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No. 74928-5-I

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

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FLIGHT SERVICES & SYSTEMS, INC.,

Appellant,

v.

AIR SERV CORPORATION,

Respondent.

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**BRIEF OF APPELLANT**

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## I. INTRODUCTION

This case involves airplane cleaning services. Delta Airlines arranged to have Air Serv Corp. (“AS”) temporarily monitor the transfer of bags of trash from Flight Services & Systems, Inc. (“FSS”) to the incinerating company, Gate Gourmet. AS paid a laborer no more than \$10 per hour for a 30-minute task and FSS used 6-14 employees to service each airplane. In *FSS I*,<sup>1</sup> this Court remanded “for further findings” because the trial court’s findings were inadequate to discern the basis of its \$235,000 award. 2015 WL 1541288, at \*1-4. The findings also lacked the specificity necessary for reviewing the trial court’s make-whole theory of damages or sanctions that shifted all fees and costs to FSS. *Id.* at \*5-6.

In a review lacking any consideration of this Court’s remand opinion, the trial court has now imposed punitive damages. It awarded a windfall at the bequest of AS by changing the measure of damages from “reasonable value of services” to “disgorgement of *total gross revenues*.” This increased the principal judgment by 172%, from \$83,300 to \$143,723 — over \$600 per hour for standard labor services.<sup>2</sup> The trial court also imposed its make-whole fee shifting theory by awarding nearly all

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<sup>1</sup> This Court’s remand opinion is *Air Serv Corp. v. Flight Servs. & Sys., Inc.*, No. 71103-2-I, 186 Wn. App. 1043, 2015 WL 1541288 (unpublished), *rev. den.*, 184 Wn.2d 1006 (2015) (hereinafter “*FSS I*”). A courtesy copy is attached in **Appendix A**.

<sup>2</sup> It is notably more than the inflated \$175 and \$250 per aircraft (\$350 and \$500 per hour) amounts AS expressly sought on its contract claims dismissed by Judge Rogers, CP 1604-06, and nearly twice the \$80,000 amount AS sought in its complaint. CP 4-6. Judge Spector only became involved on the eve of the two-day bench trial after a late transfer of the case. Judge Rogers presided over all pretrial matters.

attorney fees and costs (\$115,323) again without the specificity required for appellate review and no lodestar analysis. The total amended judgment now stands at \$259,046 when the value of the services was only \$3,511 (FSS valuation) or \$11,900 (AS demand) at most.

This is a case of first impression: awarding “disgorgement of total gross revenues” that is nothing more than punitive damages for a failed contract—no meeting of the minds on price—a sum magnitudes higher than either party expected when the services were performed, and AS having no interest in the revenues FSS received under its pre-existing contract with Delta. This Court should reverse the trial court’s award of punitive damages and dismiss.

## II. ASSIGNMENTS OF ERROR

### 1. Pertaining to Money Damage Award of \$143,723.26.

**Assignment of Error 1.** The pretrial judge erred finding liability for unjust enrichment along with quantum meruit. CP 1603-05.

**Assignment of Error 2.** The trial court erred in denying FSS’ motion and objections concerning AS’s untimely disclosure of its disgorgement theory. VRP 15-20; 28, 82, 97, 175, 389-412.

**Assignment of Error 3.** The trial court erred in finding AS’s labor services were unique; its workers stayed throughout the cleaning process; or it provided any services on “domestic” flights. CP 2523-26.

**Assignment of Error 4.** The trial court erred in finding FSS never made any payment to AS for its services. CP 2526 (FF 6). This finding

was based on the court's error excluding Tr. Ex. 58.

**Assignment of Error 5.** The trial court erred in finding AS relied on a representation it would be paid in full and FSS deliberately misled or deceived AS in very limited interaction.<sup>3</sup> CP 2526-27.

**Assignment of Error 6.** The trial court erred in finding FSS did not have access to alternative vendors and that it "refused" to provide any cost information to AS.<sup>4</sup> CP 2526-29.

**Assignment of Error 7.** The trial court erred in its computation of FSS' total (gross) direct revenues of \$81,906.50. CP 2527-28 & 2530.

**Assignment of Error 8.** The trial court erred in its computation of FSS' total (gross) fixed fees of \$61,816.76 for domestic and international flights and then allocating 100% to international flights. CP 2528-30.

**Assignment of Error 9.** The trial court erred in its computation of FSS' total gross revenues of \$144,723.26 and then wrongfully awarding 100% to AS without deduction for any costs and expenses. CP 2528-30.

**Issue 1.** Whether the trial court violated Washington's public policy against the award of punitive damages by switching to "disgorgement of total gross revenues."

**Issue 2.** Whether the claim of unjust enrichment should be dismissed where a contract implied in fact was found. If so, should the

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<sup>3</sup> Judge Rogers rejected these arguments on summary judgment. CP 1540;1604-05.

<sup>4</sup> FSS fully complied with Judge Rogers' discovery order. CP 360. FSS informed AS it did not have the cost information being sought for services performed years earlier. CP 1403. The order even allowed AS to obtain a declaration from FSS detailing the search efforts undertaken, CP 360, but AS accepted the response without any further action.

case be dismissed since quantum meruit has now been abandoned?

**Issue 3.** Whether the trial court erred when the measure of damages should be limited to the “reasonable value” of the services. AS paid no more than \$10 per hour for the labor services arranged by Delta. AS presented no evidence of market value, and FSS presented uncontroverted evidence the services had a market value of \$3,511.

**Issue 4.** Whether the doctrines of election of remedies, claim splitting or judicial estoppel bar the trial court from switching the measure of damages on remand to disgorgement of total gross revenues.

**Issue 5.** Whether the trial court erred in considering AS’s untimely disclosed disgorgement theory where Judge Rogers struck the identical disgorgement evidence for its untimeliness on summary judgment.

**Issue 6.** If unjust enrichment is an available measure of damages, did the trial court err by disregarding reasoned legal restitution principles governing the application of the unjust enrichment claim.

**Issue 7.** Whether trial court erred by awarding disgorgement of total gross revenues when FSS received the contract revenues it was entitled to receive under its pre-existing contract with Delta, and AS had no right to or expectation in those revenues.

**Issue 8.** Whether the trial court erred in finding there was no market value for AS’s services, that such services were unique, and therefore the court could award disgorgement of total gross revenues, when AS failed to meet its burden to prove there was no market value and the court made no effort to construct a hypothetical market value.

**Issue 9.** Whether the trial court erred by awarding disgorgement of total gross revenues as a sanction without regard to the *Burnet* factors.

**Issue 10.** Whether the trial court erred in finding FSS made deliberately misleading statements (contrary to the findings of Judge Rogers) justifying the award of disgorgement of total gross revenues when insufficient evidence existed of any fraud or deceit.

**Issue 11.** Whether the trial court erred by awarding disgorgement of total gross revenues without making the requisite finding of a causal link between the award and the actual labor services provided.

**Issue 12.** Whether the trial court erred by granting a windfall to AS without exercising any independent judgment to balance the equities of both parties, only considering those equities favoring AS.

**Issue 13.** Whether the trial court's findings and conclusions are erroneous by considering "domestic" flights, duties and risks not assumed by AS, significant errors in computing revenues (allocating 100% of all fixed-fees for domestic and international flights to the international flights even though only 14.47% of the total flights were international), and disregarding FSS' tender of payment to AS.

**Issue 14.** Whether the trial court erred by not vacating the original judgment.

**Issue 15.** Whether the trial court wrongfully abdicated its judicial responsibilities to AS on remand and violated due process? If so, should the case be remanded to a new trial court judge.

2. Pertaining to Sanction (Attorney Fees & Costs) of \$115,32.22.

**Assignment of Error 10.** The trial court erred in awarding attorney fees and costs to support its make-whole theory of damages, CP 2407, adopting verbatim the rhetoric and innuendo provided by AS's. The trial court fails to specify the actionable conduct or deficiencies required for appellate review. The trial court wholesale adopts AS's general references to declarations (*i.e.* Dkt. 16, 30, 46, 90, 91); an inaccurate account of FSS' request for telephonic testimony; a fictitious representation of counsel; arguments about a pretrial discovery order and a deposition previously addressed by Judge Rogers; and AS's unsupported claims of spurious violations of local court rules. CP 2530-36.

**Assignment of Error 11.** The trial court erred by imposing its "make-whole" theory without AS ever providing any advance notice of an intent to seek a sanction as the law requires. CP 2530-36.

**Assignment of Error 12.** The trial court erred by failing to properly conduct any true lodestar analysis. CP 2536-38.

**Issue 16.** Whether the trial court erred in awarding nearly all fees and costs without specifying any actionable conduct or deficiencies.

**Issue 17.** Whether the trial court erred in awarding a make-whole remedy without any advance notice of an intent to seek sanctions.

**Issue 18.** Whether the trial court erred in awarding a make-whole remedy based upon pretrial matters already addressed by Judge Rogers. Judge Rogers' discovery order had denied sanctions. CP 360.

**Issue 19.** If attorney fees and costs are available under a make-whole theory, whether a lodestar analysis is required.

### **III. STATEMENT OF THE CASE<sup>5</sup>**

The underlying facts are set forth in this Court's decision at 2015 WL 1541288. This case involves a dispute between two competing cleaning companies over the fair market value of AS's labor services arranged by Delta Airlines over roughly a three-month period. CP 929. In 2011, FSS was awarded a three-year contract with Delta to provide cabin cleaning on international and domestic flights, starting May 17, 2011. *Id.*; Tr. Exs. 2 & 51. It takes 6-14 employees to clean an airplane depending upon the airplane model and the type of cleaning ordered. CP 930-31.

Delta paid a unit charge anywhere between \$100 and \$199 for each aircraft cleaned. *See* Tr. Exs. 2-10 & 51. It also paid a monthly management fee of \$17,105; a monthly equipment fee of \$1,423; and \$3,327.09 total in start-up costs.<sup>6</sup> *See id.* FSS's contract also contained a negotiated payment rate of \$14.05 per hour for any out of scope services. Tr. Ex. 51 at p. 5. This arm's length negotiated rate with Delta was used in FSS's valuation of AS services. *See* Tr. Ex. 57.

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<sup>5</sup> Verbatim Transcript of Proceedings ("VRP") for the two-day trial is cited without dates or volume numbers. The pretrial hearing verbatim transcripts are dated.

<sup>6</sup> AS only provided supervisory services on international flights. CP 2 ¶11. It was not involved with any domestic flights. Nevertheless, the trial court inexplicably awarded AS 100% of the management fees, equipment-fixed fees, and start-up costs ("fixed fees") for both the domestic and international flights. CP 2579 (¶ 20). In fact, even AS had testified no more than 65% should be allocated to international flights, VRP 95, and FSS invoices show only 14.47% of all aircraft cleaned were international. *See* App. B.

On May 11, 2011, U.S. Customs and Border Protection (“CBP”) stated FSS would need to obtain a Compliance Agreement for the handling and transfer of collected trash on the international flights. CP 955; Tr. Ex. 65 at p. 5. FSS was told it would take 6-8 weeks to obtain its compliance agreement to clean planes at Seattle-Tacoma. CP 930-31. FSS had compliance agreements at other airports, and understood the compliance standards and requirements. CP 931 at ¶8; CP 1782 at 76.

FSS was unable to secure a compliance agreement before it started cleaning Delta’s international flights. CP 930-31. Nevertheless, CBP had agreed to allow FSS to perform the cleaning services on the international flights so long as a vendor with a compliance agreement monitored FSS’s handling and transfer of the bags of collected trash to Gate Gourmet, the company hired by Delta to incinerate the trash. *Id.*

Without consulting FSS, Delta arranged with AS to provide the temporary monitoring labor services of the international flights under AS’s compliance agreement. CP 1604. Under this temporary arrangement, until FSS could obtain its own compliance agreement, AS would send a standard labor employee to monitor FSS’s handling and transfer of the collected bags of trash to Gate Gourmet. CP 930-31.

FSS performed all cleaning services contemplated under its contract with Delta. CP 930-31. FSS witnessed AS performing the supervisory task and it took no longer than 30 minutes inclusive of travel time for each aircraft cleaned. VRP 348-55. AS testified it had no idea how long it took to perform the supervisory task and it kept no time

records. VRP 150 & 292. AS further testified it only paid its labor workers \$10 per hour for the work. VRP 144-46. AS explained the fully burdened payment rate was estimated at no more than \$25 per hour which included AS's profit, equipment (maintenance, fuel and wear and tear on the vehicle) and paying the employee time and a half.<sup>7</sup> *Id.*

On May 28, 2011, AS began providing the temporary monitoring services. *Id.* Two weeks later AS began demanding FSS pay a fee of \$250 per airplane (\$500 per hour). CP 935 at ¶19; 946 at ¶55; Tr. Ex. 64 at 1 and 3 (¶1.2). No explanation was given for this extraordinary rate. *See id.* Later, AS proposed a new contract with a price of \$175 per airplane (\$350 per hour), again without any explanation for the excessively high rate. Tr. Ex. 66 at 1 & 4 (¶1.2). AS's price demands exceeded its own unit contract rates with Delta for all cleaning operations after it had taken over the contract from FSS in November 2011. *See* Tr. Ex. 61 at pp. 2-3.

All parties knew any payment terms would need to be agreed upon by their corporate headquarters. VRP 246-47, 299; CP 936-41. On June 24, 2011, FSS President, Robert P. Weitzel, contacted AS's Vice President of finance, Mr. Toan Nguyen, objecting to the price. VRP 140-41; CP 936-37. Although Mr. Nguyen promised to get back to Mr. Weitzel, he

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<sup>7</sup> The fully burdened rate includes FICA, FUTA, SUTA and general liability insurance. VRP 144-46. AS initially thought it would be performing the entire cleaning operation with a full crew, in which case it included \$30 for profit and \$10 for equipment. *Id.* After discovering it would only be providing the monitoring services, AS reduced its estimate for profit and equipment to \$5 per hour. *Id.* This combined with the fully burdened labor rate (\$20 per hour) brought the total to \$25 per hour. *Id.* AS's estimate assumed it would take no longer than one hour per aircraft. *Id.* FSS observation testimony confirmed AS spent no more 5-10 minutes per aircraft. VRP 352-55.

never did. *Id.* Mr. Weitzel continued to dispute the price and offered to indemnify AS if it had concerns about liability. CP 1604-05; 934-35; VRP 133; 218-219, 221-223, 226-227, 229, 237, 240, 243, 246-247.

The amount demanded by AS greatly exceeded what FSS received from Delta for all the cleaning services. Tr. Exs. 3-10 (invoices) & Appx. B (summary of invoices). As shown in **Appendix B**, only 14.47% of the flights cleaned were international flights. FSS received unit price revenues of \$80,401.28 for the international flights. *Id.* The total gross revenues for the international flights, which also included management fees, equipment fixed fees, and start-up costs, were \$89,306.70 or \$187.62 per airplane. That is for the *entire cleaning operation* using 6-14 employees. *Id.*

FSS contacted AS to object to the charges in AS's invoices, which continued to show the excessively high rate. CP 939-40 at ¶35. FSS then prepared a valuation based on the actual time, hourly rates, dates of services provided and number of flights, which totaled \$3,511 over the three-month period. Tr. Exs. 17 & 57; CP 940 at ¶36-37; VRP 346-358. FSS used the out-of-scope service rate of \$14.05 per hour from its contract with Delta. Tr. Ex. 51 at p.5. It is similar to the \$16.31 per hour out-of-scope service rate in AS's contract with Delta—AS took over the Delta cleaning operations from FSS in November 2011. Tr. Ex. 61 at p.3.

On September 1, 2011, 14 weeks after the initial estimate of six to eight weeks, CBP granted FSS its own compliance agreement. Tr. Ex. 1; CP 941 at ¶40. The arrangement between Delta and AS ended on September 2, 2011. *Id.* AS provided the labor on a total of 476

international flights from May 28 – September 2, 2011. VRP 377.

