The Honorable Patrick Oishi
Noted for Hearing: July 29, 2016, 9:00 a.m.
Moving Papers

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

MacDONALD HOAGUE & BAYLESS, a Washington corporation,

Plaintiff,

v.

THE SHERIDAN LAW FIRM, P.S., a Washington corporation; and JOHN P. SHERIDAN, JANE DOE SHERIDAN, and their marital community,

Defendants.

No. 16-2-04055-1 SEA

DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT – BREACH OF CONTRACT AND COVENANT OF GOOD FAITH

I. INTRODUCTION AND RELIEF REQUESTED

In January 2013, Jack Sheridan ("Sheridan") closed his firm (The Sheridan Law Firm, P.S. ("SLF")) to become a stockholder at MacDonald Hoague & Bayless ("MHB"). He brought with him a number of active contingent fee cases, including *Tamosaitis v. URS* and *Tamosaitis v. BNI*, two separate cases he was pursuing on behalf of Walter Tamosaitis. Since SLF had invested significant time into these matters, Sheridan and MHB signed a Transitional Directorship Agreement ("TDA"). Under the TDA, fees generated at MHB from pre-existing cases would be divided pro rata: SLF would be paid based on "work performed prior to January 1, 2013" when Sheridan joined MHB, and MHB would be paid based on "work performed on January 1, 2013 or later … to be distributed per the Director Compensation Plan." [1] But the TDA did not address

[1] Decl. of John P. Sheridan in Opp'n to Pl.'s Mot. for Prejudgment Writ of Attach. & in Supp. of Defs.' Mot. for Partial Summ. J. ("Sheridan Decl."), Ex. E. Unless otherwise stated, the exhibits cited herein are exhibits to the Sheridan Decl.

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how fees would be allocated if Mr. Sheridan left MHB as to MHB clients who elected to continue to be represented by him.

Mr. Sheridan left MHB in July 2014. A number of clients he represented at MHB elected to transfer their files with him. But no agreement governed the division of fees after Mr. Sheridan departed. Thus, in every such case where SLF recovered for the client – until *Tamosaitis v. URS* – MHB asked to be and was paid based on quantum meruit, multiplying the hours worked by MHB attorneys (including Mr. Sheridan) by their hourly rates.

But when *Tamosaitis v. URS* settled for $4.3 million – resulting in a contingent fee of $1.64 million – MHB changed its tune. First, MHB sought payment in quantum meruit based on the work it performed on the case that settled ($81,515.00), *and* on *Tamosaitis v. BNI*, a case on which there had been no recovery ($72,922.50). Mr. Sheridan tendered payment of $81,515 for the work on *Tamosaitis v. URS*. MHB then changed its story again, demanding that the fee be calculated pro rata under the TDA, based on the work performed before, during and after Mr. Sheridan's tenure at MHB.

What MHB is entitled to under quantum meruit are issues for another day. But, based on undisputed evidence, the TDA does not control, and MHB's first cause of action for breach of contract should be dismissed. MHB's second cause of action for breach of the implied covenant of good faith under the TDA fails for the same reason.

II. STATEMENT OF FACTS

A. Sheridan Initiates Multiple Suits on Behalf of Walter Tamosaitis.

Mr. Sheridan is a Washington attorney and the owner of SLF. He primarily represents clients who are victims of workplace discrimination and whistleblowers on a mixed contingent fee basis. As of 2012, his clients included, among others, Grant Boyer (failure to accommodate disability), Stephen Chaussee (whistleblower) and Walter Tamosaitis (whistleblower) pursuant to mixed contingent fee agreements. Exs. A-C. Tamosaitis was a Hanford whistleblower who had a retaliation claim against his employer, URS, a Hanford subcontractor, under the Energy

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Reorganization Act, which first had to be filed with the Department of Labor ("DOL"). No discovery is permitted during the investigative phase of that proceeding, but if the DOL took no action after a year, Tamosaitis could sue in federal court. He also had claims against Bechtel National, Inc. ("BNI") (the prime contractor), for tortious interference and civil conspiracy related to URS' retaliatory actions. Sheridan Decl. ¶ 3.

