to the
22 shafts. Gefco failed to seasonably refresh its answers by disclosing its lawsuit against Hub City
23 until after the counterclaims were dismissed.
24
25

- 1 66. Gefco contends that a declaratory judgment action between two parties in a contractual
2 relationship was not the type of lawsuit that needed to be disclosed to Cascade.
- 3 67. In September 2012, Hub City demanded that Gefco agree to release Hub City from any
4 responsibility for its PTOs (except for lawsuits filed by customers). In other words, Hub City did
5 not want to be responsible for Gefco's attorney fees.
- 6 68. Faced with this demand, Gefco amended its Oklahoma petition to allege responsibility on the part
7 of Hub City for the Cascade litigation. In this amended petition, Gefco alleged that "Gefco has
8 received numerous demands for replacement of defective PTOs from additional non-litigant
9 parties."
- 10 69. Cascade is incorrect when it argues that the Oklahoma lawsuit mentioned numerous demands for
11 defective replacement parts in April 2012. This allegation was only raised in September 2012.
- 12 70. Gefco contends that Cascade already knew about all of these demands for replacement parts.
13 Cascade suspects otherwise.
- 14 71. It is unclear how relevant a declaratory judgment action would have been to Cascade's
15 counterclaims. Nonetheless, even a declaratory judgment action falls within the discovery request
16 propounded by Cascade and it should have been disclosed.
- 17 72. In December 2011, Cascade moved to compel Gefco to produce the invoices for the sale of
18 replacement shafts; up to that point, only a few had been produced. The court ordered Gefco to
19 produce the invoices and to certify that the production was complete.
- 20 73. Gefco never supplemented this production of invoices. In July 2012, the Court ordered Gefco
21 again "to produce all invoices to date for each pump shaft" with customer names redacted.
- 22 74. Gefco produced an invoice for a replacement shaft dated November 2011, but did not ship the
23 shaft until June, 2012. Shortly thereafter, Cascade ordered two replacement shafts. These shafts
24 apparently were shipped, but the shipment was stopped before it reached Cascade. This invoice,
25

1 which was produced only after the Court compelled Gefco to do so, states that the reason was that
2 the "material was too hard."

3 75. After the counterclaims were dismissed with prejudice, Gefco offered to send Cascade the shafts
4 in September 2012 as long as the shafts were not used for any purpose in this litigation.

5 76. These circumstances suggest that Gefco was making harder shafts, but failed to disclose this fact
6 despite interrogatories that sought information concerning hardness, design, manufacturing, and
7 its shaft manufacturers.

8 77. Indeed, after the counterclaims were dismissed, Cascade learned that Gefco changed the
9 manufacturer of the shafts and has not used Hub City shafts since April 2009. Interrogatories
10 propounded by Cascade in April 2010 sought precisely this information.

11 78. Gefco contends that it began making the PTO Boxes itself after Hub City decided to stop
12 supplying them. This is a change of manufacturer.

13 79. Cascade points out that in response to Interrogatory No. 1, Gefco represented that five customers
14 had reported problems, but none had defective PTOs. Yet, in its amended petition in Oklahoma,
15 Gefco refers to "numerous demands for replacement of defective PTOs." These representations
16 cannot be squared with one another.

17 80. Gefco argues that some customer complaints referred to in the Oklahoma case involved other
18 components, such as gears. Gefco deemed these irrelevant and the related records were not
19 produced. The Court deems this discovery violation admitted.

20 81. Gefco failed to respond to requests for production regarding the design specifications it gave to
21 Hub City.

22 82. Cascade asked Gefco by interrogatory to identify any changes to the design of the PTO Box.

23 Gefco did not identify any such changes. However, it learned from a report produced by Hub City
24 in July 2012 that there were two design changes, and one of them actually involved the PTO Box
25

1 installed on Cascade's 50k rig. Gefco never disclosed the invoice for the reconfigured PTO Box it
2 placed in the 50k rig.

3 83. In October 2012, Cascade learned that Gefco designed and manufactured a shaft hardened to 62
4 Rc sometime between April 2012-June 2012. This was the shaft originally ordered in Nov. 2011;
5 Gefco failed to produce the invoice until this Court ordered it to do so in July 2012.