**Procedural History.** On December 15, 2011, AS sued FSS for \$80,000 claiming, *inter alia*, breach of contract, unjust enrichment, and quantum meruit. CP 1-7. FSS answered that although it would be entitled to the fair market value, AS’s \$80,000 demand was excessive. CP 32.

On June 14, 2013, Judge Rogers dismissed on partial summary judgment the breach of contract and account stated claims based upon AS’s disputed invoices, draft contracts, and the alleged oral and written representations. CP 1604-05. Judge Rogers ruled “the parties disputed the price of the services over several months” and “[t]here was never a meeting of the minds as to price.” *Id.* Judge Rogers *sua sponte* granted summary judgment in favor of AS on the claims of quantum meruit and unjust enrichment for liability purposes, leaving only the issue of the “measure of damages” for trial. CP 1607.

AS provided no evidence of fair market value at trial.<sup>8</sup> Contrary to *Young v. Young*, 164 Wn.2d 477, 490, 191 P.3d 1258 (2008), AS argued fair market value and industry standards were irrelevant in determining the reasonable value of its services. CP 1624-25 & n. 17; VRP 51-52. AS offered “value” testimony only from its finance director, Toan Nguyen, the same individual who unilaterally determined AS’s inflated \$250 and

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<sup>8</sup> AS offered no evidence that it could not determine a reasonable market value for its service. AS took over the Delta contract from FSS in November 2011 and had the ability to determine the reasonable value for its services. Ordinary labor workers making no more than \$10 per hour were used to perform these services. VRP 144.

\$175 per plane price without discussing the services with the local manager or employees who performed the work. VRP 115-16; 150. Mr. Nguyen testified he had no prior experience pricing services like AS provided here. VRP 101. He testified his pricing was based upon his own personal assumptions. VRP 111. He had no records, market or otherwise, to support any of his pricing assumptions. VRP 139. He could not provide even a single market comparison. *Id.* Mr. Nguyen failed to use the pricing model that AS ordinarily uses to price cleaning services. *Id.*

The only evidence of fair market value offered at trial was the valuation submitted by FSS using market rates from its negotiated arm's length transaction with Delta and based upon industry standards, actual time spent performing the services and the travel time, which amounted to \$3,511 and tendered to AS. Tr. Exs. 17 & 57.

Nevertheless, the trial court applied a "make-whole" remedy and awarded a staggering money judgment in the amount of \$235,000. VRP 412; CP 2409. This included \$83,300 (\$175 per flight) in expectation damages along with "all associated attorney's fees and costs under both theories of quantum meruit and unjust enrichment." CP 2291. It awarded \$116,700 in attorney's fees "as part of the remedy to make plaintiff whole in this matter under unjust enrichment and quantum meruit—a remedy fashioned to do substantial justice and put an end to the litigation." CP 2407. It further awarded \$35,000 in sanctions "above and beyond plaintiff's reasonable attorney's fees." CP 2405-08. But the trial court failed to specify any sanctionable conduct. *Id.*

On April 6, 2015, this Court remanded for further findings because the trial court's findings were incomplete. 2015 WL 1541288, at \*3. It found, *inter alia*, the trial court failed to identify a particular theory of damages under either unjust enrichment or quantum meruit; failed to indicate whether market value was established; and failed to identify any facts supporting a disgorgement theory. *Id.* at \*3-4. The Court held “[t]he trial court must articulate the specific measure of damages and make precise findings supporting any such damages.” *Id.* at \*5. In addition, this Court found there was no legal right to attorney fees—if the trial court intended to impose sanctions, it must “specifically” identify any sanctionable conduct for review. *See id.* at \*5-6. On December 31, 2015, this Court issued the mandate. CP 2465.

On January 6, 2016, AS filed a motion that inaccurately represented the remand opinion and requested it be allowed to submit new proposed findings, conclusions and order (“Proposed FFCL”). CP 2458-2461. AS indicated courts often allow Proposed FFCL *so long as the opposing party has an opportunity to voice objections*. CP 2460. FSS responded that the trial court should be guided by the remand opinion and it should make its own determination of further findings based on the evidence presented at trial. CP 2483-84. On January 20, 2016, the trial court granted AS's motion and set February 12, 2016 for filing the Proposed FFCL. CP 2520-21. The trial court did not indicate what process it would undertake to conduct the review for making further findings. AS then submitted its Proposed FFCL on February 12, 2016.

Just five days later on February 17, 2016, the trial court signed AS's Proposed FFCL without any revision and copies were served on the parties. CP 2549-66. It appears the trial court never read them as demonstrated by no changes being made and its failure to recognize that the Proposed FFCL contained "alternative" damage choices inserted by AS. CP 2555-57 (¶20 and alternative ¶20; ¶26 and alternative ¶26). On February 17, 2016, AS's counsel notified the trial court of the significant oversight by email without even submitting a motion. *See* CP 2527.

But, instead of vacating its earlier order, the trial court had its bailiff "pull" the original. *Id.* Because the FFCL had been issued under CR 54(a)(2) and copies had been served, FSS recommended that the order be entered into the court docket and then vacated. *Id.* The trial court refused. *Id.* On February 19, 2016, the trial court filed an amended FFCL again without any revision and this time selecting AS's alternative choices that resulted in the highest possible money damages. *See* CP 2528-29 (selecting ¶¶20&26 over their alternative provisions).

This time the trial court awarded \$259,046, CP 2567, magnitudes more than even the excessive \$80,000 amount sought in AS's complaint and over \$24,000 more than the unsupported \$235,000 judgment issued in the first appeal.<sup>9</sup> CP 4-6; CP 2409. Reversing course, the trial court

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<sup>9</sup> Originally the trial court awarded \$83,300 as "the reasonable value of the services rendered." CP 2287. Following remand, the trial court awarded \$143,723.26 as "disgorgement of profit defendant received as a result of the services rendered" and made no finding that this amount is the reasonable value of the services. CP 2568 & 2523. This is an increase of over \$60,000 or more than 172% of the \$83,300 the trial court originally awarded "to make plaintiff whole in this matter under unjust enrichment and quantum

adopted AS's suggestion to award disgorgement of total gross revenues as the measure of damages. CP 2550. Though characterized as disgorgement of "profits," it is actually a punitive disgorgement of "total gross revenues." CP 2552-57. In the prior FFCL, the trial court plainly stated "[t]he issue for the court to determine is the reasonable value of services rendered," recognizing the claims are premised upon restitution. CP 2287. But now the trial court awarded AS total gross revenues amounting to \$143,723.26.<sup>10</sup> CP 2557. Then, to achieve its goal of making AS whole (VRP 412), the trial court awarded \$115,323.22 in attorney fees and costs based upon its make-whole theory of damages or sanctions that lack any modicum of specificity or proof of violation. CP 2564, 2568.

On February 22, 2016, AS hastily sought to have the trial court's FFCL entered as a final judgment on a six-day note. CP 2539-45. FSS objected to entry of judgment without the trial court conducting any meaningful review following the Court's remand opinion or the submission of AS's Proposed FFCL. CP 2546. FSS also objected to the trial court's refusal to enter its initial FFCL so that it would be a matter of

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meruit...to do substantial justice and put an end to the litigation." CP 2291 & 2407. This new award amounts to over \$300 per flight (\$600 per hour), far greater than even the inflated \$250 contractual rate (\$500 per hour) AS originally proposed on the assumption it would be doing all cabin cleaning, not just the monitoring labor.

<sup>10</sup> This is nearly double the amount AS sought on its breach of contract claim previously dismissed by Judge Rogers. CP 1604-05. It hardly can be considered fair and just restitution when the money judgment pales in comparison to even the grossly inflated \$83,300 amount AS sought under its failed contract theory.

record on the court docket. CP 2547. FSS urged the trial court to set a briefing schedule to allow FSS to provide input on AS's Proposed FFCL and to conduct a full and careful review consistent with the remand decision. CP 2546-47. The trial court never responded.

On March 1, 2016, the trial court entered AS's proposed judgment verbatim without any changes. CP 2667-69. It awarded AS a principal judgment of \$143,723.26, together with all attorney fees and costs of \$115,323.22, for a total judgment of \$259,046.48. *Id.* The trial court never vacated its first judgment (CP 2409) or its original findings (CP 2287) from 2013. On March 17, 2016, FSS filed its Notice of Appeal of both the pre- and post-remand decisions of the trial court. CP 2570-2636.

#### IV. AUTHORITY

**A. The trial court has wrongfully imposed punitive damages contrary to Washington law and this Court's decision in *FSS I*.**

An award of damages constitutes reversible error if it is outside the range of relevant evidence, shocks the conscience, or results from passion or prejudice. *Mason v. Mortg. Am., Inc.*, 114 Wn.2d 842, 850, 792 P.2d 142 (1990). Here, the trial court's staggering award of \$259,046.48 based upon "disgorgement of total gross revenues" and awarding nearly all attorney fees/costs is nothing but punitive. *Cf., Rochow v. Life Ins. Co. of N.A.*, 780 F.3d 364, 373-75 (6th Cir. 2015) (rejecting disgorgement of profits in ERISA case as impermissible double recovery more than necessary to make a plaintiff whole); *Kleinman v. Merck & Co., Inc.*, 8 A.3d 851, 863 (N.J. Super. 2009) ("Disgorgement of profits is a punitive,

not a compensatory, form of damages. There is no law in New Jersey that allows such a recovery in this type of claim.”).

By significantly overcompensating AS, the award of FSS’ gross revenues amounts to punitive damages not allowed by established Washington law. *See Dailey v. North Coast Life Ins. Co.*, 129 Wn.2d 572, 574, 919 P.2d 589 (1996) (“Punitive damages not only impose on the defendant a penalty generally reserved for criminal sanctions, but also award the plaintiff with a windfall beyond full compensation.”); *Barr v. Interbay Citizens Bank of Tampa, Fla.*, 96 Wn.2d 692, 699-700, 635 P.2d 441, 649 P.2d 827 (1982) (Washington rejects punitive damages because compensatory damages fully compensate the plaintiff).

The amended judgment is magnitudes higher than even the inflated amount sought by AS in its complaint where AS claimed damages of \$80,000 based upon a disputed account balance of \$84,026.64. CP 4-6. The complaint alleged damages of \$175 “for each international flight cleaned,” equating to roughly \$350 per hour or \$83,300 for the 476 flights. CP 3-4. The trial court’s new money judgment increases the award to over \$300 per aircraft (\$600 per hour) or \$143,723.26. CP 2568. There is no principled rationale for this absurdly inflated award. FSS invoices show the judgment nearly doubles the actual total gross revenues received by FSS for all cleaning services on the international flights. **See Appendix B** (summary of FSS’ invoices). This constitutes reversible error.

The disgorgement award has no nexus to the reasonable value of the labor services rendered by AS. Both quantum meruit and unjust

enrichment are founded upon restitution, which is not punitive. *See Young*, 164 Wn.2d at 490.<sup>11</sup> This is a case of first impression: awarding disgorgement of gross revenues in an implied contract case as a way to punish FSS for an alleged “promise” to pay that Judge Rogers ruled was unfounded.<sup>12</sup> *See Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d 146, 155, 43 P.3d 1223 (2002) (punishment of promise breaker is unjustified unless conduct is also a tort for which punitive damages are recoverable).

In *FSS I*, this Court signaled Restatement (Third) of Restitution § 31 concerning unenforceable contracts for services “with no definitive market value” should govern. *See* 2015 WL 1541288, at \*5 n. 19.

Restitution based on performance of an unenforceable contract is *likely to yield a smaller recovery than damages for breach*...The value to the recipient of a requested performance—if performed as requested—is *normally market value when no price has been specified; otherwise, the lesser of market value and a price the recipient has expressed a willingness to pay*....In the rare case in which the claimant might prove that a requested performance had a market value in excess of the promised compensation, recovery in restitution will be limited by the contract price...*It follows that a liability in restitution under this section cannot exceed what would have been the defendant's liability in contract, had the contract been enforceable.*

RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 31  
cmt. i (measure of recovery) (italics added).

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<sup>11</sup> *See* Paul T. Wangerin, *Restitution for Intangible Gains*, 54 La. L. Rev. 339, 346 (1993) (“[S]killed lawyers can sometimes use claims for restitution as a back door method for collecting punitive damages. Thus, in jurisdictions in which punitive damages are difficult to obtain, claims for restitution might lead to essentially punitive awards.”).

<sup>12</sup> Judge Rogers dismissed AS’s breach of contract and account stated claims because he found there were no promises (no meeting of the mind on price). CP 1604-06

Here, the price FSS “expressed a willingness to pay” was \$3,511.10. CP 4 (¶25); Tr. Ex. 57. FSS tendered payment of \$3,511 on October 23, 2012, later returned by AS. Tr. Ex. 58. *See* § IV.E.7, *infra*.

The trial court’s switch to disgorgement of “total gross revenues” far in excess of either the rejected \$175 “contract” price or the \$3,511 FSS offered to pay was clear error in light of Section 31, which speaks only of “reasonable value of services” and “reasonable price,” not disgorgement. *See* § 31 cmt. e. The facts did not change on remand – only AS’s strategy to reap an even greater windfall (\$143,723) than the heavily inflated contract damages (\$83,300) dismissed by Judge Rogers.

**B. The case should be dismissed. The only remaining claim of unjust enrichment is unavailable where a contract implied in fact has been found and the claim of quantum meruit has been abandoned.**

It is well established unjust enrichment *only operates in the absence of* an express contract or a contract implied in fact (quantum meruit).<sup>13</sup> *Young*, 164 Wn.2d at 86; *Wuliger v. Mfrs. Life Ins. Co.*, 567 F.3d 787, 799 (6th Cir. 2009) (unjust enrichment exists only “in [the] absence of an express contract or a contract implied in fact”). The pretrial

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<sup>13</sup> “An action to recover the reasonable value of the services is predicated upon quantum meruit.” *Dailey v. Testone*, 72 Wn.2d 662, 664, 435 P.2d 24 (1967). Recovery under quantum meruit is limited to the reasonable value of the services. *Young*, 164 Wn.2d at 485-86; *Eaton v. Engelcke Mfg., Inc.*, 37 Wn. App. 677, 682, 681 P.2d 1312 (1984). Where the parties have impliedly-in-fact contracted for work under a tacit agreement, but no price was specifically set, “the measure of recovery is likely to be the reasonable value of the labor and materials.” 3 Dan B. Dobbs *LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION*, §12.20(2) at 468 (Prac. Treatise Series 2d ed. 1993). “The recovery should always be measured by the reasonable market rate for the labor, materials and services.” *Id.* at 469.

judge expressly ruled for liability on the claim of quantum meruit, leaving for trial only the measure of restitution damages. CP 1607. Therefore, *a fortiori*, the unjust enrichment claim should have been dismissed.

AS has also now abandoned the claim of quantum meruit. After remand, although the trial court notes quantum meruit liability was decided on summary judgment and damages was an issue at trial, all other references to quantum meruit are eliminated in the amended FFCL and judgment. *See* CP 2522-23, 2526 (§16), 2568 (§1). The trial court fails to explain why it does not address or decide the quantum meruit claim and AS has not cross-appealed the abandonment of quantum meruit. Therefore, the case should be dismissed. This was the legal risk assumed by AS when it directed the trial court to take a wholly unprincipled approach in its effort to extract a windfall judgment.

**C. The trial court committed legal error by changing the measure and amount of damages on remand.**

**1. This Court did not remand to have the trial court come up with another measure and amount of damages.**

Remanding for “further findings,” this Court ordered the trial court to “clarify the findings on material issues,” *i.e.*, “identify [a] particular theory of damages” the trial court had used to award damages of \$83,300 as the reasonable value of services. 2015 WL 1541288, at \*1, 3, 4-5. “Clarifying” a judgment “explains or refines rights already given. It neither grants new rights nor extends old ones.” *Kemmer v. Keiski*, 116 Wn. App. 924, 933, 68 P.3d 1138 (2003). The trial court cannot “go back,

rethink the case, and enter an amended judgment that does not find support in the trial court record.” *Presidential Estates Apt. Assoc. v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996). Failure of the court to give all the relief it otherwise would have given had the 2013 judgment been more fully considered is not grounds for amendment. *See Seattle-First Nat. Bank Connell Branch v. Treiber*, 13 Wn. App. 478, 482, 534 P.2d 1376 (1975).