Mr. Sheridan submitted the administrative claim against URS to the DOL in 2010, and also sued BNI and URS in Benton County Superior Court for civil conspiracy and tortious interference the same year. This allowed him not only to pursue a recovery from BNI, but also to conduct discovery relevant to the claims against *both* BNI and URS while the administrative claim languished at the DOL. A year after filing the DOL claims, Mr. Sheridan nonsuited URS from the state proceeding and dropped the civil conspiracy claim. At that point, the only claims pending in Benton County were against BNI. Mr. Sheridan then filed whistleblower retaliation claims against URS on behalf of Mr. Tamosaitis in the United States District Court, Eastern District of Washington, under the Energy Reorganization Act (which provides for attorney fees).

As of January 1, 2013, Mr. Tamosaitis' last claim in Benton County (against BNI for tortious interference) had been dismissed at summary judgment, and was on appeal to Division III of the Washington Court of Appeals. The whistleblower claims against URS in federal court had also been dismissed, and were on appeal to the Ninth Circuit. *Id.* ¶ 4.

B. <u>Mr. Sheridan Becomes a Stockholder at MHB, and Signs a Transitional Directorship Agreement and a Buy-Sell Agreement Drafted by MHB</u>.

In 2012, Mel Crawford and Kay Frank, partners at MHB, recruited Mr. Sheridan to join the firm. Ex. JJ ("Crawford Dep.") at 6:7-9. He joined MHB effective January 1, 2013, by virtue of signing two documents. First, he signed MHB's general Buy-Sell Agreement that all shareholders signed at the same time, which provided that any shareholder joining the firm would pay $35,000 for the stock, and that MHB would buy the stock back from the shareholder for the same price if they left the firm. Ex. D ¶ 3. It was not specific to Mr. Sheridan, who played

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no role in drafting the document. Sheridan Decl. ¶ 6 & Ex. GG (Shaeffer Dep.) at 24:8-9. In the past, departing partners would continue to share in the MHB profits according to a formula. Ex. HH ("Greenfield Dep.") at 5:19-6:13; Crawford Dep. at 42:3-43:7. By design, paragraph 5 of the Buy-Sell Agreement cut off Sheridan's rights to any split of fees with other MHB stockholders upon his removal as a stockholder. Crawford Dep. at 42:3-43:7; Shaeffer Dep. at 48:12-18; Ex. D ¶ 5.

Second, as Mr. Sheridan was bringing a number of active cases with him, MHB prepared the Transitional Directorship Agreement to set the terms by which fees received on such cases after joining MHB would be divided. Sheridan Decl. ¶ 9 & Ex. E ("TDA"). The section at issue here is paragraph 2:

> 2. Division of Fees on Cases Brought to MHB: For any current case that Mr. Sheridan brings to MHB, fees from any recovery will be divided pro rata based on the amount of work performed before and after January 1, 2013. Fees generated from work performed prior to January 1, 2013, will be paid to the Law Offices of Jack Sheridan. Fees generated from work performed on January 1, 2013 or later will be paid to MHB Business account *to be distributed per the Director Compensation Plan.*

Ex. E (emphasis added). None purport to address issues related to his potential departure from the firm. Indeed, *all* of the TDA's terms are directed at facilitating Mr. Sheridan's joining and work at MHB; not one even contemplates his departure. For example:

- Directorship Date and Initial Compensation (¶ 1)—requires Sheridan to buy shares for $35,000, but does not address MHB's duty to buy back those shares upon his departure;
- Adjustment to Director Compensation Percentage (¶ 3)—provides a progressive formula for calculating Sheridan's compensation, but makes no statement regarding the procedure for winding up upon his departure;
- Outstanding Liabilities and Line of Credit (¶ 4)—allocates Sheridan's liabilities upon arrival, requires MHB to obtain liability insurance for him, and obligates Sheridan to join MHB's line of credit; it states nothing about what happens in these regards upon his departure;
- Trust Accounting (¶ 8)— requires money in the SLF trust account to be transferred to MHB' s trust account; it makes no provision for transferring client funds to another firm should Mr. Sheridan leave MHB and clients elect to have him represent them