6 84. In September 2012, Gefco redesigned the shaft to be hardened to Rc 42.

7 85. Gefco did not respond to the allegation that it had not disclosed anything about these changes to
8 the PTO Box.

9 86. Gefco also did not respond to Cascade's allegation that Gefco failed to provide any information
10 in response to a request for production regarding Cotta Brand PTO boxes. These boxes apparently
11 use harder steel and allegedly have not experienced failures.

12 87. Finally, Gefco did not disclose the Joint Defense Agreement with Hub City reached in July 2012.
13 The Court had previously ordered an earlier Joint Defense Agreement to be disclosed, but there
14 does not appear to have been any order to disclose subsequent agreements.

15 88. With respect to its failure to disclose information regarding all problems with 50k rigs and its
16 failure to disclose that Gefco began manufacturing PTO boxes in-house, Gefco's omissions were
17 in bad faith. In light of the litigation strategy and conduct of Cascade, however, Gefco's efforts to
18 protect itself are understandable if not appropriate. The Court is particularly concerned about
19 Gefco's failure to comply with this Court's discovery orders.

20 89. I have already found that Cascade's counterclaims would have been fatally undermined had it
21 been candid about the provenance of the shafts. This finding makes it difficult to conclude that
22 Gefco's transgressions prejudice Cascade's case.

23 90. On the other hand, there is little doubt that Gefco's omissions directly influenced this court's
24 ruling bifurcating Cascade's counterclaims. Gefco persuaded the Court not to require disclosure
25

1 of its customer list when there was, purportedly, no real evidence that any other customer had
2 reported problems with their 50k rigs. Gefco insisted this was a fishing expedition and an attempt
3 to destroy Gefco's business despite the fact that Cascade's problems with the 50k rig were
4 unique. The Court determined that Cascade's so-called enterprise claims would be bifurcated
5 from the claims regarding the specific 50k rig used at Wheeler Canyon.

6 91. In retrospect, that ruling was prescient. Nonetheless, it is inappropriate for a litigant and its
7 counsel to encourage the Court to take the drastic step of bifurcating claims while withholding
8 critical information from the opposing party and the Court.

9 92. The Court's letter ruling dated November 27, 2013 is incorporated by reference.

12 CONCLUSIONS OF LAW

- 13 1. As set forth in the letter ruling signed today, the Court concludes that Cascade and Mr. Niermeyer
14 fabricated the evidence upon which Cascade's counterclaims were based. Bad faith on this level
15 exceeds any conduct described in Washington case law. Had this matter proceeded to trial and
16 the Western Hydrostatics records been found after trial, the remedy would have been vacation of
17 any judgment against Gefco and a new trial. Roberson v. Perez, 123 Wn. App. 320 (2004). In
18 addition to a new trial, the plaintiffs in Roberson were awarded reasonable fees and costs
19 associated with the trial that lead to the judgment.
- 20 2. This Court has the inherent authority to impose sanctions when it finds a party has litigated in bad
21 faith. State v. S.H., 102 Wn. App. 468 (2000). "The court's inherent power to sanction is
22 'governed not by rule or statute but by the control necessarily vested in courts to manage their
23 own affairs so as to achieve the orderly and expeditious disposition of cases.'" Id., citing
24 Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991). "Sanctions may be appropriate if an act
25 affects the 'integrity of the court and, [if] left unchecked, would encourage future abuses.'" Id.

1 Gonzales v. Surgidev, 899 P.2d 594, 600 (1995). As the Chambers Court held, sanctions may be
2 appropriate if the “very temple of justice has been defiled” by the sanctioned party’s conduct.