An appellate court’s mandate is the law of the case binding on the lower court that must be followed. *Bank of America, N.A. v. Owens*, 177 Wn. App. 181, 183, 311 P.3d 594 (2013). The trial court cannot disregard the appellate court’s directions on remand. *Id.* at 189.

**2. The reasonable value measure used for the original judgment is clear from the record.**

The trial court’s amended findings and conclusions make clear it did not base its original \$83,300 award on any disgorgement theory because the new damages are 172% higher. The 2013 trial record shows the theory of damages to arrive at the unproven \$83,300 figure was the “reasonable value of services” (the unaccepted \$175 per flight offer) and not disgorgement. VRP 376-77; *see In re LaBelle*, 107 Wn.2d 196, 219, 728 P.2d 138 (1986) (written findings may be supplemented by oral decision or statements). To the dollar, \$83,300 is precisely what Judge Spector awarded in 2013. CP 2291 ¶16 (“\$175/flight or \$83,300” plus attorney’s fees). Judge Spector plainly used the contract expectation damages (\$175/flight) dismissed by Judge Rogers on summary judgment

for the original \$83,300 judgment. VRP 53-54 (AS counsel explaining reasonable value is 476 flights times \$175 per flight for a total of \$83,300); VRP 393 (court expressing view reasonable value not strictly bound by market value considerations).

This “reasonable value” measure was distinct from the “benefit conferred” measure, which focused on FSS’s profits from cleaning Delta international flights totaled \$159,345 or \$132,241 depending on how the court allocated fixed fees. VRP 374-376. FSS objected to use of disgorgement of revenues in its motion in limine and repeatedly throughout trial. CP 1747-51; VRP 321-33; 387-94. The judge confirmed with AS counsel that she could award only one measure, either “reasonable value” or FSS profits, but not both. VRP 42-44.

Given these statements, the trial court’s original findings can only be interpreted as using the “reasonable value of services” measure. CP 2287, 2291(¶16). The judge’s rationale could not have been a “modified disgorgement of profit” measure. 2015 WL 1541288, at \*5. The trial court used a “reasonable value” measure and rejected the disgorgement (“increased value”) approach. VRP 387-412; CP 2287 & 2291. AS never cross-appealed in *FSS I* so it is precluded from seeking an increase.

**3. AS’s resurrected claim on remand of disgorgement of gross revenues is barred by claim splitting.**

AS’s claim splitting is barred. *See Babcock v. State*, 112 Wn.2d 83, 93, 768 P.2d 481 (1989) (claim preclusion). The remand was not a “redo” for AS to resurrect its unprincipled and untimely disgorgement theory. *See*

*Owens*, 177 Wn. App. at 193 (party cannot hold back reserved claim for resurrection later following an appeal and remand). “[A]n alternate theory of recovery, or an alternate remedy” should be raised and decided earlier, not held in reserve pending appeal and remand. *See Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 331, 941 P.2d 1108 (1997). The disgorgement theory not pursued by AS in the original proceedings is deemed abandoned. *See Owens*, 177 Wn. App. at 193.

“[F]lying squarely in the face of the indisputable policy against allowing piecemeal appeals,” *id.*, AS seeks to resurrect a disgorgement claim that would effectively allow them to sit on a theory after it did not prevail on it in *FSS I*. The trial court “has no authority to revisit” reserved claims not pursued in the original proceedings. *Owens*, 177 Wn. App. at 183; *Sweeney v. Frank Waterhouse & Co.*, 43 Wash. 613, 617, 86 P. 946 (1906) (“But no court, we think, has gone so far as to allow a litigant to experiment with a court by trying his case piece-meal.”).

#### **4. Election of remedies doctrine bars AS from switching to its new disgorgement theory.**

Election of remedies applies where two or more coexistent remedies are repugnant and inconsistent with each other. *Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, 701, 756 P.2d 717 (1988).<sup>14</sup> The pursuit of

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<sup>14</sup> Election of remedies applies in unjust enrichment and restitution cases. *See Young*, 164 Wn.2d at 486; *Original Appalachian Artworks, Inc. v. Schlaifer Nance & Co.*, 679 F. Supp. 1564, 1579-80 (N.D. Ga. 1987); *Washington Co-op. Chick Ass'n v. Jacobs*, 42 Wn.2d 460, 463-65, 256 P.2d 294 (1953); *Ryan v. Plath*, 18 Wn.2d 839, 865, 140 P.2d 968 (1943); *JDFJ Corp. v. Int. Raceway, Inc.*, 97 Wn. App. 1, 7, 970 P.2d 343 (1999).

one necessarily negates the other remedy. *Id.* “When remedies, although inconsistent, are pled in the alternative and prosecuted to final judgment, the court’s choice becomes the pleading party’s choice.” *Stryken v. Panell*, 66 Wn. App. 566, 571, 832 P.2d 890 (1992).

Here, the trial court’s award of “reasonable value of services” in *FSS I* became AS’s election. CP 2287. AS is not allowed to switch theories after the appeal. FSS appealed the “reasonable value” award in *FSS I*; AS filed no cross-appeal to claim the award was inadequate or based on the wrong measure of recovery. AS cannot use FSS’s appeal in *FSS I* as a dress rehearsal to try out different theories before settling on the one it thinks has the better chance of surviving a second appeal.

**5. Judicial estoppel prevents AS from changing its theory to disgorgement of gross revenues.**

AS admitted in its trial brief that it was only seeking its contractual expectation damages in the form of reasonable value of services and, therefore, is judicially estopped from switching to a new disgorgement theory. CP 1625-26 (“Air Serv only argues for the price it requested to be charged...[t]wo sophisticated parties agreed to the price while the services were being performed”). Judicial estoppel precludes AS from claiming “reasonable value” is the proper measure in *FSS I* and then later seeking an advantage by taking a clearly inconsistent position, asserting disgorgement of profits is the proper measure on remand. *See, e.g., Taylor v. Bell*, 185 Wn. App. 270, 281-2, 340 P.3d 951 (2014).

**6. The trial court committed legal error by considering AS's untimely disgorgement of s revenues theory.**

AS's 11th hour disclosure of its disgorgement theory was untimely. In April 2013 (2 months before trial), although FSS asked AS to "describe in detail the damages" and to provide any proof in support of its damages, AS failed to describe any disgorgement damages or provide evidentiary support. CP 443 & 447. On June 5, 2013, in a belated supplementation to discovery in violation of KCLR 37(g) requiring a party to supplement before discovery cutoff, AS began making a claim to FSS's revenues and/or profits from the Delta contract. *See* CP 1585-86. FSS moved to strike the "Pelton Declaration" (CP 1380-1425) filed by AS to support its newly disclosed disgorgement theory. CP 1474-1535. Summary judgment Judge Rogers struck AS's evidence of FSS revenues and/or profits due to the untimely disclosure. CP 1546-47; CP 1602.

When trial started on June 24, 2013, FSS made a motion in limine to similarly keep the untimely revenue/profits evidence out, but Judge Spector denied the motion and said it would go to the weight. VRP 13-20. A day later, the judge granted AS's motion in limine to prevent FSS from offering evidence on market rate or industry standards. *See* VRP 256-268. Throughout trial, FSS objected to AS's disgorgement theory due to its untimeliness. *See* VRP 15-20, 82, 97, 175, 389-412. Based upon the untimely disclosure, FSS' objections should have been sustained.

**D. The trial court erred by not applying established legal principles for determining the proper measure of damages.**

The trial court erred by failing to apply the proper measure of

damages<sup>15</sup> for run-of-the-mill services performed by laborers paid no more than \$10 per hour. Tr. Ex. 60; VRP 144.<sup>16</sup> AS had the burden of proving the reasonable market value. *See Young*, 164 Wn.2d at 486 (burden of proving implied contract); *Eaton*, 37 Wn. App. 677, 682, 681 P.2d 1312 (1984) (quantum meruit). “[R]easonable value is measured by the amount which the benefit conferred would have cost the defendant had it obtained the benefit from some other person in the plaintiff’s position.” *Noel v. Cole*, 98 Wn.2d 375, 383, 655 P.2d 245 (1982); *see also Young*, 164 Wn.2d at 489-490. “In the absence of such evidence the appropriate result then is for the trial court to leave the parties where it finds them.” *TVL Assoc. v. A&M Constr. Corp.*, 474 A.2d 156, 160 (D.C. App. 1984) (reversing award of quantum meruit for insufficient evidence).

Assuming *arguendo* AS could recover under unjust enrichment, the measure of damages would be the same. “Unjust enrichment from requested benefits is measured by their reasonable value to the recipient.” RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 50(2)(b) (“Reasonable value is normally the lesser of market value and a

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<sup>15</sup> In unjust enrichment cases, the standard of review for applying the wrong measure of damages is *de novo*. *Young*, 164 Wn.2d at 483.

<sup>16</sup> “The reasonable market value of the plaintiff’s services is the only remedy necessary.” Candace S. Kovacic, *A Proposal to Simplify Quantum Meruit Litigation*, 35 Amer. U.L.Rev. 547, 560 (1986), cited in *Young*, 164 Wn.2d at 486. “Reasonable value of the plaintiff’s services is...perhaps the only workable measurement for recovery...The defendant’s gain is more subjective and thus more difficult to measure.” *Id.* at 611; *see also* 1 Dan B. Dobbs, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 3.3(6) at 308 (Pract. Treatise Series 2d ed. 1993) (preference for market measured damages has sound bases “not the least of which is the virtual impossibility of knowing whether the plaintiff has subjective harms or how to measure them”).

price the recipient has expressed a willingness to pay.”); *see also Young*, 164 Wn.2d at 489 (“the value of the received benefit focuses on the receiver of the benefit.”). Where the recipient has requested benefits without specifying a price, the presumptive measure of enrichment is the market price. RESTATEMENT (THIRD), *supra* § 49 cmts. d & f. “Reasonable value is uniformly determined by reference to a market price or “going rate,” without consideration of alternatives such as cost to the claimant or value in advancing the purposes of the defendant.” *Id.* § 50 cmt. d (italics added, internal quotes in original).

In *FSS I*, AS acknowledged it did not meet its burden of proof by admitting it only provided a “figure it was willing to accept for payment” without establishing its price was reasonable in the market in an arm’s length transaction. [Pre-Remand] Brief of Respondent dated July 17, 2014, No. 7110-2-I, at 32. AS produced no evidence of fair market value, failing its burden of proving the reasonable value by more than speculative evidence or its own subjective notions of value.<sup>17</sup> Because AS’s restitution claims were based on speculation and conjecture, rather than competent evidence, its damage claims should have been denied.

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<sup>17</sup> AS offered no evidence of what similar services would have cost FSS from third-party providers. AS employees Nguyen and Green testified only that AS had never supplied such services. VRP 75, 101, 274. Unlike all his other price settings, Mr. Nguyen did not utilize his computer “pricing model” to generate an appropriate price. VRP 116, 139. It was literally a number pulled out of thin air based on his own “personal assumptions.” VRP 111. *AS had to ask Delta Airlines how much to charge FSS*. Tr. Ex. 53. Mr. Nguyen, AS’s vice-president of finance, admitted he had no personal knowledge about what a reasonable rate in the cabin cleaning industry would be and he set the price arbitrarily without checking with anyone else. VRP 101, 111, 115-116, 139, 150.

Only FSS provided proof of the reasonable market value of the services. Tr. Exs. 17 & 57 are based on actual time spent by AS for the services rendered (as witnessed) and paid at the \$14.05 hourly market rate FSS negotiated with Delta for out-of-scope services. Tr. Ex. 51 at p. 5; *cf.* Tr. Ex. 61 at p. 3 (similar rate in AS-Delta contract). This analysis of reasonable value was FSS's same position in 2011 when the price dispute began, and has remained consistent. Tr. Ex. 57; CP 34 ¶48. AS never maintained any employee timekeeping records; it just assumed the work was performed and charged an extraordinary rate. No AS witnesses testified to the actual work on AS's invoices (Tr. Ex. 19), that the work performed was accurately reflected, or the charges were reasonable.

**1. FSS was not “unjustly enriched” by the gross revenues received for cleaning airplanes under its contract with Delta.**

When a plaintiff confers a benefit on the defendant in reliance on “an agreement which is unenforceable,” the plaintiff is entitled to restitution of the benefit conferred to prevent unjust enrichment of the defendant *at the plaintiff's expense.*” 3 Dobbs § 13.2(2) at 519 (italics added). It is not enough to show a “benefit conferred”—the received benefit must be “at the plaintiff's expense.” *Young*, 164 Wn.2d at 484-85; *Norcon Builders, LLC v. GMP Homes VG, LLC*, 161 Wn. App. 474, 490, 254 P.3d 835 (2011) (mere fact defendant received a benefit from plaintiff is insufficient alone to justify recovery).

In a services case, “at the expense of another” usually means the

reasonable value of the services, not the increase in value. *Dragt v. Dragt/DeTray, LLC*, 139 Wn. App. 560, 576-77, 161 P.3d 473 (2007); *Bailie Communications, Ltd. v. Trend Business Systems, Inc.*, 61 Wn. App. 151, 160, 810 P.2d 12 (1991). There is no unjust enrichment “at the expense of” the plaintiff where a defendant receives that to which it is entitled under the terms of a valid, preexisting agreement with a third party. *Ehsani v. McCullough Family Partnership*, 160 Wn.2d 586, 595, 159 P.3d 407 (2007); 1 Dobbs § 4.1(2) at 558 & n. 3, 563 (“[O]ne who is enriched by what he is entitled to under a contract or otherwise is not unjustly enriched.”).

Here, FSS did not deprive AS of Delta revenues or profits that AS was entitled to: these were FSS’s profits under its pre-existing contract with Delta. *See Laurin v. DeCarolus Const. Co., Inc.*, 363 N.E.2d 675, 679 (Mass. 1977) (disgorgement remedy is not punitive if “it merely deprives the defendant of a profit wrongfully made, *a profit which the plaintiff was entitled to make*”). FSS had to use the revenues to, *inter alia*, pay the 6-14 employees that were necessary to clean each aircraft.

## **2. AS failed to prove no fair market value.**

When fair market value is the presumptive measure of damage, the plaintiff “must produce evidence showing that the [service] does not have a fair market value.” *Cf., Sherman v. Kissinger*, 146 Wn. App. 855, 874, 195 P.3d 539 (2008) (for damage to personal property, measure of damages usually depends on fair market value, unless none exists); *Russell*

*v. City of New Bedford*, 910 N.E.2d 404, 411 (Mass. App. 2009) (“evidence must support the inference” that fair market value is not fair or adequate measure, i.e., in cases of “service-type property” where there may not be active market from which market value can be determined).

**3. No evidence supports the trial court’s new finding of “unique services.”**

The trial court ruled “disgorgement of the profit the defendant received as a result of the services rendered” was appropriate based on a new finding that “the services provided by Air Serv were unique in nature and neither party established a ‘market value for the services rendered.’” CP 2523. There is nothing “unique” about a labor worker making \$10 per hour monitoring a bag of trash being handed off.

Originally, the trial court made no finding of uniqueness. CP 2287-92. Not until the amended findings does this finding first appear. The “unique” finding, made nearly three years after trial, was done without any review of the record; AS offered no record to support such a finding. Inserted solely to enable AS to bootstrap a claim of disgorgement, the “unique” finding is contradicted by amended FF 10, which reads:

*Without Air Serv, or another authorized vendor's supervision, FSS would have been unable to provide cleaning services to any of Delta's international flights at SeaTac Airport. FSS was unable to identify any other authorized vendor that was willing to assist it by providing supervision for any of the Delta flights. So without Air Serv's services, FSS would have been unable to service the international flights for Delta.*

CP 2526 (italics added).