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going forward;

- All Work Through MHB (¶ 9)—provides Sheridan "won't do any work or provide any professional advice except as a Director of MHB"; states nothing regarding Sheridan's capacity after leaving the firm, or his right to take on new clients upon departure, or upon his removal as a shareholder, but before his departure (Sheridan worked at MHB through July 2014 as an employee, not as a shareholder).

The testimony of MHB directors involved at the time corroborates this interpretation of the TDA. For example, Joe Shaeffer was MHB's Managing Partner from 2011 until at least 2014, was involved in drafting the TDA, and acknowledges that paragraph 2 (the paragraph MHB now relies upon) was included because Mr. Sheridan "was primarily concerned that [he] would get credit for the work that [he] had performed before [he] got [to MHB]. Shaeffer Dep. at 5:4-6:16, 11:17-12:10, 25:14-16. He agrees that all discussions regarding paragraph 2 of the TDA were premised on the assumption that Mr. Sheridan would stay at the firm "forever." *Id.* at 12:20-13:24. He admits that prior to when the TDA was signed on or about January 16, 2012, there were no discussions about fee splits should Mr. Sheridan leave MHB because they did not expect him to leave at that point. *Id.* at 16:15-17:3 ("And let me be very clear about that. To my recollection, prior to January 16, I don't recall any specific conversations about fee splits should Sheridan leave the firm because it was anticipated that [he] would be there forever.") According to Shaeffer, the first time he discussed splitting contingent fees earned post departure was in June 2014 (one and a half years after the TDA was signed), in connection with Mr. Sheridan's departure from MHB. Mr. Sheridan "instantly said" he was not going to do that. *Id.* at 17:6-9, 19:11-17; Ex. II ("Ford Dep.") at 18:15-19:2. Shaeffer confirms that when the TDA was drafted, there were no discussions about how Mr. Sheridan and MHB would split contingent fee cases in the event that Sheridan left, other than Sheridan would recover the $35,000 buy-in as provided in the Buy-Sell Agreement. Shaeffer Dep. at 23:13-20.

Mel Crawford was also a MHB director during Mr. Sheridan's tenure. He concurs that in negotiating and drafting the TDA, it was expected that the relationship between MHB and Mr. Sheridan would be a long one. Crawford Dep at 8:24-9:5. He confirms that there were no

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discussions in that process about the TDA applying, should Mr. Sheridan leave MHB, to require a pro rata split of fees generated by Mr. Sheridan after leaving the firm. *Id.* at 8:20-23, 36:25-38:4; *see also* Ford Dep. at 9:25-10:5.

C. Soon After Joining MHB, Mr. Sheridan Writes to SLF Clients to Bring Them Into MHB.

Mr. Sheridan wrote to his clients, including Boyer, Chaussee and Tamosaitis, advising them of his new relationship with MHB, and asked them to acknowledge that MHB would be their new attorneys under the same terms as with SLF. Sheridan Decl. ¶ 11, Exs. F and G. All transferred their files to MHB. Both Tamosaitis appeals were briefed and argued, and the dismissal of claims against BNI for tortious interference had been affirmed, during Mr. Sheridan's tenure at MHB. *Tamosaitis v. Bechtel Nat'l, Inc.*, 182 Wn. App. 241, 327 P.3d 1309, *review denied*, 181 Wn.2d 1029, 340 P.3d 229 (2014). This brought an end to the claims against BNI, but the claims against URS remained live as the URS appeal remained pending before the Ninth Circuit. Sheridan Decl. ¶ 12.