3 Chambers at 46.

- 4 3. Cascade’s conduct in this case rises to this level. A failure to sanction conduct such as this would
5 effectively condone litigation gambling that fabricated or (at minimum) carelessly preserved
6 evidence could force settlement because the risks and costs of litigation are too high.
- 7 4. On these bases, it is appropriate to require Cascade and Mr. Niermeyer to pay Gefco’s reasonable
8 attorney fees and costs. Not all of the more than \$2 million Gefco may have spent is necessarily
9 reasonable. Gefco may make an application for an award of reasonable attorney fees.
- 10 5. Gefco’s discovery violations were also undertaken in bad faith, although under these
11 circumstances they were perhaps necessary defensive tactics. Because of the fatal flaws in
12 Cascade’s counterclaims, I cannot conclude that Cascade was prejudiced by these violations. For
13 this reason, I am not imposing an award of attorney fees against Gefco payable to Cascade.
- 14 6. However, Gefco’s lack of candor to the tribunal warrants a sanction under the reasoning of S.H.,
15 since it should have been plain to Gefco that the Court relied on its representations in deciding to
16 bifurcate Cascade’s claims. It is appropriate to sanction Gefco in the amount of \$10,000 payable
17 to the Jon and Bobbe Bridge Drop-in Child Care Center at the Maleng Regional Justice Center.
18

19
20 ORDER

21 Now, therefore, it is hereby

22 ORDERED that Cascade and Mr. Niermeyer shall reimburse Gefco for its reasonable
23 attorney fees and costs. Gefco shall file its application for attorney fees and costs by December
24 11, 2013; Cascade shall respond by December 18, 2013; any Reply is due December 20, 2013;
25

1 It is further ORDERED that Gefco shall pay a sanction of \$10,000 to the Jon and Bobbe
2 Bridge Drop-in Child Care Center at the Maleng Regional Justice Center by January 1, 2014.
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4 DATED this 27th day of November, 2013.
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7 Hon. Susan Craighead
8 King County Superior Court Judge
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APPENDIX C

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

GEORGE E. FAILING COMPANY, dba
GEFCO, a division of Blue Tee Corp., a
Delaware corporation,

Plaintiff/Counterclaim Defendant,

v.

CASCADE DRILLING, INC., a Washington
corporation,

Defendant/Counterclaimant.

No. 09-2-25097-9 SEA

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
SUPPORTING AND AWARD OF
ATTORNEY FEES AND COSTS

FINDINGS OF FACT

1. In a letter ruling date November 27, 2013 this Court authorized an award of attorney fees and costs to Gefco as a sanction for serious misconduct by Cascade Drilling. Gefco made its initial application in December, 2013.
2. In a hearing in March, 2014 the Court expressed its multiple concerns with Gefco's fee application. In particular, the Court excluded hours billed by counsel who assisted Gefco's lead attorney, Richard Seifert. The Court also asked counsel to remove time devoted to

1 fighting Cascade's discovery requests regarding problems with rigs other than the one at
2 issue in this case, which the Court previously found to be misconduct by Gefco.

3 3. Gefco and Cascade worked together to present the Court with spreadsheets attempting to
4 remove the items that the Court had indicated were not acceptable and to show which
5 items were still in dispute. This was a big undertaking, considering that more than \$2
6 million in fees and costs were in dispute.

7
8 4. The Court studied these spreadsheets and realized that it would be impossible for the
9 Court to consider Cascade's objections and analyze the itemized billing in a reasonable
10 amount of time. As a result, the Court requested that Counsel provide Excel spreadsheets
11 to the Court to enable its bailiff to manipulate the information to allow the Court to
12 evaluate the billings and Cascade's objections. This required many hours, some of them
13 overtime.

14
15 5. The Court will designate both the spreadsheets provided by Gefco and the Court's
16 manipulated versions as exhibits, since they are color-coded and this will allow for more
17 efficient review on appeal.¹

18 6. In its amended fee application, Gefco removed from its request hours devoted to its
19 collection action, the response to the motion to bifurcate, the Oklahoma Declaratory
20 Judgment action, the choice of law issue, its opposition to sanctions motions against
21 Gefco, clerical work, and the appeal, totaling \$295,447.04.

22
23 7. The remaining fees requested are \$1,801,207.27, in addition to \$221,825.96 in attorney's
24 costs and \$675,214.70 in expert fees and costs.

25 ¹ The Court will make this designation the week of January 5, 2015, as the Clerk's Office is operating with a skeleton staff over the holidays.