No evidence supports the latter finding that FSS would not have been able to service Delta international flights without AS's services. It is pure speculation contradicted by other evidence.<sup>18</sup> Likewise, no evidence showed the services were "unique." At trial, AS counsel argued the "value of services...is unique" without identifying in what way they were unique or offering any evidence of uniqueness. VRP 50. AS's counsel remarked: "As far as reasonable value of the services, it's a unique situation." VRP 418. He then argued AS's last offer (\$175 per flight) was the reasonable value. *Id.* at 418-421. "Argument of counsel does not constitute evidence." *Green v. A.P.C.*, 136 Wn.2d 87, 100, 960 P.2d 912 (1998).

AS's counsel admitted: "It's not like they forced—AS was not—didn't have to provide these services, there were other vendors that could." VRP 51. AS did not claim this was a "no market" situation, *i.e.*, the *uniqueness of services* provided by AS in terms of subcontracting to piggyback onto another company's license, only the uniqueness of FSS's *need for such services* from bidding on a cleaning project without first having its own compliance agreement firmly in place. VRP 153.

The "unique" finding is contradicted by AS's own exhibit listing

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<sup>18</sup> FSS's Robert P. Weitzel testified when Delta made the arrangements to bring AS in, FSS did not seek another authorized vendor to subcontract with and FSS could have gone to other vendors to utilize their permit. CP 1680, 1784-85 (pp. 87-90); CP 931-933 (¶¶ 7, 10, 11 & 14). Judge Spector refused to allow FSS witnesses to testify about subcontracting with other vendors. After initially allowing Mr. Weitzel to testify via Skype, the judge rescinded permission and ordered he could only testify in person in her courtroom on the final day of trial when he was in Cleveland, Ohio. VRP 8-11, 340-41, 366-370. When FSS manager Tom Priola was asked if "FSS could have gone to other contractors to...operate under their compliance agreement?" the judge sustained AS's objection as beyond the scope of witness disclosure. VRP 345-46.

seven cleaning companies that had “current USDA approval to handle regulated garbage.” Tr. Ex. 12 at 3. This email showed one vendor subcontracted under another vendor’s permit at Sea-Tac Airport at the same time and in same way Delta arranged for services from AS. *Id.* (“Evergreen [Eagle] sub-contracts with World Service to clean BA [British Airways]”). Delta’s field manager, Roy Tschumi, confirmed with CBP that FSS could “subcontract with a compliant company to clean [Delta] aircraft.” Tr. Ex. 12 at 1-2.

No evidence supports the finding that *market value* was not established by the parties. These parties created their own market value with pricing that is not that far apart from each other when the \$150 per flight risk factor is discarded<sup>19</sup>—\$14.05 per hour (FSS - Tr. Ex. 57) vs. \$25 per hour (AS - \$20 labor + \$5 profit per plane),<sup>20</sup> although AS records showed it never paid its laborers more than \$12 per hour. Tr. Ex. 60.

When no third-party market can be found, market value “is not an existing fact but a legal construct or even a convention.” 1 Dobbs § 3.5 at 324. “[T]he supposed ‘market’ value of the plaintiff’s entitlement is...an effort to estimate what market value would be if there were a market.” *Id.* § 3.2 at 288. Courts usually construct a “hypothetical market”: what potential willing buyers and sellers, neither being under compulsion, would consider, directly or indirectly, if they were negotiating a price. *Id.*

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<sup>19</sup> See n. 31, *infra*.

<sup>20</sup> See AS Trial Brief (CP 2431-2432 n. 18); VRP 83, 114, 139, 146, 154-155 (Nguyen testimony). One hour was assumed by Mr. Nguyen. VRP 84, 113.

§ 3.5 at 324-25; § 3.6(1), at 333. Here, the trial court erred by not constructing a hypothetical market, adopting disgorgement of gross revenues because AS failed to offer evidence of market value, while ignoring FSS's evidence of market value.

**E. The trial court erred by misapplying a punitive disgorgement of total gross revenues theory.**

**1. Imposing disgorgement of total gross revenues (not profits) constitutes legal error.**

On remand, the trial court imposed disgorgement of total gross revenues without deduction for expenses and costs as an apparent sanction. CP 2529 (FFCL ¶25). This was in essence a default.

When a trial court imposes default in a proceeding as a sanction for violation of a discovery order, it must be apparent from the record that (1) the party's refusal to obey the discovery order was willful or deliberate, (2) the party's actions substantially prejudiced the opponent's ability to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction would probably have sufficed.

*Marina Condo. Homeowner's Ass'n v. Stratford at Marina, LLC*, 161 Wn. App. 249, 260, 254 P.3d 827 (2011), citing *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). “[T]he least severe sanction that will be adequate to serve the purpose of the particular sanction should be imposed,” while insuring a “wrongdoer does not profit from the wrong.” *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 355-56, 858 P.2d 1054 (1993). Here, the trial court wrongly imposed a severe sanction exceeding even the claims made by AS.

Due process requires the defendant be given notice and an opportunity to be heard “at a meaningful time and in a meaningful manner” on the issue of whether a default judgment is an appropriate discovery sanction. *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 336-38, 54 P.3d 665 (2002) (defendant could not be precluded from presenting evidence or argument to rebut plaintiffs’ evidence of CPA damages). Here, the trial court acted without a hearing or any meaningful process to allow FSS to offer evidence or argument against disgorgement.

Without due process or a proper *Burnet* inquiry, the trial court erred in finding FSS’s “refused” to provide cost information. *See* CP 2529 (¶25) (see IV.G.1 *infra*). Initially raised during trial as a motion in limine [CP 1922-32; VRP 256-68], the motion to exclude cost evidence was similarly granted without a proper *Burnet* inquiry or other written order or findings, except the failure to produce “was intentional.” CP 2291(original FFCL ¶12). The court did not analyze prejudice or lesser sanctions. No prejudice could be shown since AS was in the exact same business and must have known what the costs were.

The trial court erred in imposing an undue amount of fixed fees, disregarding AS testimony that only 60-65% of fixed fees could be allocated to international planes (the other 35-40% to cleaning domestic). *See* CP 2528-30 (¶¶20, 26) VRP 95 (Nguyen). Rejected “Alternative 20” (CP 2529) refers to 65%, but the judge crossed it out in favor of FFCL 20 that imposes 100% of all fixed fees (domestic and international) “as an

appropriate sanction” (CP 2528) to increase AS's windfall by \$21,635.86, even though AS conceded 100% figure was incorrect.

Here, disregarding the 60-65% evidence and failing to conduct a proper *Burnet* inquiry—not considering prejudice or whether a lesser sanction would suffice—is grounds for reversal. *See Burnet*, 131 Wn.2d at 497; *Jones v. City of Seattle*, 179 Wn.2d 322, 343, 314 P.3d 380 (2013) (extending *Burnet* inquiry to discovery violations that arise during trial).<sup>21</sup>

## **2. Courts and commentators have not extended disgorgement to contracts in general.**

Disgorgement of profits “as a general principle” is unjustified “because there is no compelling argument in its favor as long as the goods or services are available on the market.” E. Allan Farnsworth, *YOUR LOSS OR MY GAIN? THE DILEMMA OF THE DISGORGEMENT PRINCIPLE IN BREACH OF CONTRACT*, 94 *Yale L. J.* 1339, 1378 (1985) (hereafter “Farnsworth”). Only where goods or services are truly “unique” (*i.e.*, not fungible; not readily bought and sold on a market) might disgorgement be a viable remedy, but the reciprocity principle vitiates against *complete disgorgement* since “at least some of the profit is the result of [a defendant’s] skill and industry,” and in fairness the plaintiff had the opportunity to abandon the enterprise and reduce its risk of

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<sup>21</sup> Discovery sanctions and motions in limine are reviewed for abuse of discretion. *Burnet*, 131 Wn.2d at 494 (discovery sanctions); *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995) (motions in limine). Abuse of discretion is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *Olver v. Fowler*, 161 Wn.2d 655, 663, 168 P.3d 348 (2007).

undercompensation. *Id.* at 1378-79. Disgorgement may be appropriate for fiduciary relations, but it is oversolicitous and inappropriate to ordinary commercial dealings. *Id.* at 1357, 1369, 1392; *see Dragt*, 139 Wn. App. at 576-577 (without breach of fiduciary duty, recovery for unjust enrichment limited to reasonable value of development services amounting to \$593,462 of financial contributions, not \$2 million increase in value of 220-acre parcel owners sold for \$3.3 million).<sup>22</sup>

Not yet adopted in Washington, the Third Restatement of Restitution acknowledges distinctions based on culpability, setting out different rules depending on whether the defendant is an innocent recipient, unconscious wrongdoer, or “conscious wrongdoer.” *See, e.g.*, RESTATEMENT (THIRD) OF RESTITUTION § 49-51 (2011). Restitution measured by a defendant’s gain occurs where a plaintiff’s property is taken by tortious misconduct such as fraud, embezzlement, conversion, breach of fiduciary duty, or copyright-trademark infringement. 1 Dobbs § 4.1(1) at 553.<sup>23</sup> This Court should adopt the foregoing.

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<sup>22</sup> “In no jurisdiction do courts generally apply the disgorgement principle...judicial recognition has been rare.” Farnsworth, at 1369. *See Froom-Lipman Group, L.L.C. v. Forest City Enterprises, Inc.*, 747 F.Supp.2d 891, 904 (N.D. Ohio 2010) (denying broker claims to percentage of revenues where “the benefit conferred by Plaintiffs is not the value of the Gulfstream Project, but is instead the value of Plaintiffs’ services...fair compensation for the benefit they conferred on Forest City”); *Media Services Group v Bay Cities Comm.*, 237 F.3d 1326 (11th Cir. 2001) (claimant awarded \$61,116 as fair value of brokerage services for facilitating sale of radio station, not seller’s disgorgement of profit from sale of station for \$2.4 million despite court’s finding that claimant’s services “made the sale of WMXZ possible”); *Ryan*, 18 Wn.2d at 867-868 (in unjust enrichment action, plaintiff not allowed to claim percentage of profits from constructive trustee who has right to charge reasonable expenses and charges).

<sup>23</sup> “Restitution of business profits...when used to expand liability, is proper only when the defendant is a conscious or serious wrongdoer.” 1 Dobbs § 4.5(3) at 646.

At the trial in 2013, Judge Spector was fully aware of the exceptional nature of disgorgement as a remedy. During closing, FSS counsel explained that disgorgement applies mainly to cases where the recipient is “consciously tortious in acquiring the benefit” and this is a “simple services contract” case where market value should be the measure. VRP 387-94. In response, the worst Judge Spector could say about FSS’s conduct was it amounted to “acquiescence by silence,” VRP 391, which was a contract theory rejected by Judge Rogers. CP 1604. Rejecting disgorgement at trial, there is no principled basis for the trial court to change its mind now and increase its award by \$60,000.

**3. In this arm’s length transaction, the trial court based disgorgement on findings of fraud and deceit unsupported by the evidence or the law.**

The trial court based disgorgement on its conclusion that FSS is a wrongdoer that should be punished for “deceiving” or “misleading” AS into believing FSS would pay \$175 per flight. CP 2526-27, ¶ 9, 11. Judge Rogers expressly rejected this argument. CP 1604-05. This Court ruled:

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Profit-making in a business is a complex matter...If the defendant uses the plaintiff’s machine in producing goods, which he packages, distributes and sells to retail customers, he may increase his profits, but we are not so sure that the increase has much if any connection with the plaintiff’s machine. We can be sure, however, that the defendant’s profits relate in part to the defendant’s own investments, efforts, or enterprising attitude.

*Id.* at 647. “[C]onscious or very serious wrongdoing ought to be the only justification for reaching the defendant’s business profits (as distinct from market gains). The major cases allowing business profits are in fact conscious wrongdoer cases.” *Id.* at 647-48.

To the extent that the trial court focused upon Air Serv's reliance upon FSS's representation that it would pay Air Serv the \$175 per plane fee, that appears to be some form of estoppel or doctrine of account stated, *theories that were not before the trial court.*

2015 WL 1541288, at \*4 (italics added).

The trial court's "wrongdoer" analysis is flawed. FSS consistently maintained it was and is "willing to pay Air Serv for its services." CP 4 ¶25 (complaint); CP 34, ¶48 (answer admitting "FSS is willing to pay Air Serv the fair market value of those services"); Tr. Exs. 21-22 (FSS willing to pay, but not at high prices AS was demanding that were "more than what we charge [Delta] for international cleaning"). No evidence showed FSS represented it would pay \$175 per flight. Both trial court judges explicitly confirmed this. VRP 413 (Judge Spector: "I don't think it's disputed that the price was rejected."); CP 1604 (Judge Rogers).

FSS committed no fraud and is not a wrongdoer. The trial court's finding of "deliberately misled" involves misrepresentation. *See Little v. King*, 160 Wn.2d 696, 721, 161 P.3d 345 (2007); *Sattler v. Northwest Tissue Center*, 110 Wn. App. 689, 698, 42 P.3d 440 (2002).<sup>24</sup> Ten days

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<sup>24</sup> Though the term "fraud" is not expressly stated in the amended findings, the references to "deliberately misleading," "purposefully acted to deceive," and "representations" equate to fraud. *See Little v. King*, 160 Wn.2d 696, 721, 161 P.3d 345 (2007); *McRae v. Bolstad*, 101 Wn.2d 161, 167, 676 P.2d 496 (1984) ("One of the nine essential elements of common law fraud is that the defendant intended his misrepresentation of fact to deceive and be acted upon by the person to whom it is made."); BLACK'S LAW DICTIONARY (10th ed. 2014) ("deceit" defined as false statement of fact made with intent that someone else will act on it synonymous with "fraudulent misrepresentation"). Absent clear and cogent evidence of or findings on the nine elements of fraud, all liability and damage determinations based on fraud are unsupported and must be vacated and reversed. *Angelo v. Angelo*, 142 Wn. App. 622, 645, 175 P.3d 1096 (2008); *Pedersen v. Bibioff*, 64 Wn. App. 710, 723 n. 10, 828 P.2d 1113 (1992).

before trial, AS's attorney admitted on the record:

There is no way the court can assume that this is a fraudulent contract when we have two sophisticated parties who know much more than we do about this industry...[a]ll there is silence and inaction.

VRP (June 14, 2013) at 10:22–11:6. Broken assurances of payment do not constitute wrongdoing. *Eaton v. Engelcke Mfg., Inc.*, 37 Wn. App. 677, 679, 681 P.2d 1312 (1984); *Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d 146, 155, 43 P.3d 1223 (2002) (breach of contract “is neither immoral nor wrongful; it is simply a broken promise”).

The trial judge was not at liberty to unilaterally find fraud or estoppel when the summary judgment ruling of Judge Rogers specifically found there was no such promise and this Court ruled such theories were not before the trial court. *See Green v. Hooper*, 149 Wn. App. 627, 635-639, 205 P.3d 134 (2009) (error for trial court to insert unpleaded claim into findings and conclusions as retroactive amendment). AS did not mention fraud, misrepresentation, or estoppel. AS's theory was this is a “simple case” of “refus[al] to pay for services.” CP 1608 (Pltff. Tr. Brief). In FSS's half-time motion to dismiss the disgorgement theory, AS counsel did not argue fraud or deceit made disgorgement possible. VRP 321-331.