D. Mr. Sheridan Leaves MHB, and Boyer, Chaussee and Tamosaitis All Discharge MHB and Elect to Be Represented by Mr. Sheridan's Firm.

Case selection issues arose between Mr. Sheridan and MHB only six months into their relationship. *Id.* ¶ 13, Exs. H and I. The stockholders were able to persuade him to remain with the firm at that point, but the issues persisted and Mr. Sheridan ultimately left MHB on July 31, 2014. Sheridan Decl. ¶ 14; Crawford Dep. at 10:5-11:15.

In June 2014, Mr. Sheridan and MHB management sent joint letters to each client he was then representing, whether or not they had been a client prior to joining MHB, and asked each to elect SLF or MHB as their attorneys. Boyer, Chaussee, Tamosaitis and other clients elected SLF, while one client elected MHB. That one client, Becky Rufin, ultimately went to Mr. Sheridan after MHB declined to take the case, which was on appeal at the time, and is still on appeal (SLF is handling the appeal). Sheridan Decl. ¶ 16, Ex. K.

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E. Mr. Sheridan Prevails in Both *Boyer* and *Chaussee*, and MHB Requests and Accepts Payment in Quantum Meruit, Based on the MHB Fees Awarded by the Court in Those Cases.

The *Boyer* case went to trial two months later, in September 2014, and resulted in a $75,000 verdict in favor of Mr. Boyer. Sheridan Decl., Ex. L. Mr. Sheridan then received an award of $331,001.28 in fees and costs for Boyer, based on the work performed by both SLF and MHB on the case. Exs. M and N at 6-7.[2] Under the SLF fee agreement, Boyer was obligated to pay attorney fees of $311,962.50 (less costs advanced and $20,000 in fees that Mr. Boyer had advanced). Sheridan Decl. ¶ 17.

Of course, since MHB did not recover on behalf of Boyer while it had the file, and was discharged when Boyer transferred his file to Mr. Sheridan upon his departure, MHB had no *contractual* right to a fee in the case; its right to any fee from Boyer for its work on the case could only be on a quantum meruit basis. MHB submitted an accounting for Mr. Boyer's signature of its claimed fee, seeking payment of $147,975.20 in fees – MHB's billable hours awarded by the Court. Ex. P. MHB did *not* claim a pro rata share of the fee, which would have been as much as $265,000 if the TDA governed (it does not), since its terms do not provide for giving any credit to SLF for time its attorneys invested on the case after January 1, 2013.[3] Sheridan sent a check to MHB in the amount of its accounting, thus satisfying any quantum meruit obligation Boyer had to MHB, which MHB cashed. Ex. Q.

The *Chaussee* case went to trial eight months after Mr. Sheridan left MHB, in March 2015, and he obtained a $1 million verdict in favor of Mr. Chaussee, and an award of an additional $380,940.83 in fees and costs. Exs. R & T. Again, Mr. Sheridan sought fees and costs on behalf of Chaussee based on the work of both SLF and MHB, supported by another declaration from Chamberlain. Exs. S, T & U. Under the SLF fee agreement, Chaussee was obligated to pay fees of $544,091.60 (less $20,000 in fees that Chaussee had advanced) in

[2] MHB Stockholder Katie Chamberlain submitted a supporting declaration, and fees for the time spent by MHB assisting in the fee application were included in the fee request. Ex. O.

[3] Calculation of MHB's fee in the *Boyer* matter under the TDA reveals the absurdity of its claim that the TDA governs in regard to recoveries made after Mr. Sheridan left the firm, as discussed below.

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accordance with the fee agreement.