- 1 8. Cascade alleges that there was no need for nine partner-level attorneys to do work that
2 should have been completed by associates or paralegals. It points to hours billed by Ada
3 Ko, Donald Scaramastra, and Paul Tinchero.
- 4 9. The Court finds that the work of Ms. Ko was essential to Gefco's case because she utilized
5 her sophisticated business law expertise to author a brief arguing for the piercing of the
6 corporate veil.
- 7
8 10. Mr. Scaramastra attended the evidentiary hearing but played no active role. Gefco argues
9 that he was there to respond to questions regarding Cascade's motion for sanctions.
10 However, the Court told the parties that it was strictly addressing evidentiary issues
11 regarding Gefco's motion and it would not address Cascade's motion at the hearing. There
12 was no need for Mr. Scaramastra to attend the hearing and the hours he billed are excluded.
13 The award is reduced by \$11,928.
- 14
15 11. Cascade questions the work of Paul Trinchero, who addressed warranty issues. Cascade
16 contends that one cannot tell from the billing records whether his work was directed
17 toward warranty claims against Hub City or defenses of warranty claims alleged against
18 Gefco. He was at the time an associate billing at \$330. The Court finds that the hours
19 billed by Mr. Trinchero are reasonable and appear to have related to Gefco's defense.
- 20 12. Cascade does not specifically address billings by the other partner-level attorneys. This
21 Court will not comb the spreadsheets to find them if Cascade was unwilling to do so.
- 22
23 13. Cascade contends that the billing rates of Gefco's attorneys were excessive. In particular,
24 Cascade challenges Mr. Seifert's billing rates of \$475-\$510 per hour. In and of itself that
25 fee might be reasonable, Cascade argues, but Mr. Seifert was nearly always accompanied

1 by a paralegal, co-counsel, or an expert, making his hourly rate more like \$1,000 per hour.
2 The Court is aware that opposing counsel rarely had assistants accompany them to
3 depositions or to court hearings. The Court has observed Mr. Seifert in court extensively
4 and it does not appear to the Court that he could have undertaken the depositions or the
5 hearings without the assistance of others (including counsel for Hub City). However, Mr.
6 Seifert cannot both bill in his capacity as a highly qualified and experienced litigator
7 involving technical subject matter *and* also charge for the work of a paralegal to keep him
8 organized. Ordinarily, the Court would not consider it reasonable to allow charges for
9 experts to attend depositions and hearings, but in this case Gefco's mission in this
10 litigation involved factual detective work. The Court finds that it is not reasonable to
11 include in the fee award the cost of Mr. Seifert and a paralegal to attend depositions. The
12 Court finds that it is reasonable to include the cost of experts who attended depositions
13 and court hearings. The Court will deduct from the attorney fee award the billings for
14 paralegals who attended depositions and court hearing. Accordingly, the Court deducts
15 \$29,247.50 for Ms. Francisco's time, \$2,070 for Ms. Jackson's time, \$2,217.50 for Ms.
16 Sugai's time, for a total of \$33,535 in deductions.

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18
19 14. Cascade makes a similar argument with respect to preparation for depositions. This often
20 involved many paralegals and experts. The Court has examined paralegal billing line by
21 line. Much of the work they performed regarding depositions was entirely appropriate for
22 their role—they uploaded documents, sorted documents, prepared notebooks, and
23 scheduled depositions. The work they performed that overlapped with Mr. Seifert's role
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1 has already been largely removed in Finding of Fact #13. The Court is not prepared to
2 parse the billings any further.

3 15. The Court finds that it is reasonable to include the fees and costs of the experts in
4 preparing for depositions in light of the highly technical nature of this case.

5 16. Cascade objects to the inclusion in an attorney fee award of all of the travel time charged
6 by Mr. Seifert and his team. They argue that typically expert witness fees and costs are not
7 recoverable absent statutory authority. *Hume v. American Disposal Co.*, 124 Wn.2d 656
8 (1994). This case is not typical. Gefco had to investigate what happened on the Wheeler
9 Canyon job and previous jobs using the drill in question. This was essential for its side of
10 the failure analysis. Moreover, it was this investigation that ultimately established that the
11 evidence Cascade was proffering was not what it purported to be. In this case, it would be
12 unreasonable not to award reasonable expert expenses as part of this attorney fee award.