When participants in a business transaction deal at arm's length, there is no duty to disclose facts nor any right to rely on the statements of the other party. *See Annechino v. Worthy*, 175 Wn.2d 630, 636, 290 P.3d 126 (2012). Here, there is no evidence the parties' relationship involved more trust and confidence than a typical arm's length transaction. On June

24, 2011, the only time FSS president Robert P. Weitzel spoke with AS finance officer Nguyen about pricing, FSS objected to the \$175 rate. VRP 100, 102 (Nguyen); Tr. Ex. 68.<sup>25</sup> A brief phone call between managers of two competing businesses in the same cabin cleaning industry cannot establish a justifiable right to rely. *See Colonial Imports, Inc. v. Carlton Nw., Inc.*, 121 Wn.2d 726, 733-34, 853 P.2d 913 (1993). Immediately after the phone call, Mr. Nguyen, AS's corporate officer charged with negotiating the contract terms [VRP 94, 99, 102, 111, 141], sent an internal email to other AS executives and its general counsel:

[M]y thoughts are we move forward with a contract at \$175 per aircraft with invoicing every 2 weeks. *If they don't like these terms, we walk and I will give Brad Wilson at Delta notice as to why.*

Tr. Ex. 68 (Nguyen email June 24, 2011) (italics added). This email confirms there was no deal at the \$175 rate.<sup>26</sup>

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<sup>25</sup> Silence does not constitute fraud or misrepresentation absent an affirmative duty to speak. *Oates v. Taylor*, 31 Wn.2d 898, 904-05, 199 P.2d 924 (1948) (no duty to speak where parties dealing at arm's length without fiduciary relationship); *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 698, 994 P.2d 911 (2000) (between adversaries there is no special relationship of trust and confidence giving rise to duty to speak).

<sup>26</sup> AS stayed in because its paramount concern was pleasing Delta to build good will and take over the FSS contract to clean Delta flights. Tr. Ex. 54 (AS email chain dated May 28-31, 2011). AS's motivation was not to help FSS, its competitor, but to "leverage this" opportunity into taking over the 3-year Delta cabin cleaning contract with an estimated value of \$1.1 million. *Id.*; Tr. Ex. 2 (FSS-Delta agreement effective May 17, 2011). Three months into the 4-month arrangement, when Delta Airlines asked AS manager, Gilbert Green, "What's going on with FSS cabin[?]," Green's response was, "We're still sending people over and you know they haven't paid a dime." Tr. Ex. 34 (August 17, 2011 email). Green said nothing about FSS making promises or assurances of payment. AS postured as "the good guy" to win Delta's favor, while making FSS out as "the bad guy." AS's strategy paid off. In October, 2011, Delta terminated FSS's 3-year contract and entered into a 3-year contract with AS. Tr. Ex. 61.

**4. Failing to apportion revenues to FSS for its pre-existing contract with Delta, the trial court erred by awarding gross revenues.**

Even if disgorgement were available, the trial court erred by misapplying it. To avoid a windfall (punitive damages), the doctrine of apportionment requires the portion of profits attributable to the defendant's own efforts not be awarded to the plaintiff.

The court must determine which part of the profit results from the defendant's own independent efforts and which part results from the benefits provided by the plaintiff...Where the relative contributions of the two parties are inseparable or untraceable, there should be no recovery of profits....

*EarthInfo, Inc. v. Hydrosphere Res. Consultants, Inc.*, 900 P.2d 113, 120–21 (Colo. 1995) (burden of apportionment on plaintiff). “An informed estimate about apportionment might be better than a liability we know exceeds the defendant's illicit gains.” 1 Dobbs § 4.5(3) at 643; § 4.1(4) at 567 (profit recovery as a measure of restitution is “extraordinary”). When restitution is measured by disgorgement of a defendant's profits without any credit for his own effort and investment, so that it exceeds both the plaintiff's loss and the defendant's gain, “[s]uch restitution can fairly be called punitive.” *Id.* at 567-68.

Because the \$143,723 in disgorgement of total gross revenues awarded is 172% more than the inflated \$83,300 that AS alleged to be the “reasonable value of services” (CP 2287, 2291), the additional recovery for disgorgement amounts to a windfall that improperly punishes FSS. The trial court erred by failing to give FSS any credit for contributing to its

own profits. FSS's enterprising efforts predominately produced the Delta contract profits. FSS earned the Delta cleaning contract through its own initiative and enterprise without AS. FSS saved no money operationally Delta's arrangement with AS. FSS still had its own crew of cleaners and supervisors (6-14 workers per international flight [CP 931¶6 (Weitzel Decl.), CP 1434 ¶14 (Kim Decl.); VRP 109 (Nguyen); VRP 303-04 (Green) (9-person crew preferred)] who performed all cleaning according to federal standards—not a single incident of regulatory violations or sanctions occurred. FSS did not even solicit AS to provide the service. It was Delta, not FSS, that made the arrangement with AS. CP 1604.

**5. There is no causal link between the gross revenues and the labor provided by AS.**

There has to be a causal link between the claimant's services and the recipient's gain. Farnsworth, at 1343-47.<sup>27</sup> Not all profit is gain—the gain must be caused by the defendant's breach or wrongdoing. *Id.* at 1343. If the profit would have resulted anyway had there been no breach, there is no recoverable gain. *Id.* A defendant's breach or wrongdoing with respect to the plaintiff is not the cause in fact of profits where it could have realized that gain by some other means. *Id.* at 1344.<sup>28</sup>

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<sup>27</sup> "Measurement and causation are related and troubling issues when it comes to restitution." 3 Dobbs, § 12.7 (5) at 183. "If the breach does not cause the defendant's gain at all, then there is no basis for saying the defendant was unjustly enriched." *Id.* Unjust enrichment furnishes no basis for "supercompensatory liability" because it is limited to enrichment "at another person's expense, at another person's loss." *Id.* at 184-185 n. 19, quoting Mather, RESTITUTION AS A REMEDY FOR BREACH OF CONTRACT: THE CASE OF THE PARTIALLY PERFORMING SELLER, 92 Yale L.J. 14 (1982).

<sup>28</sup> Farnsworth's view limiting recovery to "saving of the costs of other means" instead

Here, the trial court made no finding that FSS's total gross revenues from performing its cleaning contract with Delta s were "the result of the services rendered" by AS. Though this Court required *causation* to be proven (2015 WL 1541288, at \*2), the trial court made no findings of causation or apportionment. It simply awarded all gross revenues FSS earned from cleaning Delta flights without deducting for costs, making no effort to calculate net profits (revenues less costs). No evidence showed FSS could not have realized the same gain (Delta contract profits) by some means other than AS's services (*i.e.*, subcontract with another licensed vendor). *See* Farnsworth, at 1344-46. No evidence showed FSS earned any greater profit with AS's services than it could have made without AS's services. *See id.* Any "breach" or failure by FSS with respect to AS was not the cause in fact of FSS's gain.

**6. The trial court failed to balance the equities.**

Restitution is literally restoration of something...to prevent unjust enrichment of the defendant by making him *give up what he wrongfully obtained from the plaintiff*.

1 Dobbs § 1.1 at 5 (*italics added*).

The defendant is forced to restore something that in good conscience *belongs to the plaintiff*. *Id.* § 2.1(2) at 61. Equity suggests

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of disgorgement of profits, *id.* at 1347-50, is consistent with Washington law. *See Olwell v. Nye & Nissen Co.*, 26 Wn.2d 282, 285, 173 P.2d 652 (1946) (owner of egg-washing machine awarded "reasonable value of defendant's use of the machine" measured by "saving in labor cost," not wrongful user's revenues or profits from sale of eggs). Unlike *Olwell*, AS had no property or contractual interest in FSS's contract with Delta Airlines.

fairness, moral rectitude, and flexibility rather than rigidity, its interest in justice rather than law. *See id.* § 2.1(3) at 63. “Balancing of equities and hardships is the process through which discretion is informed and expressed.” *Id.* § 2.4(5) at 109; *Douchette v. Bethel School Dist. No. 403*, 117 Wn.2d 805, 812, 818 P.2d 1362 (1991). While discretion of equity courts makes possible decisions that are “flexible, intuitive, and tailored to the particular case,” discretion also makes possible decisions that are “unanalyzed, unexplained, and un-thoughtful” when used to grant a plaintiff more than its entitlement. *See* 1 Dobbs § 2.4(2) at 92; *Proctor v. Huntington*, 169 Wn.2d 491, 502, 238 P.3d 1117 (2010) (courts must grant equity “in a meaningful manner, not blindly”).

Principles of equity do not justify giving AS the entirety of Delta gross revenues it never expected to be paid, repeatedly offering to accept a fixed per plane fee of \$175, having entered into the arrangement with eyes wide open, undertaking the work without an enforceable agreement on price. *Cf. Tasini v. AOL, Inc.*, 851 F.Supp.2d 734, 741 (S.D.N.Y. 2012).<sup>29</sup> Here, the trial court unfairly punished FSS without considering equities against awarding disgorgement without any offsets.

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<sup>29</sup> AS benefitted from its subcontract with FSS: it obtained the Delta contract worth \$1.1 million, the reason it got involved in the first place. Tr. Exs. 54 & 61. When a plaintiff “directly benefits” from the defendant’s breach of duty in tort or contract—a benefit either resulting from the breach or derived from the defendant or someone who acts on the defendant’s behalf—recovery is reduced by the amount of the benefits received. 1 Dobbs § 3.8(2) at 376 (defendant entitled to credit for direct benefit). Refusing to consider the benefit to AS, the trial court erred by failing to weigh this equity. VRP 405; *see National Surety Corporation v. Immunex Corp.*, 176 Wn.2d 872, 880, 297 P.3d 688 (2013) (unjust enrichment is simply irrelevant where any “enrichment” to the recipient was more than matched by benefit to the claimant).

Because liability was established on summary judgment, the only issue remaining for trial was “the measure of damages.” CP 1607. Judge Spector ruled at the beginning of trial the parties only had to “address the measure of damages” – AS would not need to address “unclean hands”—an affirmative defense alleged by FSS. CP 34; VRP 32; *J.L. Cooper & Co. v. Anchor Sec. Co.*, 9 Wn.2d 45, 75, 113 P.2d 845 (1941) (unclean hands is inequity, misconduct, deceit, misrepresentation, or dishonesty that mitigates relief). Having narrowed the issue to damages, it was unfair and prejudicial for the court to make misconduct findings against FSS for being “deliberately misleading” when the judge would not allow FSS to prove AS’s own misconduct to balance the inequities.

**7. The findings and conclusions are erroneous.**

Scope of services performed. The trial court erred when it found plaintiff provided services for both domestic and international flights between May 28 and September 30, 2011. CP 2523 ¶1. *See* Tr. Ex. 65 at p. 3 & Tr. Ex. 29 at pp. 1 and 10 (Addendum 2) expressly limiting the scope of services to inbound *international* Delta flights at Sea-Tac airport.

Errors regarding risk and duties assumed by AS. The trial court erred when it found AS was required to assume the risk of liability for a violation of CBP rules *and* AS labor workers remained with the airplane throughout the cleaning process. CP 2525-26 (FFCL ¶4).

“While cleaning international arrival flights, the cleaning firm is responsible for all regulated garbage.” Tr. Ex. 29 at 6 §2E (compliance agreement). FSS was “the cleaning firm.” AS did not perform cleaning

functions. Tr. Ex. 53. Cleaning was done by FSS crews and supervisor under its cleaning contract with Delta. The Agreement distinguishes between “the company, its employees and subcontractors.” Tr. Ex. 29 at 3, 10. AS merely “supervise[d] FSS handling of regulated trash,” *id.* at 10, watching garbage bags pass from FSS cleaners to the incinerating company. Under federal rules, AS could be liable *for its own violations*, but not those of a subcontractor like FSS.<sup>30</sup>

Contingent liabilities are not recoverable in unjust enrichment.<sup>31</sup> The Delta arrangement here did not result in any liabilities: no incidents, violations, penalties, or liabilities of any kind. Tr. Ex. 17 at 3; CP 3, ¶17. AS witnesses spoke only of “potential penalties” and “potential liability,” admitting fines were possible but rarely imposed. VRP 80-82, 138-39, 161 (Nguyen); 176, 296-297 (Green). FSS undisputedly offered indemnity to lower the price. Tr. Ex. 55; CP 1682 (Weitzel Dep. at 97:1-6); CP 1683 (Weitzel Dep. 103:18-25); CP 1805-06 (Weitzel Dep. at 113:7-114:3);

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<sup>30</sup> Rules incorporated in the Compliance Agreement limited AS’s responsibility. *See* 9 CFR 94.5; 9 CFR 94.5(c)(4)(iii), 94.5(e). FSS was subject to all federal regulations and requirements. 9 CFR 94.5(e)(2); Tr. Ex. 29 at 10. FSS was subject to civil penalties of up to \$250,000 per violation of the Plant Protection Act (“PPA”) and/or the Animal Health Protection Act (AHPA). *See* Tr. Ex. 29 at 2; 7 USC § 8313(b)(1) & (2) (civil penalties under AHPA applies to “any person that violates this chapter” and violator’s “degree of culpability” taken into account by Secretary); 7 USC § 7702 (12); 7 U.S.C. § 7734(b)(1) & (2) (civil penalties for “[a]ny person that violates this chapter” and “degree of culpability” is factor Secretary takes into account).

<sup>31</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, § 50 cmt. g (2011) (restitution for unjust enrichment will not have effect of liquidating contingent or deferred obligations that defendant is not otherwise liable to pay); *Newcomer v. Masini*, 45 Wn. App. 284, 288, 724 P.2d 1122 (1986) (“Potential liability does not satisfy that requirement”—indemnitee must prove actual liability); *State v. Sherrill*, 13 Wn. App. 250, 255, 534 P.2d 598 (1975) (fair market value reflects “only what exists in fact and not what is hypothetical”).

VRP 136 (Nguyen). Mr. Nguyen testified indemnity would have eliminated the \$150 risk factor in AS's \$175 pricing. CP 2138; VRP 147.

No competent evidence proved AS supervised FSS cleaning crews *the entire time* FSS cleaned Delta planes. Neither the Compliance Agreement nor federal rules required this. FSS testified AS was only present to monitor the passing of trash bags from FSS cleaners to Gate Gourmet, the cartage company, 5-10 minutes per flight. Tr. Ex. 57; VRP 352-55 (Priola). AS manager Gilbert Green admitted he never directly supervised cabin cleaners. VRP 288. He did not speak to AS employees who did the supervisory work. *Id.* at 292. He did not know how long it took AS employees to supervise each plane; he merely assumed they were there for as long as "it took FSS to clean the aircraft." *Id.*; *but see* ER 401, 602, 701. AS kept no records of employees going to specific planes to supervise FSS cleaning crews. *Id.* at 292-294. The only records AS kept were the total number of flights. *Id.* When AS's finance officer, Toan Nguyen, figured a \$175 "price," he assumed one full hour per flight, but never checked with anyone to verify this assumption. VRP 145, 150.

Errors in calculating revenues. The trial court erred in computing total direct revenue. CP 2527-29. The invoices demonstrate direct revenue of \$1,771.02 in May 2011 and 899.76 in September 2011. Tr. Exs. 3-10 & Appx. B. Total direct revenue was \$80,401.28. *Id.*

The trial court erred in computing total management fees, Equipment-Fixed Fees and Start-up Costs (referred to as "Fixed-Fees") and then allocating "100%" of these fees to international flights. CP 2528-

29. FSS informed AS it had no information segregating Fixed-Fees for domestic and international flights. CP 1484. But FSS invoices show the number of international and domestic flights and the “Fixed Fees,” which are actually costs, can be apportioned *pro rata*. Tr. Exs. 3-10 & Appx. B, *infra*. At most, the total fixed fees received from Delta Airlines for the international flights were \$8,904.42. *Id.*

The court erred in its computation of total gross revenues of \$143,723.26. CP 2528-30. The invoices show FSS had total gross revenues of no more than \$89,306.70. Tr. Exs. 3-10 & Appx. B.

Failing to recognize payment made by FSS. The trial court made an erroneous finding: “FSS has never made any payment to Air Serv for the services Air Serv provided.” CP 2526 (FF 6). The judge asked FSS counsel at trial, “Why wasn’t anything paid?” VRP 64. Counsel told the judge about the payment, but the next day when FSS offered Tr. Ex. 58 to prove tender of \$3,511, the judge refused to enter it. VRP (June 25, 2013) at 358-359. In light of the unrefuted tender, disregarding FSS’s payment was error. *See Bulaich v. AT & T Information Systems*, 113 Wn.2d 254, 264-265, 778 P.2d 1031 (1989) (when settlement offeror offers relevant evidence, “other purpose” exception to ER 408 is met).