Once again, MHB had no *contractual* right to a fee in a contingent fee matter in which it did not recover anything for its client; any right to a fee from Chaussee could only be via quantum meruit. Once again, MHB submitted a final accounting to Chaussee of the fee it claimed, seeking payment of $117,650.00 – MHB's hours and outstanding costs that the Court awarded, *and not including fees that the Court denied!* Ex. V. MHB director Mel Crawford felt even then that MHB's entitlement to fees was properly measured based on what a court awarded (or would award) in the case in question. Crawford Dep. at 38:5-40:3. Once again MHB did *not* claim a pro rata share of the fee, which would have been as much as $194,000 if the TDA governed (which it does not). Indeed, Mr. Crawford testified that the firm considered requesting a pro rata division internally, but decided not to do so. *Id.* at 18:11-20:23. Mr. Sheridan sent a check to MHB in the amount of its accounting, thus satisfying Chaussee's quantum meruit obligations to MHB, which MHB cashed. Ex. W.

The fees paid to MHB in *Boyer* and *Chaussee* more than compensated MHB for the salary and benefits it paid Mr. Sheridan during his tenure there. But that is not the end of MHB's return on that investment. As discussed below, it has received an additional $82,000 in regard to the *Tamosaitis* case, and Mr. Sheridan continues to represent additional clients who elected to discharge MHB and transfer their files to Mr. Sheridan. Mr. Sheridan expects that those cases will produce recoveries for those clients, and estimates that MHB may receive up to an additional $500,000 in fees for those matters. Sheridan Decl. ¶ 19, Ex. X.

F. <u>The Dispute About MHB's Fee in *Tamosaitis*</u>.

After Mr. Sheridan left MHB, the Ninth Circuit reversed the dismissal of claims against URS, and remanded the case for trial. *Tamosaitis v. URS Inc.*, 781 F.3d 468 (9th Cir. 2015). By late 2012, Mr. Tamosaitis' claims in both federal and state court had been dismissed on summary judgment, and were on appeal before the appropriate appellate forums. In August 2015, and over a year after he left MHB, Mr. Sheridan was able to settle the *Tamosaitis* federal claims against

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URS for $4.3 million. Sheridan Decl. ¶ 20. Once again, MHB had no contractual right to a fee from Tamosaitis since it recovered nothing on his behalf while it had the file. Any right to a fee from Tamosaitis for MHB's work on those claims could be based only on quantum meruit. And once again, MHB submitted an accounting of the fee it sought on that basis. But it did not limit its requested quantum meruit fee to the value of time spent on the whistleblower claims against URS that had been filed in federal court (approximately $82,000), which were the claims that had settled. Rather, MHB also demanded payment for the time it invested in briefing the appeal of the dismissal of state court tortious interference claims against Bechtel (an additional $73,000, approximately), even though the appeal had been unsuccessful and the case lost. Ex. Y. MHB did so even though several directors expressed the view internally that doing so would be inconsistent with not requesting payment of fees that the court did not award in *Chaussee*, and that the appropriate measure of MHB's fee was the portion that a court would have awarded in *Tamosaitis v. URS.* Crawford Dep. at 22:12-24:6, 24:25-25:16, 38:5-40:3.

Had those fees in some ways also contributed to the recovery from URS, Mr. Sheridan would have gladly agreed that they should be paid. But the fees related entirely to briefing the appeal of the dismissal of Bechtel. Mr. Sheridan disagreed that Tamosaitis owed MHB anything for work on a case that had been lost, and which had not contributed to the URS settlement. Thus, he sent MHB a check in the amount of the MHB accounting for its work on the URS case – $82,220.27 – which represented every penny of MHB's billable hours claimed and all outstanding costs billed to that case. MHB cashed the check. Ex. Z. The disputed fees for MHB's work on the Bechtel case – approximately $73,000.00 – are being held in trust. Sheridan Decl. ¶ 21.