13 17. Turning first to the costs claimed by the legal team, Mr. Seifert took at least 22 trips to
14 California during this litigation, eight of them for depositions. He also took trips to
15 Nevada and Colorado to meet personally with Mr. Rottman and Mr. Ayres for unspecified
16 "meetings." Additionally, there were six trips to Oklahoma to meet with his client. During
17 many of these trips Mr. Seifert was accompanied by Ms. Francisco, his paralegal. The
18 Court has looked everywhere in Gefco's submissions and cannot locate any document
19 breaking out the travel costs by trip and by biller. The Court was prepared to exclude Ms.
20 Francisco's travel costs. Mr. Seifert's first three trips to Oklahoma would have been
21 included on the grounds that he was developing a relationship with his client, but the
22 remainder would have been excluded. The Court is unable to determine the costs for Mr.
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1 Seifert to accompany Mr. Rottman and Mr. Ayres to Colorado and Nevada, whether for
2 meetings or for depositions. It is Gefco's responsibility to provide the Court with billing
3 records that allow the Court to make a finding of reasonableness and to (as the Court
4 would have here) adjusted the amount awarded based on an analysis of reasonableness.
5 *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151 (1993). Without this information, the
6 Court cannot award costs for attorney travel expenses. Thus, the \$25,439.99 requested for
7 lodging, the \$784 requested for local transportation, the \$64,981.34 requested for air
8 travel, and the \$18,562.28 requested for transportation are excluded, with the exception of
9 the expert travel costs discussed below.
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11 18. As for the other attorney costs claimed by Gefco, the Court finds that all of the costs set
12 forth in Exhibit B to Seifert's Reply Declaration are reasonable with the exception of the
13 travel costs discussed above, the \$4,425 for Donald Bunn's initial invoice (discussed more
14 fully below), and fees for in-house copying, which is generally subsumed in the overhead
15 covered by attorney fees.
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17 19. Mr. Rottman was paid almost \$191,930.97 over a one year period. There is no question
18 that Mr. Rottman's work was essential to the defense that Gefco was preparing for trial.
19 His work yielded the receipts that, along with the metallurgical experts, destroyed
20 Cascade's case. And yet the amount of his fees is enormous. The Court scoured his
21 invoices and compared them to the attorney billing records. Some of his invoices appear to
22 be actual invoices. They are detailed, describing specifically what Mr. Rottman did. For
23 example an entry from Sept. 20, 2011 reads: "Review Chuck Riders deposition, make call
24 and locate Quality Machine Shop in Ventura, California (Not Ojai California). Talk to
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1 office personnel..." and there is a specific charge of \$1,100 associated with his work that
2 day. In contrast, billing records beginning in the middle of the stack of records submitted
3 to support Mr. Rottman's fees look very different. For example, On March 7, 2012, the
4 billing entry reads: "Travel from Los Angeles to Seattle, 4:30 a.m. to 9:30 a.m – 5 hrs. @
5 \$200 per hour, Taxi from airport to meeting, \$40.00, Meeting at Law Office – 5 hrs @
6 \$200, Hotel charges of \$284.06." On that date he claimed \$2,000 for 10 hours of work. In
7 attorney billing records for that day, Mr. Seifert indicates that he met with Rottman and
8 damages experts "re. related matters. Discovery requests to Cascade. Strategy discussion
9 with L. Rottman. Revise joint submission to the court on discovery disputes. Case
10 Management." He claimed 9.5 hours at \$510 per hour for that day's work. His paralegal
11 claimed \$1,121 for spending 5.9 hours in the damages meeting, as well as other tasks. It is
12 difficult to know what Mr. Rottman could contribute to a damages discussion, which is
13 largely an economic analysis for which Mr. Knoll was paid almost \$100,000. A strategy
14 session with Mr. Rottman might have made sense, but Mr. Rottman remained in Seattle
15 the following day and spent 4 ½ hours in a "meeting at law office." The corresponding
16 attorney billing records make this appear to have been a very substantive meeting
17 including Hub City's lawyers regarding newly produced shafts. Without day by day
18 comparisons with the attorney billing records, it is difficult to sort out what time was
19 productively spent. Moreover, Mr. Rottman made so many trips to Seattle for meetings
20 that it would appear he had little else to do. It is also unclear why he needed to attend all
21 of these meetings in person, or why Mr. Seifert needed days to prepare Mr. Rottman for
22 his perpetuation deposition when Mr. Rottman was living and breathing this case. It is
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1 impossible for the Court to determine the reasonableness of each billing given no
2 information from Mr. Rottman about the substance of his work after March 24, 2012. The
3 billings after that date are excluded.