**F. The original judgment should have been vacated.**

The 2013 judgment “is binding until reversed on appeal or vacated in some manner provided by law.” *State v. Lyerly*, 15 Wn. App. 606, 607, 550 P.2d 546 (1976). But neither this Court nor the trial court has reversed

or vacated the original judgment. CP 2287, 2291, 2410. Stating the general rule “the judgment must be set aside” when findings are incomplete, this Court only remanded “for additional findings” without expressly vacating or reversing the 2013 judgment. 2015 WL 1541288 at \*4, 8. When a case is remanded without reversal, the trial court is to supply the incomplete findings and then afford the parties an opportunity to file additional argument after the necessary findings are supplied. *Bowman v. Webster*, 42 Wn.2d 129, 135, 253 P.2d 934 (1953). That never occurred here. This Court should vacate both the 2013 and 2016 judgments.

**G. The trial court erred in awarding fees and costs as a sanction for its “make-whole” theory without specifically identifying any objectionable conduct or deficiencies.**

**1. Previous findings were inadequate and lacked specificity. Amended findings repeat this same legal defect.**

The trial court’s new findings continue to lack the legal specificity required for appellate review.<sup>32</sup> “[I]t is incumbent upon the trial court *to specify the sanctionable conduct* in its order.” *Biggs v. Vail*, 124 Wn.2d 193, 201, 876 P.2d 448 (1994) (bold/italics added); *see also Dexter v. Spokane Cty. Health Dist.*, 76 Wn. App. 372, 377, 884 P.2d 1353 (1994). Any claim that pleadings are not well grounded in fact must be supported by findings “specifically identify[ing] the deficiencies in each of those

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<sup>32</sup> The trial court previously imposed a \$116,700 sanction for AS’s full attorney fees and costs along with another \$35,000 sanction. CP 2407-08. The trial court now imposes \$115,324.22 in the new amending findings and fails to explain the difference between the new and the old sanction. CP 2537. The facts have not changed, only the trial court’s ruling has. The inexplicable difference demonstrates the arbitrariness of the sanction.

documents.” 2015 WL 1541288, at \*6. Without such findings, effective appellate review is impossible. *Biggs*, 124 Wn.2d at 201.

The record demonstrates the trial court’s award is little more than an end-run around Washington’s established laws governing fee shifting. *Rettkowski v. Dept. of Ecology*, 128 Wn.2d 508, 514, 910 P.2d 462 (1996). The trial court addressed eight “general” subject areas (CP 2530-36, ¶¶ 27-33), each of which are addressed in detail below.<sup>33</sup>

Paragraph 27.a. The trial court generally claims the declaration of Robert P. Weitzel warrants severe sanction of all fees and costs. CP 2530-31. Judge Spector excluded Robert P. Weitzel from testifying and his declaration was never even submitted as evidence on the merits. Therefore, at best, the trial court could only make supposition about the declaration from the evidence introduced at trial. Even then, the trial court cites to no such evidence (let alone with the specificity required by law) that would confirm or deny any statements made by Mr. Weitzel.

The trial court refers to Dkts. 16 & 30 and claims “numerous statements which were later proven to be false.”<sup>34</sup> CP 2530. The trial court goes on to discuss only four alleged statements and then fails to

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<sup>33</sup> Judge Spector began the case at trial. Judge Rogers had presided over all pretrial matters during the first 15 months. Nevertheless, as discussed below, Judge Spector’s punitive sanction is premised primarily upon pretrial matters already considered and decided upon by Judge Rogers.

<sup>34</sup> Dkts. 16 & 30 are two separate declarations submitted by Mr. Weitzel, the former with respect to vacating an order of default and the latter pertaining to FSS’ motion for summary judgment. Although the trial court refers to “[t]his declaration” (CP 2530), it is unclear which declaration it is referring to.

specifically identify any “proof” of the alleged falsities. As discussed below, no such proof exists. Nevertheless, it was incumbent upon the trial court to specify the proof of any alleged falsities.

First, Judge Spector granted AS’s motion in limine excluding any evidence of “custom and practice within the industry” and, as stated previously, Mr. Weitzel was excluded from testifying. Therefore, no party introduced any evidence either confirming or denying any statement of custom and practice within the industry. The documentary evidence at trial, however, showed at least one other cleaning company with a compliance agreement (American Eagle) that subcontracted with another cleaning company (World Service) for cleaning.<sup>35</sup> Tr. Ex. 12 at 3.

Second, neither party introduced any evidence of whether or not Gate Gourmet had a compliance agreement. Any inference by the trial court one way or the other is mere speculation.

Third, the trial court states it “does not believe Mr. Weitzel objected to AS’s proposed price.” CP 2530. But Mr. Nguyen himself testified that Mr. Weitzel did object to AS’s excessive price on June 24, 2011. VRP 140-41. Mr. Nguyen likewise testified in his declaration that Mr. Weitzel called to tell him the “bill rate was too high...[and] it was more than what Delta was paying him [FSS].” CP 1313(Nguyen Decl.).

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<sup>35</sup> Mr. Weitzel testified in his deposition it was prevalent in the industry for those companies with compliance agreements to supervise the work of other companies without a compliance agreement through informal agreements based upon the actual time devoted and the supervisor’s rate of pay. CP 1835-36. FSS informed AS it did not have copies of the informal agreements. CP 1497. But the lack of documentary evidence of FSS’s informal agreements can hardly be said to prove a falsity.

The trial court's statement contradicts the evidence.

Finally, the trial court claims Mr. Weitzel's statement that Ms. Ong had requested he provide a reasonable rate for the services to lack credibility. Ms. Ong was never asked at trial whether she had requested Mr. Weitzel provide a reasonable rate for the services. But even if the question had been asked, such credibility evaluations between witnesses with differing recollections could hardly be said to constitute sanctionable conduct. At most it is a "he said, she said" and goes to the weight.

Paragraphs 27.b and 31. The trial court next claims Mr. Kim's declaration "contained admittedly false statements." CP 2531. Mr. Kim was terminated for other reasons by FSS well before he provided any declaration or trial testimony. VRP 244. He was testifying as a lay witness, not a speaking agent for FSS. As such, his actions cannot be legally attributed to FSS. *Id.* at 227 (judge ruling Kim was not a speaking agent with authority to bind FSS). The trial court identifies a single sentence in his declaration (out of a total of five pages) as inconsistent with his trial testimony. CP 2022-26 (declaration). The sentence indicates Mr. Kim believed AS would be responsible for payment, which he corrected at trial. CP 2023; VRP 242. AS's claim that this single statement controlled the outcome of the summary judgment ruling is absurd. AS never even appealed Judge Rogers' summary judgment ruling and all parties testified they knew any agreement on AS's labor services would have to be approved by their corporate officers (not Mr. Kim).

Paragraph 27.c and 31. The trial court then refers to Dkt. 90

concerning Robert P. Weitzel's statement about how Ms. Ong sent AS's invoices to the wrong email address. CP 2531-32 & 1432 (declaration). Mr. Weitzel's testimony is fully accurate and unrebutted. In any event, no finding was ever made that this was a material fact; it was not.

Paragraph 27.d & 32. The trial court inaccurately claims Robert A. Weitzel's declaration was filed in "bad faith" on the whereabouts of Robert P. Weitzel near the time of trial. CP 2532. AS never even called Robert A. Weitzel or Robert P. Weitzel in its case in chief. Only FSS called Robert P. Weitzel and the trial court excluded him under its discretionary authority to allow remote testimony under CR 43(a)(1). *See* 2015 WL 1541288, at \*7. This ruling benefitted AS and the trial court stated it was not making any inferences about the decision to not testify in person. VRP 368.

The trial court's ruling was also premised upon a misunderstanding. The trial court incorrectly believed Robert A. Weitzel stated "he" would be traveling on vacation during the time of trial. VRP 340; CP 2524:7-9 & 2288. What Robert A. Weitzel actually said in his June 20, 2013 declaration was that "Robert P. Weitzel" (not Robert A.) would be traveling from June 24-26, 2013 based upon Robert P. Weitzel's preplanned family vacation. CP 1715. Robert A. Weitzel mistakenly believed Robert P. Weitzel would still be on his family vacation to Hilton Head, S.C. at the time of trial. CP 1715. But Robert P. Weitzel had returned on June 23, 2016, the day before trial and was available to testify

by phone in Cleveland, Ohio through Skype.<sup>36</sup> VRP 338. The trial court believed Robert A. Weitzel represented he was traveling on vacation from June 24-26 and, as a result, the trial court excluded the testimony of Robert P. Weitzel. VRP 340-41.

The trial court's claim in the "procedural irregularities" that FSS's counsel had represented to Judge Rogers at the June 14, 2013 hearing that all his witnesses would be available during the week of June 24, 2013 is unsupported and untrue. CP 2524. Although FSS intended to make its witnesses available, due to the schedules of the out-of-state officers, it needed to have them testify telephonically. FSS has supplied the entire verbatim record from the June 14, 2013 hearing and there were no representations concerning the availability of FSS witnesses. When questioning the veracity of statements being made by AS's counsel about what had occurred at the June 14 hearing, the trial court stated, "Well, I'll find out *on the record*." VRP 372. If the trial court communicated with Judge Rogers, it was incumbent upon the judge to make a record of the substance of any such communication for appellate review.

The trial court also erroneously ruled without any evidence that FSS's counsel had knowledge of Robert A. Weitzel's mistaken belief. CP

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<sup>36</sup> On June 10, 2013, Robert P. Weitzel accurately informed the court of his prepaid travel plans to Hilton Head, S.C. CP 1572-76. Although he returned on June 23, Robert P. Weitzel still was unavailable to testify in Seattle, but the trial court refused to allow counsel to call Robert P. Weitzel back to explain. The trial court had previously indicated it would be calling Robert P. Weitzel back. VRP 339.

2532:16-21. There is no support for this new claim.<sup>37</sup> The motion for telephonic testimony was based upon the facts provided by Robert A. Weitzel. CP 1703. FSS counsel's "reaction at trial" was forthright and honest, answering Judge Spector's questions openly, honestly and completely. VRP 340-41. There is no evidence counsel "acted in concert with his client" to deceive the court regarding Robert P. Weitzel's unavailability or whereabouts. This finding is nonsense.

Paragraph 27.e. The trial court refers to Dkt. 46 alleging some non-identified false statements in a declaration from counsel. CP 2532-33; 649-848 (declaration). This declaration was submitted in conjunction with FSS's motion to compel and accurately details plaintiff's failure to appear for deposition and discovery violations. CP 637-48. Not only was Judge Spector not involved, these matters were all reviewed by Judge Rogers. The trial court once again leaves the appellate court guessing at any specific actionable conduct and proof of any such falsity. The declaration details the non-compliance issues and attaches the evidentiary support.

Paragraph 28 & 30. Judge Spector generally refers to an alleged failure by FSS to comply with Judge Roger's order dated April 15, 2013, again failing to specifically identify any actionable conduct. CP 359-61 (court order) & CP 1394-1406 (supplemental discovery responses). Judge

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<sup>37</sup> The trial court never inquired into counsel's knowledge of the mistake and there is no factual support for this baseless accusatory remark. AS slipped this new unsupported accusation into the new amended findings. It was not mentioned by the trial court in the first sanction order (CP 2405-2408), demonstrating the fallacy of the position.

Rogers' order includes a statement saying "sanctions are denied." CP 361. The order was dated April 15, 2013, and requested FSS to supplement its discovery responses within 30 days. On May 3, 2013, FSS fully supplemented its discovery responses consistent with the order. CP 1394-1406. FSS informed AS that it "did not keep records of the total costs for providing services on international flights at Sea-Tac under FSS's contract with Delta." CP 1403. It never "refused" to provide anything. Judge Rogers' order allowed AS to request a declaration from FSS detailing the efforts undertaken to search for relevant documents. AS never requested the declaration. This cost information was requested nearly two years after AS had already taken over the contract with Delta and FSS accurately stated it did not have the records of its costs for the international flights at Sea-Tac. AS did not prove FSS' answer was false in any way.

AS was not prejudiced by not having cost information. AS's finance officer, Mr. Nguyen, knew the approximate costs because AS took over the same Delta cleaning contract in November 2011.<sup>38</sup> This Court recognized revenues did not equate to profits. 2015 WL 1541288, at \*4. Disgorgement of *gross revenues* was not "the best the trial court could

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<sup>38</sup> Mr. Nguyen was responsible for pricing AS's 2011 cabin cleaning contract with Delta Airlines. VRP 87-91, 94, 153, 159; 416. He knew what competing vendors bid to win the Delta contract in 2011. *Id.* at 91-92. He compared the AS and FSS contracts with Delta. *Id.* at 106-108; 122. They are nearly identical, with "similar" rates and charges. *Id.* at 92, 106-07; Tr. Ex. 51 & 61. Mr. Nguyen testified the two companies' invoices are "similar in structure" and contain the same "variable portion and...fixed portion." VRP 98-99. AS allocated fixed fees between international and domestic flights "in similar fashion as" FSS did. *Id.*

do.” *See id.* Both FSS and AS entered similar 3-year cleaning contracts with Delta in the same year (2011) with similar pricing. Although having shared knowledge of market conditions and costs with the same airline at the same time, AS did not present any evidence of estimated costs, revenues, and profits that FSS would have had during the three-month period. AS had specialized knowledge of costs for labor and management, equipment, insurance, and other liabilities such as taxes and profit margin. VRP 113-115; 138-39; 144-45 (Nguyen). AS failed to meet its burden of proving its damage theory with any reliable evidence of profits.

Paragraph 29. The “not prepared” argument is the same argument rejected by Judge Rogers. AS was offered the opportunity to depose Mr. Weitzel again to satisfy any concerns it may have had with preparation, but AS elected not to do so. CP 1537 & 1572-73.

Paragraph 32 & 33. The trial court generally alleges improper conduct and simply reveals its stated make-whole intention to provide a “full award of attorney fees” of \$115,323.22. CP 2535-36. The references to alleged violation of local court rules are unfounded, lacking any notion of specificity (all untrue). Similar arguments made by AS were rejected by Judge Rogers. *See, e.g.*, CP 45 & 355 [LCR 4(g) &4(j)]; CP 353 [LCR 7(b)(4)]. AS’s improper actions required several motions on shortened time. There is no evidence supporting AS’s claim it was served improperly under LCR 7(b)(1) as evidence by Judge Rogers granting the motions. CP 1547. AS’s claim of any violation of LCR 40(e)(1) is likewise unfounded. Scheduling issues were appropriately addressed by motion. CP 1700.

**2. No lodestar analysis was conducted.**

This Court previously determined fees and costs were not available under the trial court's "make-whole theory of damages." 2015 WL 1541288, at \*5. Nevertheless, the trial court has continued to award nearly all attorney fees and costs at the behest of AS. The trial court has never conducted any competent lodestar analysis. CP 2536-38. In Washington, a lodestar analysis must be conducted to determine the reasonableness of any requested fee award. *Mahler v. Szucs*, 135 Wn.2d 398, 433, 957 P.2d 632 (1998). FSS was the only party that provided a lodestar analysis, presenting a number of legal grounds for reducing the excessive fees. CP 2341-90. The trial court blindly approved AS's attorney fee and costs as demonstrated by the fact the trial court's new amended findings and conclusions state that AS sought \$120,323.22 when in fact it sought \$116,700. *Cf.* CP 2407 & 2301 with CP 2536.

**3. No advance notice for seeking sanctions.**

Sanctions are not permitted here since AS failed to provide advance notice to FSS of its intent to seek sanctions. CR 26(i); *Biggs*, 124 Wn.2d at 198; VRP 378; CP 2293. "[D]ue process considerations demand that a party and/or attorney to whom a motion for sanctions is directed must have both notice and an opportunity to be heard." *Vay v. Huston*, CV 14-769, 2016 WL 1408116, at \*9 (W.D. Pa. Apr. 11, 2016) (when party "ups the ante" by changing form of sanctions it is seeking during ongoing proceedings, proceedings become unnecessarily complicated and court must either adjourn to provide allegedly offending party a full and fair

opportunity to respond, or deny relief for sanctions that is outside scope of initial notice). “[S]anction rules are not fee shifting rules.” *Fisons*, 122 Wn.2d at 356 (lack of intent to violate rules and other party's failure to mitigate are considered in fashioning appropriate sanctions).