This motion does not address what amount MHB would be entitled to under quantum meruit. What is significant for purposes of this motion is that, and once again, *MHB did not claim a pro rata share of the fee under the TDA*. Ex. Y. This accounting, submitted by MHB as its claimed fee and the basis therefore, is yet another admission that its belated claim that the

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issue is governed by the TDA is unfounded. But this is not the only objective evidence of the parties' intent that conclusively disproves MHB's breach of contract claim. Indeed, their discussions in the run-up to and after the *Tamosaitis* case settled corroborate Mr. Sheridan's interpretation of the TDA. For example, in late July 2015, Mr. Sheridan notified Shaeffer that *Tamosaitis* might settle, asked MHB to be ready to submit an accounting, noted that it might have to forego fees billed to the BNI case that did not contribute to the URS recovery, and suggested that they review their bills to see what might "be translated to the federal case like state deposition fees and costs for depositions we could have used at the federal trial." Ex. Z at 3. Shaeffer's response: "So the state court case fizzled? A shame Bechtel got off. They were the real MFs in this thing." *Id.* at 2. MHB made no assertion that the fee should be allocated pro rata.

Indeed, MHB agreed with Mr. Sheridan's view that its fees should be limited to those which contributed to the federal case. It provided Mr. Sheridan with its billings from both cases and asked for his assistance in determining what state court billings might also be credited towards the federal case. Ex. AA at 2. Mr. Sheridan could find none that he felt would have been awarded in a fee petition in the federal case. Shaeffer's response: "OK. Just so I can report back to the management committee (I am not on it anymore), why is that the measure of our fees, *as opposed to the quantum meruit value of the total work performed?*" *Id.* at 1 (emphasis added). Again, MHB admitted that its right to a fee was governed by the doctrine of quantum meruit, and not by the TDA.

In September 2015, Mr. Sheridan sent MHB $82,000, and put the $73,000 that MHB had also demanded be paid into trust. Ex. DD, EE. Starting on October 9, 2015, MHB's Chairman, Tim Ford, began a lengthy email chain in which he proffered a number of creative theories as to why MHB's quantum meruit fee was actually higher than it had demanded, to convince Mr. Sheridan to accept its demanded number as a "compromise." The email chain culminates on October 31, 2015. But while the two debated how MHB's quantum meruit fee should be calculated, Ford stated in support of his position on numerous occasions that the issue was not

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governed by contract:

> I think we are in agreement that the law says that in this circumstance fees should be divided on a quantum meruit basis; the only question is what that means. . . .
>
> * * *
>
> As you can see, these passages support a much more onerous position than MHB has taken, but except for the part about fiduciary relationships they don't fit our situation very well *because our agreement does not provide for any post-dissolution distribution of fees earned.* That is why we have agreed the answer has to be some sort of quantum meruit division between the law firms . . .
>
> * * *
>
> *Attached are copies of the buy sell agreement and the transitional agreement we made when you joined the firm. As you can see, they make no specific provision for division of a fee received by a director who has left the firm for work done both before and after his exit.*
>
> I did some more research and it all points in the same direction. In the absence of such an agreement, Washington law provides that a "contingency fee … must be divided proportionately. . . .["]
>
> * * *
>
> There is no contract governing [the fee's] division. Therefore, equitable principles control. The applicable equitable principle is quantum meruit.

Ex. FF at 14, 12, 6, 2. Significantly, even internally, no one suggested at that time that the TDA governed the issue. Crawford Dep. at 26:1-10.

III. STATEMENT OF ISSUES

1. Does the TDA govern the allocation of fees generated after Mr. Sheridan left MHB?

IV. EVIDENCE RELIED UPON

This motion is based on the Declaration of John P. Sheridan filed herewith, the exhibits attached thereto, and the record herein.