4 20. Devon Ayres billed \$114,646, an amount which appears to include his expenses. Mr.
5 Ayres is a hydrologist who worked for Cascade on the Wheeler Canyon job. Because he
6 knew the drillers personally, he was very instrumental in the process of finding them and
7 securing their co-operation. His role was more that of an investigator than an expert
8 hydrologist and, as Cascade points out, his testimony was more like that of a fact witness.
9 This work was essential for preparing Gefco's defense at the trial on liability. The
10 difficulty is that he was paid at the rate of an expert hydrologist rather than an investigator.
11 Other problems with the billing records are portions that are redacted, bills that appear to
12 have been split with Hub City, and the mysterious addition of 15% on most of his
13 expenses. Likely it would have been much more cost effective to have employed and
14 investigator to do all but the persuasion of the drillers to co-operate. Although the Court
15 has reviewed every line of his bills, the Court is not prepared to spend hours with a
16 calculator determining which tasks could have been performed by someone paid at
17 perhaps \$85 per hour, as well as removing the 15% charges on expenses. A reasonable
18 amount to assess for the services he performed is \$45,000 and his expenses would total
19 \$16,918 less 15% (\$3,005), for a total of \$13,913. In sum, Gefco is awarded \$58,913 for
20 his work.
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24 21. Don Bunn billed \$90,811. The Court has been provided very little information concerning
25 the work he performed and, as Cascade points out, his invoices are extremely sketchy. In

1 the end, the most important expert was and would have been at trial Dr. David Howitt.

2 Given the information before the Court, it is not reasonable to include Mr. Bunn's fees and
3 expenses in the award.

4 22. Jon Knoll billed \$99, 896. Mr. Knoll is a forensic accountant who was tasked with
5 helping Gefco defend against Cascade's damages claims, which included the complex
6 problem of determining how much the failure at Wheeler Canyon reduced Cascade's value
7 for sale. His bills are not at all specific and each one includes "meetings with attorneys
8 and experts." In his declaration, Mr. Knoll suggests that his job was complicated by the
9 failure of Cascade to turn over documents in a timely manner. Primarily, his role should
10 have been to analyze what Cascade could prove its damages were, and what it could not
11 prove, and then help Mr. Seifert capitalize on the weaknesses in Cascade's analysis. There
12 are only so many meetings required for such work—Mr. Knoll billed 155 hours, a good
13 month's worth of work. It appears to the Court that this work could have been
14 accomplished in half of that time. His associate, Lorraine Barrack, billed almost as many
15 hours as Mr. Knoll at \$295 per hour. The Court finds that a reasonable award for Mr.
16 Knoll's work is \$50,000.

19 23. Gefco seeks an award of \$101,469 for the preparation of an animation. Animations are
20 risky ventures, as they are often not admitted or allowed to be shown to the jury. Rarely,
21 in this Court's experience, are they helpful. The Court does not find it reasonable to
22 include the \$101,469 bill from Fulcrom Legal Graphics in the award.

24 24. Cascade challenges no other expert fees or costs and the Court finds the remainder to be
25 reasonable.