**H. Demonstrating unfair bias on remand, the trial court abdicated its judicial responsibilities to AS. If this Court remands, it should be to a new judge.**

Without exercising independent judgment, the trial court abdicated its judicial role to AS, who directed the switch to a punitive disgorgement of revenues theory, hastily entering amended findings without meaningful review or changes. This denied FSS’s due process right to a fair proceeding and merits remand to a different judge. *See In re Pers. Restraint of Davis*, 152 Wn.2d 647, 692, 101 P.3d 1 (2004) (unbiased judge is essential element of due process); *State v. Ra*, 144 Wn. App. 688, 704-05, 175 P.3d 609 (2008) (due process, appearance of fairness, and Code of Judicial Conduct). The test is whether a reasonably prudent and disinterested observer would conclude there was a fair, impartial, and neutral trial. *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674 (1995).

Here, the trial judge entered AS’s initially proposed amended findings without making any substantive revisions. CP 2549-65. There was no hearing, briefing, or oral argument. The first version was entered apparently without the judge reading it as she failed to even recognize it contained alternative provisions. CP 2555-57; CP 2565. The judge made no choice of alternatives before signing AS’s proposed findings. Notified

of the error, the court issued new findings, choosing the two options most favorable to AS and roughly \$21,000 more costly to FSS. CP 2529-30. The judge first findings were “pulled” from the clerk’s office, even though the signed document had been served on the parties. CP 2547.

Coupled with hostile remarks at the 2013 trial (*e.g.*, VRP 180, 341, 368-73), the judge has had difficulty maintaining independence, fairness and impartiality. *See Richey & Gilbert Co. v. Northwestern Natural Gas Corp.*, 16 Wn.2d 631, 649-50, 134 P.2d 444 (1943) (trier of fact must use independent judgment and not blindly accept views of advocating attorneys); CJC, Rules 2.4, 2.6(A) & cmt. 1. If this Court remands, it should order review before a different judge.

## V. CONCLUSION

FSS respectfully requests the trial court’s decision be reversed, the 2013 and 2016 judgments vacated, and the case dismissed.

Dated this 7th day of October, 2016.

LIFE POINT LAW

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# APPENDIX A

## Court's Remand Opinion

*Air Serv Corp. v. Flight Servs. & Sys., Inc.*, No. 71103-2-I,  
186 Wn. App. 1043, 2015 WL 1541288 (2015)

186 Wash.App. 1043

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1  
Court of Appeals of Washington, Division 1.

AIR SERV CORPORATION, Respondent,  
v.  
FLIGHT SERVICES & SYSTEMS, INC., Appellant.

No. 71103-2-I.

April 6, 2015.

Appeal from King County Superior Court; Hon. Julie A. Spector, J.

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UNPUBLISHED OPINION

VERELLEN, A.C.J.

\*1 In a bench trial to determine damages for unjust enrichment or quantum meruit, findings of fact and conclusions of law must specify the measure and quantity of damages. Here, the trial court entered judgment for Air Serv Corporation (Air Serv) against Flight Services & Systems, Inc. (FSS) for \$200,000, including attorney fees, and ordered an additional amount of \$35,000 as sanctions for violations of various court rules. FSS appeals, contending that the trial court applied the wrong measure of damages, improperly excluded evidence, and erred in imposing an attorney fees award and sanctions. Because we cannot discern from the trial court's findings the basis for the award, we remand for further findings on the existing record.

*FACTS*

On April 14, 2011, FSS entered into a contract with Delta Airlines to provide cabin cleaning services at Seattle-Tacoma airport for Delta's domestic and international flights. FSS was to begin providing these services on May 17, 2011. In order to provide cleaning services for international flights, FSS was required to obtain a federal compliance agreement from the United States Department of Agriculture.

Sometime in May 2011, the United States Customs and Border Protection (CBP) notified Delta that FSS would not be permitted to board Delta's international flights because it did not have the required compliance agreement. CBP identified other companies that were in compliance, including Air Serv. Because FSS was unable to obtain a compliance agreement for at least another six to eight weeks and Delta had an immediate need for cleaning services on international flights beginning the next day, Delta consulted with CPB about having Air Serv provide temporary services until FSS obtained its own compliance agreement.

CPB agreed to allow FSS to provide the cleaning services without the compliance agreement so long as Air Serv supervised those services. Specifically, Air Serv would be required to supervise the handling and transfer of trash collected on the plane. Air Serv agreed to do so, and beginning on May 28, 2011, provided supervision of FSS's handling and transfer of the trash during cleanings.

Approximately two weeks later, Air Serv proposed to FSS a rate of \$250 per plane for its services. After FSS objected to this amount, Air Serv proposed a lower rate of \$175 per plane. Beginning in July 2011, Air Serv sent invoices to FSS at this price, for a total of 476 flights that were serviced during the temporary arrangement.

FSS did not pay the invoices, but Air Serv continued to provide the temporary services until FSS obtained its federal compliance agreement in September 2011. On September 2, 2011, Air Serv ceased providing its supervisory services to FSS. FSS did not pay the invoices, which totaled \$83,300. On September 20, 2011, FSS disputed the amount on the invoices and informed Air Serv that it would only pay a total of \$3,511.10, based upon an hourly rate of \$14.05.

On January 6, 2012, Air Serv filed a complaint against FSS seeking damages for breach of contract, consumer protection act violations, unjust enrichment and quantum meruit. The trial court dismissed the consumer protection and breach of contract claims on summary judgment, finding that there was no meeting of the minds on the price for the services rendered by Air Serv. But the trial court granted partial summary judgment for Air Serv for liability under the unjust enrichment and quantum meruit theories, with damages to be proven at trial.

\*2 After a bench trial on damages, the trial court found that FSS owed \$83,300 to Air Serv for its services and \$116,700 in attorney fees, for a total judgment award of \$200,000. The court further ordered an additional \$35,000 in sanctions against FSS based on "numerous violations of the rules of the Court, including, but not limited to CR 11, CR 26(g), CR 37(b) & (d), CR 56(g) and the Court's local rules."<sup>1</sup> FSS appeals.

## DISCUSSION

### *Measure of Damages*

FSS contends that the trial court applied the wrong measure of damages. FSS argues that instead of basing the damages award on the reasonable market rate, the trial court erroneously awarded expectation damages, a contract remedy that is unavailable here because the breach of contract claim was dismissed. Because the trial court's findings are inadequate for us to review this claim, we remand for further findings.

Unjust enrichment and quantum meruit are methods of recovery for contracts "implied in law" and contracts "implied in fact."<sup>2</sup> Unjust enrichment is founded on notions of justice and equity and implies a contract in law to allow recovery for the value of a benefit conferred absent any contractual relationship when "fairness and justice require it."<sup>3</sup> Quantum meruit is founded in the law of contracts and implies a contract in fact when the defendant requests work, the plaintiff expects payment for the work, and the defendant knows or should know the plaintiff expects payment for the work.<sup>4</sup> Accordingly, recovery for quantum meruit is limited to the value of services rendered, while "unjust enrichment applies to a far broader category of cases."<sup>5</sup>

The measure of recovery for unjust enrichment to a faultless claimant is either (1) "the amount which the benefit conferred would have cost the defendant had it obtained the benefit from some other person in plaintiff's position," or (2) "the extent to which the other party's property has been increased in value or his other interests advanced."<sup>6</sup> When services have been provided, the first measure is typically represented by the market value of the services rendered, while the second measure involves disgorgement of the profit the defendant received as a result of the services rendered.<sup>7</sup>

Quantum meruit damages are measured by "the reasonable value of services."<sup>8</sup> While also typically represented by the market

value, this measure can be calculated in a variety of ways.<sup>9</sup>

Here, the parties presented limited evidence to the trial court to establish the measure of damages under either theory. On market value, Air Serv took the position that the services were unique and that there was no market. In its discovery responses, FSS pointed to a single example of a “subcontractor” for cleaning services and alleged a custom and practice in the industry.<sup>10</sup> But in depositions, FSS’s designated speaking agent Robert P. Weitzel could not recall the names of any companies that provided such services in the past and could not recall or was not aware of the responses of other companies to FSS’s inquiries to provide the service Air Serv provided. While Weitzel stated he was aware of one prior occasion when FSS was involved in a similar arrangement long ago, he could not recall which company was involved or the price for such services. Because FSS did not provide discovery related to a market value, the trial court granted Air Serv’s motion in limine to preclude FSS from offering evidence of market value.<sup>11</sup>

\*3 At trial, Air Serv presented evidence of how it arrived at the \$175 price per plane that was invoiced but ultimately rejected by FSS. Toan Nguyen, who handled pricing for Air Serv, testified that the pricing was based on labor, equipment, associated profit and liability, i.e., the financial and operational risk involved in allowing FSS to use its compliance agreement. Nguyen explained the breakdown of the first quote of \$250 per plane as \$60 for labor of three people, \$30 profit, \$10 for equipment and fuel maintenance, and \$150 for risk of liability. He further testified that he lowered the price to \$175 per plane to take into account that Air Serv would be providing supervisory services rather than actual cleaning based upon \$20 for labor, no costs for equipment or fuel, a reduced price of \$5 for profit, and \$150 for liability risk. Air Serv also presented testimony, and the trial court found, that FSS told Air Serv it would pay the \$175 per plane charge and that Air Serv relied upon that representation.

In support of its unjust enrichment theory based on disgorgement of profits, Air Serv presented evidence of revenues FSS received on the Delta contract during the period of time that Air Serv performed work for FSS. Air Serv presented invoices that FSS sent to Delta showing total charges for all services, domestic and international, of approximately \$414,000. The charges for services itemized as “international” flights on these invoices totaled \$77,730.50.<sup>12</sup> The invoices also listed additional charges, including “fixed fees.” These were likely for services that were provided for both international and domestic flights but were not parsed out by FSS, despite discovery requests to do so.

Air Serv also acknowledged in its trial brief, in its response to the half-time motion, and in closing argument that disgorgement of profits FSS received from its contract with Delta would normally require reducing the gross revenues by any “costs” FSS incurred to generate those revenues. Because FSS had refused to provide any cost information in interrogatory answers or document production and refused to arrange for a speaking agent able to address that topic, the court entered an order compelling discovery on costs. FSS did not provide any information on costs and instead took the position that it did not maintain cost information specific to the Seattle–Tacoma operation. As a result, no evidence of costs was produced in discovery or presented at trial.

The trial court entered findings and conclusions “quantifying the undisputed services” and concluding that FSS owed Air Serv “the reduced amount of \$175/flight or \$83,300 along with all associated attorney’s fees and costs under both theories of quantum meruit and unjust enrichment.”<sup>13</sup> But the trial court’s findings and conclusions are incomplete. Specifically, other than reciting that the issue was to determine the reasonable value of services rendered by Air Serv to FSS, the court did not identify any particular theory of damages under either unjust enrichment or quantum meruit. The court’s findings do not address whether market value was established under either an unjust enrichment or quantum meruit theory, or whether no market exists for the services Air Serv provided.

\*4 Nor are the court’s findings sufficient to support a disgorgement of profit theory of unjust enrichment. The court made findings that FSS received “direct revenue” per plane paid by Delta as well as “fixed fees” paid each month by Delta. The court found that FSS received \$77,730.50 in direct revenue due to Air Serv’s actions from June to August 2011,<sup>14</sup> and a total amount of \$77,439.09 for fixed fees.<sup>15</sup> The court further found that total revenues (domestic and international) FSS received from Delta were over \$400,000. The court also made a finding that FSS intentionally failed to provide information regarding costs.

But the court made no finding or conclusion that because FSS intentionally withheld cost information, these revenues were the best the trial court could do to arrive at a disgorgement figure. There was no finding that \$77,730.50, the full amount of

direct revenue from international flights supervised by Air Serv from June through August, was a reasonable figure for revenue for all flights serviced (rounding off to exclude 15 additional flights in May and 10 additional flights in September). There was no finding of what portion of the fixed fees was properly allocated to work supervised by Air Serv and on what basis. There was no finding and no direct evidence that FSS was in any real jeopardy of losing its entire contract with Delta if it was unable to clean the international flights so that \$400,000 total gross revenue paid by Delta has any significance in a disgorgement of profits theory. Conceivably, a figure of \$83,300 could be within the range under a disgorgement theory, taking into account FSS's intentional withholding of cost information and the direct revenue from June to August, plus some additional revenue for 25 additional flights in May and September. But the court did not enter any specific findings supporting such a theory of recovery.

As previously noted, there is no finding or other determination by the trial court that \$83,300 or any other dollar amount is the reasonable value of the services received by FSS, under any theory. Rather, at most, the findings suggest the trial court relied upon the price proposed by Air Serv at \$175 per plane. This is problematic. Under either theory of unjust enrichment or quantum meruit, the price proposed by one party and rejected by another does not normally establish market or reasonable value. Air Serv provides no compelling authority that this evidence can serve as a back door measure of the reasonable value of services. To the extent that the trial court focused upon Air Serv's reliance upon FSS's representation that it would pay Air Serv the \$175 per plane fee, that appears to be some form of estoppel or doctrine of account stated, theories that were not before the trial court.

CR 52 requires that the court make findings of fact and conclusions of law “[i]n all actions tried upon the facts without a jury.”<sup>16</sup> “[F]indings must be made on all material issues in order to inform the appellate court as to ‘what questions were decided by the trial court, and the manner in which they were decided.’”<sup>17</sup> When the findings are incomplete and “consideration of the legal questions involves speculation as to the legal theories the trial court pursued,” the judgment must be set aside and the case remanded with instructions to the trial court to enter or clarify the findings on material issues.<sup>18</sup>

\*5 Because the trial court did not identify a precise theory of damages or make findings of a reasonable value of the services or how the court arrived at such a reasonable value of the services, we remand for additional findings. We appreciate that the parties provided the trial court with limited information regarding value and profit, but the existing findings are inadequate. Even a general finding that the reasonable value of the services is \$200,000 would have been inadequate. The trial court must articulate the specific measure of damages and make precise findings supporting such damages, whether under a market value, modified disgorgement of profit, or some other “rare circumstances” measure of the value of services appropriate based upon total circumstances.<sup>19</sup>

#### *Attorney Fees as Damages*

The trial court awarded attorney fees alternatively under a “make whole” theory of damages, or as part of sanctions imposed upon FSS. FSS contends that the court had no legal basis for imposing attorney fees as damages for claims of unjust enrichment and quantum meruit. We agree.

“Attorney fees will not be awarded as a part of the cost of litigation in absence of a contract, statute, or a recognized ground in equity.”<sup>20</sup> Here, the trial court awarded attorney fees to Air Serv “as part of the remedy to make plaintiff whole in this matter under unjust enrichment and quantum meruit—a remedy fashioned to do substantial justice and put an end to the litigation....”<sup>21</sup>

Air Serv offers no authority supporting an award of attorney fees and costs as “make whole” damages under unjust enrichment or quantum meruit. The award of attorney fees can only survive under the trial court's alternative rationale that the trial court has inherent authority to impose attorney fees as a sanction under CR 11 and other relevant rules.

#### *Attorney Fees and Additional \$35,000 as Sanctions*

The trial court recognized an alternative basis for the award of \$116,700 in attorney fees “as terms” and ordered \$35,000 in additional sanctions against FSS payable to Air Serv.<sup>22</sup> The order awarding terms and sanctions includes several findings in support of the award. Additionally, the trial court’s findings and conclusions include a section describing “procedural irregularities” involving the conduct of FSS counsel during trial.<sup>23</sup> And the April 15, 2013 order compelling discovery recites that FSS failed to comply with the case schedule without reasonable excuse or justification and that FSS has provided untrue statements in its discovery responses.

“[I]n imposing CR 11 sanctions, it is incumbent upon the court to specify the sanctionable conduct in its order.”<sup>24</sup> This requires specific findings that “either the claim is *not* grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, *or* the paper was filed for an improper purpose.”<sup>25</sup> Otherwise, remand is necessary for the trial court to “make explicit findings as to which filings violated CR 11, if any, as well as how such pleadings constituted a violation.”<sup>26</sup>

\*6 The trial court’s findings here lack the specificity required to support the terms and sanctions award. Specifically, Finding (a) identifies eight pleadings as not well grounded in fact, filed without any reasonable investigation, and/or filed in bad faith and for improper purposes. While these recitations are required for CR 11 sanctions, the findings do not specifically identify the deficiencies in each of those documents. Finding (b) merely refers to “numerous improper filings” without identifying whether these are the same or in addition to those identified in Finding (a), and there is no indication what was improper.<sup>27</sup> Finding (c) recites that FSS failed to comply with the April 15, 2013 order compelling discovery, but offers no details, specifics, or even categories of failure.

Finding (d) states that FSS “intentionally failed to be appropriately prepared for its CR 30(b)(6) deposition” but again, provides no details or categories of inadequate preparation.<sup>28</sup> Finding (e) refers to FSS and its counsel intentionally certifying unwarranted discovery responses but again, contains no specifics. Finding (f) refers to declarations FSS filed in support of its summary judgment motion that were made in bad faith, without clarifying whether this finding is limited to the declarations listed in Finding (a) or includes other declarations. Finding (g) refers to “misrepresentations to the Court during trial,” without further details.<sup>29</sup> Finding (h) and (i) offer no further insight into the actions that were the basis for sanctions.<sup>30</sup>

The trial court’s findings in support of the sanctions award are inadequate to allow for meaningful review. Accordingly, we remand to allow the court to make additional findings on the existing record to determine an appropriate award. We also note that, in addition to findings that the hourly rates and itemized time are reasonable, the lodestar analysis should include more details supporting any award of attorney fees as terms.

Finally, FSS challenges the trial court’s rulings limiting testimony of defense witnesses and excluding evidence as a sanction for discovery violations. FSS contends that the trial court erred by failing to conduct the inquiry required by *Burnet v. Spokane Ambulance* before excluding evidence as a discovery sanction.<sup>31</sup> We find no merit to these claims.

In *Burnet*, the court held that before excluding a witness as a sanction for a discovery violation, the trial court must explicitly consider whether a lesser sanction would probably suffice, whether the violation was willful or deliberate, and whether the violation substantially prejudiced the opponent’s ability to prepare for trial.<sup>32</sup> If the *Burnet* standard applies, we may engage in harmless error analysis.<sup>33</sup>

Here, either *Burnet* has no application or any error was harmless. First, FSS contends that the trial court erred by refusing to allow FSS President Robert P. Weitzel to testify via Skype without conducting a *Burnet* inquiry before excluding the testimony. We disagree.

\*7 The court did not exclude a witness as a sanction for a discovery violation, thereby prompting a *Burnet* inquiry. Rather, the court was exercising its discretion to not permit Weitzel to testify remotely. Under CR 43(a)(1), the trial court has discretion to take testimony remotely from a witness who is not present in court. The trial court did not allow Weitzel to testify remotely after discovering that Weitzel was present in his office in Ohio rather than on a scheduled vacation. The court’s decision that Weitzel failed to demonstrate good cause to testify remotely and that the defense had misrepresented to the court the reasons for his unavailability is not an exclusion of a witness for a discovery violation. *Burnet* has no application to this ruling.

Second, FSS contends that the trial court erred by not allowing Thomas Priola to testify as FSS's speaking agent (CR 30(b)(6) witness) because the court failed to conduct a *Burnet* inquiry before excluding the testimony. We disagree.

After the court ruled that Weitzel was unable to testify by Skype as FSS's CR 30(b)(6) witness, Air Serv moved in limine to limit defense witness Priola from testifying as the speaking agent for FSS because he was not designated as a CR 30(b)(6) witness. The trial court agreed, ruling that his testimony would be limited and denying FSS's request to call Priola. As the court explained:

It's been denied because you failed to comply with the discovery rules, which requires that you as an attorney of record shall designate him accordingly, not when one witness is inconvenienced so then you just morph another witness into the 30(b)(6) at your convenience. We have rules for a reason and they need to be complied with, and they haven't been done so here.<sup>[34]</sup>

The record is clear that FSS did not designate Priola as FSS's 30(b)(6) witness. Air Serv had disclosed Priola as a witness to testify only about communications directly between FSS and Air Serv. FSS did not specifically disclose him as a witness but simply included on its primary witness list anyone included on Air Serv's list. While that would include Priola, it would only be to the extent he was called by Air Serv, i.e., to testify only about communications between FSS and Air Serv. "While a 'reservation of rights' is sufficient to disclose witness names, it is insufficient to disclose the substance of a proposed witness's testimony."<sup>35</sup> As in *Jones*, simply reserving the right to call any witnesses appearing on the other party's list of potential witnesses does not satisfy the requirements of the local rules for witness disclosure.<sup>36</sup>

The court's lack of a *Burnet* inquiry was at most harmless error. FSS did not make an offer of proof and identify the specific testimony it sought to provide through Priola; FSS simply requested to designate him as its speaking agent.<sup>37</sup> Thus, FSS is unable to demonstrate whether Priola had any relevant testimony to offer as a speaking agent for FSS and what effect, if any, preventing Priola from testifying as FSS's speaking agent had on the outcome of the case.

\*8 Finally, FSS contends that the trial court erred by failing to conduct a *Burnet* inquiry before preventing FSS from presenting evidence of industry standards or market rates as a sanction for failing to provide this in discovery. We disagree.

On the second day of trial, Air Serv filed a motion in limine to exclude evidence relating to costs incurred by FSS, revenues received by FSS other than the invoices provided, and any industry standard or market rate of the value of the services at issue. The basis for requesting the exclusion was FSS's failure to provide such information in response to repeated discovery requests and court orders compelling discovery. The trial court granted the motion on evidence of industry standard and market value, but reserved ruling on evidence of costs.<sup>38</sup>

Again, any error in failing to conduct a *Burnet* inquiry before granting the motion in limine was harmless. FSS did not make an offer of proof of evidence relating to industry standard or a market rate.<sup>39</sup> Indeed, the record reveals that the claimed "industry standard" was based on statements in declarations submitted by FSS that FSS was later unable to verify.<sup>40</sup> Thus, FSS fails to show that a ruling excluding such evidence had any effect on the outcome of the trial.

#### *Bias*

FSS argues that trial judge exhibited bias and this matter should not be remanded to the same judge. "Litigants 'must submit proof of actual or perceived bias to support an appearance of impartiality claim.'" <sup>41</sup> While FSS recites several instances of adverse rulings and accuses the trial judge of being "caustic" and "hostile," those rulings and comments were based upon the conduct of FSS and its attorneys. FSS fails to establish bias. Remand to the same trial judge for additional findings is appropriate.

We remand for further findings consistent with this opinion.

WE CONCUR: LEACH, and APPELWICK, JJ.

All Citations

Not Reported in P.3d, 186 Wash.App. 1043, 2015 WL 1541288

Footnotes

1 Clerk's Papers (CP) at 2303. The trial court awarded attorney fees alternatively as part of a "make whole" theory of damages, or as part of the sanctions for FSS's violations of court rules.

2 *Young v. Young*, 164 Wn.2d 477, 483, 191 P.3d 1258 (2008).

3 *Id.* at 483–84.

4 *Id.* at 486.

5 *Id.* at 486 (quoting *Bailie Commc'ns Ltd. v. Trend Bus. Sys. Inc.*, 61 Wn.App. 151, 160, 810 P.2d 12 (1991)).

6 *Id.* at 487 (quoting *Noel v. Cole*, 98 Wn.2d 375, 383, 655 P.2d 245 (1982)).

7 *See id.* at 487–88.

8 *Id.* at 485.

9 *See Losli v. Foster*, 37 Wn.2d 220, 232, 222 P.2d 824 (1950) (actual cost of labor and materials); *Irwin Concrete Inc. v. Sun Coast Properties, Inc.*, 33 Wn.App. 190, 653 P.2d 1331 (1982) (various contract prices); *Modern Builders, Inc. v. Manke*, 27 Wn.App. 86, 91, 93–95, 614 P.2d 1332 (1980) (fair market value of improvements or costs plus a reasonable profit).

10 CP at 306–07.

11 As discussed below, FSS's challenge to this ruling lacks merit.

12 While FSS refers to invoices showing total gross revenues for international flights as \$62,595.73, these invoices were never provided in discovery or submitted to the trial court and are therefore not part of the record for consideration by this court. Copies of these invoices have simply been appended to FSS's brief without any motion to supplement the record or any basis for doing so.

13 CP at 2184.

14 This number corresponds to invoice billings for international flights only and does not include any direct revenue for cleaning the 15 international flights in May and 10 international flights in September that Air Serv supervised.

15 This number appears to be based on Air Serv's calculation of fixed fees, which accounts for fixed fees of \$10,373.03 in May, \$18,528 in June, \$20,746.06 in July, \$18,528 in August, and \$9,264 in September. *See* CP at 2428 (Air Serv's Trial Brief). The amount calculated for September is half of the monthly fees, although Air Serv stopped providing services on September 2. *See* Ex. 10.

16 CR 52(a)(1).

17 *Federal Signal Corp. v. Safety Factors, Inc.*, 125 Wn.2d 413, 422, 886 P.2d 172 (1994) (internal quotation marks omitted) (quoting *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 707, 592 P.2d 631 (1979)).

18 *Mayes v. Emery*, 3 Wn.App. 315, 321–22, 475 P.2d 124 (1970).

19 See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 31 cmt. e (“In the  
rare case where there is no evidence of market, custom, or usage to settle the question, the reasonable value  
of the plaintiffs services—in a case within § 31, the amount ‘necessary to prevent unjust enrichment’—is a  
question for the finder of fact, based on all the circumstances of the case.”).

20 *Greenbank Beach and Boat Club, Inc. v. Bunney*, 168 Wn.App. 517, 524, 280 P.3d 1133 (2012).

21 CP at 2300.

22 CP at 2300–01.

23 CP at 2181–82.

24 *Biggs v. Vail*, 124 Wn.2d 193, 201, 876 P.2d 448 (1994).

25 *Id.*

26 *Id.* at 202.

27 CP at 2299.

28 CP at 2299.

29 CP at 2300.

30 See CP at 2300 (providing for alternative award of attorney fees based on violations of court rules and  
finding that “[a]ll fees and expenses are reasonable and were necessarily incurred”).

31 131 Wn.2d 484, 933 P.2d 1036 (1997).

32 *Id.* at 494; *Jones v. City of Seattle*, 179 Wn.2d 322, 338, 314 P.3d 380 (2014).

33 *Jones*, 179 Wn.2d at 343.

34 Report of Proceedings (RP) (June 25, 2013) at 370.

35 *Jones*, 179 Wn.2d at 342.

36 *Id.* at 343. The local rules require parties to provide a list disclosing primary and additional witnesses  
according to trial schedule deadlines and to include a brief description of the witness’s relevant knowledge.  
*Id.* at 341; see KCLR 26(k).

37 FSS simply cites to objections to questions that were sustained. See RP (June 25, 2013) at 345, 346, 350,  
355–56, 357.

38 See RP (June 25, 2013) at 268, 270. FSS challenges only the exclusion of evidence of industry standard and  
market rate.

39 During argument on the motion in limine, the court asked counsel for FSS if there was going to be  
testimony on this issue, to which counsel responded, “I don’t recall any testimony on market rate.” RP  
(June 25, 2013) at 267. The court again asked what evidence FSS had relating to industry standards or  
market rate, and counsel responded, “I don’t think anybody has testified to industry standards or market  
rate,” at which point the court noted, “Then you’re ... conceding.” RP (June 25, 2013) at 269.

40 See CP at 306–07, 1462.

41

*GMAC v. Everett Chevrolet, Inc.*, 179 Wn.App. 126, 154, 317 P.3d 1074 (2014) (quoting *Magana v. Hyundai Motor Am.*, 141 Wn.App. 495, 523, 170 P.3d 1165 (2007), *rev'd on other grounds*, 167 Wn.2d 570, 222 P.3d 191 (2009)).

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# APPENDIX B

Total Gross Revenues from  
Flight Services Invoices: Trial Exhibits 3-10

**Total Gross Revenues From Flight Services' Invoices: Trial Exhibits 3-10**

	Column A (from invoice)	Column B <sup>1</sup> (from invoice)	Column C Column A / (Column A + Column B)	Column D Column B / (Column A + Column B)	Column E <sup>1</sup> (from invoice)	Column F <sup>2</sup> (from invoice)	Column G <sup>1</sup> Column D x Column F	Column H Column C + Column H
Invoice Date	# Domestic Flights	# International Flights	Percentage Domestic Flights Cleaned	Percentage International Flights Cleaned	Unit Price Direct Revenues for the International Flights	Total Mgmt Fees, Equipment Fixed Fees, Start-up Costs	Total Mgmt. Fees, Equipment Fixed Fees, Start-up Costs for the International Flights	Total Gross Revenues
5/31/2011	321	53	85.83%	14.17%	\$1,771.02	\$10,373.03	\$416.03	\$2,187.05
6/15/2011	403	74	84.49%	15.51%	\$10,036.00	\$9,264.00	\$1,437.18	\$11,473.18
6/30/2011	460	74	86.14%	13.86%	\$12,972.00	\$9,264.00	\$1,283.78	\$14,255.78
7/15/2011	455	75	85.85%	14.15%	\$12,731.20	\$9,264.00	\$1,310.94	\$14,042.14
7/31/2011	486	80	85.87%	14.13%	\$14,348.80	\$11,482.06	\$1,622.91	\$15,971.71
8/15/2011	460	74	86.14%	13.86%	\$13,352.00	\$9,264.00	\$1,283.78	\$14,635.78
8/31/2011	431	80	84.34%	15.66%	\$14,290.50	\$9,264.00	\$1,450.33	\$15,740.83
9/15/2011	394	67	85.47%	14.53%	\$899.76	\$9,264.00	\$100.48	\$1,000.24
<b>Total</b>	<b>3410</b>	<b>577</b>	<b>85.53%</b>	<b>14.47%</b>	<b>\$80,401.28</b>	<b>\$77,439.09</b>	<b>\$8,905.42</b>	<b>\$89,306.70</b>

<sup>1</sup> AS provided service on 15 international flights in May 2011 (not 53) and 5 international flights in September 2011 (not 67). Tr. Ex. 19. As such, Columns E & G are adjusted pro rata (i.e. 15/53 and 5/67) in May and September to reflect the lower numbers.

<sup>2</sup> AS never provided any management, Equipment Fixed Fees, or Start-Up Costs. But it inexplicably claims to be entitled to 100% those costs. Even if it were entitled to these costs (which it should not), the proof of the invoices demonstrate only 14.47% of all services performed were from international flights. AS provided no services on any domestic flights.

\$89,306.70 constitutes the total gross revenues (not profits) for all international flights cleaned by FSS using 6-14 employees. This is \$187.62 per flight (total gross revenues of \$87,306.70 divided by 476 aircraft cleaned).

### CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the United States of America and the State of Washington that on the date specified below, I caused the foregoing to be filed in Division I Court of Appeals and to be served as follows:

Division I Court of Appeals 600 University St One Union Square Seattle, WA 98101-1176 Phone: 206-464-7750	Messenger Service <input type="checkbox"/> First Class U.S. Mail <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/>
David Crowe Van Kampen, Paine & Crowe, PLLC 1001 Fourth Avenue Ste 4050 Seattle, WA 98154-1000 dcrowe@VKPClaw.com Phone: (206) 436-8339	Messenger Service <input type="checkbox"/> First Class U.S. Mail <input checked="" type="checkbox"/> Facsimile <input type="checkbox"/>

DATED: October 7, 2016, at Federal Way, Washington.

*Vicky Reasoner*  
Vicky L. Reasoner-Martens