1 25. Cascade raises several challenges to Mr. Seifert's billing entries. First, some of them are
2 vague. Cascade asserts that 15% involve the phrase "related matters," and others include
3 the phrase "case management." Second, Cascade redacted some information from some
4 entries and suggests the Court undertake and *in camera* review of those items. Third, Mr.
5 Seifert billed in half hour increments. Overall, Cascade raises significant concerns about
6 Mr. Seifert's practice of block billing, which overlays all of these issues. The Court shares
7 Cascade's concerns about the practice of block billing and the use of half hour billing
8 increments. Mr. Seifert claims that he rounded down rather than up. Case law frowns on
9 this practice. Federal cases cited by Cascade suggest that even quarter hour billing
10 increments are too large— .10 hour is the standard. *Welch v. Metropolitan Life Ins. Co.*,
11 480 F.3rd 942, 948-49 (th Cir. 2007).; *Lopez v. San Francisco Unified School District*, 385
12 F. Supp. 2d 981, 993 (N.D. Cal. 2005). Use of the phrases "related matters" and "case
13 management" are symptoms of block billing. Cascade does not specify all of the redacted
14 items and the Court will not comb through the records to find them. The difficulty with
15 this issue is that it is very hard to find a fair approach to determining an award of attorney
16 fees, especially when we are dealing with fees of this magnitude. The Court finds that it is
17 reasonable to reduce Mr. Seifert's fees by one third, after having made the deductions
18 described elsewhere in these Findings. Accordingly, the Court reduces his fee award by
19 \$466,900, leaving a total of \$933,800.

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23 26. Cascade contends that it is impossible to determine how much time was related to
24 discovery issues that included thwarting some of Cascade's discovery demands. Gefco
25 asserts that it has removed those items, pursuant to the Court's request. Given that much

1 of the litigation in this case was about discovery, the Court finds that it is reasonable to
2 include the items related to discovery on the basis of Mr. Seifert's statement that Gefco
3 complied with the Court's request.

4 27. The Court's bailiff prepared color coded spreadsheets (to be designated as exhibits) which
5 assisted the Court in analyzing whether Clerical work had been removed from Gefco's
6 attorney fee request. After she manipulated the Excel spreadsheets, the Court specifically
7 reviewed the items she highlighted in orange as being possibly clerical or related to the
8 travel of paralegals. The Court has reviewed those items. It appears that clerical work has
9 been removed from the billings and that to the extent that Ms. Francisco was performing
10 tasks such as uploading and coding documents, these tasks may have required her
11 expertise and familiarity with the case. The Court does not believe further reductions for
12 clerical work would be reasonable.
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15 **CONCLUSIONS OF LAW**

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17 1. This Court has the authority to impose attorney fees and costs on Cascade as a sanction
18 for its pursuit of litigation on the basis of evidence that was, at best, inaccurately
19 identified and at worst fabricated, as set forth in my ruling on the subject. *Chambers v.*
20 *NASCO, Inc.*, 501 U.S. 32 (1992).; *Roadway Express, Inc. v. Piper*, 227 U.S. 752 (1980).;
21 *State v. S.H.*, 102 Wn.App. 468 (2000).
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23 2. The Court undertook a detailed review of attorney fees and costs claimed by Gefco to
24 determine their reasonableness, *Berryman v. Metcalf*, 177 Wn.App. 644, 657 (2013).
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- 1 3. The Court places on Gefco the burden of establishing the reasonableness of its fees and
2 costs, *Scott Fetzer Co. v. Weeks*, 122 Wn.2d. 141, 151 (1993).
- 3 4. Because the premise for awarding attorney fees and costs in this case is that there was no
4 evidentiary basis upon which Cascade's counterclaims could have been filed, the entirety
5 of Gefco's defense was unnecessary. Thus it is appropriate and reasonable in this instance
6 to include costs that might not be awarded in an ordinary-fee shifting scenario.
- 7 5. The Court required Gefco to exclude from its request fees and costs related to its
8 collection action, its pursuit of litigation in Oklahoma, and fees related to its resistance to
9 Cascade's discovery demands concerning complaints about other rigs, including the
10 motion to bifurcate.
- 11 6. As set forth in the Court's Findings of Fact above, the Court is satisfied that an award of
12 \$1,288,844 in Attorney Fees, Attorney Costs of \$105,591, and Expert fees and costs of
13 \$247,286 are reasonable as a sanction for Cascade's conduct.
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17 **ORDER**

18 Pursuant to the Court's Findings of Fact and Conclusions of Law entered today, Cascade is
19 hereby ORDERED to pay to Gefco Attorney Fees and Costs in the amount of: \$ 1,394,435 and
20 Expert fees in the amount of \$247,286.

21 DATED this 29th day of December, 2014.
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25 Hon. Susan J. Craighead
King County Superior Court Judge