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V. ARGUMENT

A. MHB's Breach of Contract Claim Should Be Dismissed.

1. MHB Is Entitled Only to Quantum Meruit from Tamosaitis.

MHB did not represent Mr. Sheridan in the *Tamosaitis* case; it represented Tamosaitis. Absent an agreement between counsel, it is the client that must pay the lawyer's fee for services provided – not another attorney that also represented the client. And clients have the right to discharge their attorney at any time, for any reason. *Kimball v. Public Utility Dist. No. 1 of Douglas Cnty.*, 64 Wn.2d 252, 257, 391 P.2d 205 (1964); 7 Am. Jur. 2d *Attorneys at Law* § 282 (1997). When a contingent fee lawyer is fired prior to obtaining a recovery for the client, there is no breach of the contingent fee agreement if no fee is paid to the attorney, and because no breach occurs, a discharged attorney may not sue on a contingent fee agreement. Rather, he or she must sue in quantum meruit arising out of the contract for the reasonable value of the services rendered through the date of discharge. *Kimball*, 64 Wn.2d at 258, 391 P.2d 205; 1 Joseph M. Perillo, *Corbin on Contracts* § 1.20, at 71-72 (1993) (primary rights in actions in quantum meruit or quasi-contract are contractual); *Fetty v. Wenger*, 110 Wn. App. 598, 600 n.4., 36 P.3d 1123, 1124 (2001), *as amended on denial of reconsideration* (Feb. 27, 2002).

As counsel for Mr. Tamosaitis, Mr. Sheridan had an obligation to make sure that Tamosaitis was not asked to pay more than he was obligated, and on his behalf took the entirely reasonable and appropriate position that MHB was entitled only to a quantum meruit fee from the URS settlement for work performed in *either* case that contributed to the outcome in URS. And conversely, that MHB was *not* entitled to quantum meruit based on work performed on a different *case* against a different *defendant* which Tamosaitis could *not* have requested as prevailing party fees from URS. But whatever Tamosaitis owes MHB, it can be based only on quantum meruit related to the URS settlement. Mr. Sheridan will pay that debt, whatever it is, on Tamosaitis' behalf.

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2. MHB Has No Contract With Mr. Sheridan That Requires Him to Split Fees After Leaving MHB.

The only basis on which MHB can recover from Mr. Sheridan is if there is some independent obligation on his part to MHB to share the fee *Mr. Sheridan* earned *after* Tamosaitis discharged MHB, for the $4.3 million settlement *Mr. Sheridan* negotiated of Tamosaitis' claims against URS. This motion addresses whether such an obligation exists under the TDA.

a. Standards of Contract Interpretation and Construction.

Whether the TDA controls the division of the *Tamosaitis* fee turns on the interpretation and construction of that agreement. In construing a contract, the court's duty is to determine the parties' intent at the time of contracting. *See E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106 Wn.2d 901, 907, 726 P.2d 439 (1986); *Farmers Ins. Co. v. Clure*, 41 Wn. App. 212, 215, 702 P.2d 1247 (1985). Ambiguities are to be construed against the drafter of the agreement. *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 355, 103 P.3d 773 (2004). But rules of construction are not goals in themselves but only aids to interpretation; the goal is to give effect to the apparent clear intention of the parties. *Farmers*, 41 Wn. App. at 215. The contract must be read as the average person would read it; it should be given a "practical and reasonable rather than a literal interpretation," and not a "strained or forced construction" leading to absurd results. *E-Z Loader*, 106 Wn.2d at 907.

In determining the intent of the parties, Washington follows the objective manifestation theory of contract interpretation. *Hearst Commc'n, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). In *Berg v. Hudesman*, the Washington Supreme Court held that the "meaning of a writing can almost never be plain except in a context." 115 Wn.2d 657, 668, 801 P.2d 222 (1990). Thus, extrinsic evidence is admissible as to the entire circumstances under which a contract was made, as an aid in ascertaining the parties' intent, regardless of ambiguity. *Id*. at 667-68.

In determining the parties' intent, a court may consider several factors, including "the contract as a whole, the subject matter and objective of the contract, all the circumstances

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surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties." *Id.* at 667. However, extrinsic evidence of a party's unexpressed, subjective intent is not admissible. *Hearst Commc'n*, 154 Wn.2d at 503-04.

b. Undisputed Evidence Establishes That the TDA Does Not Apply to Fees Generated After Mr. Sheridan Left MHB.

The TDA as a Whole and Circumstances of Its Making. Nothing in the TDA itself suggests that it governs the division of fees earned should Mr. Sheridan leave MHB. It certainly does not say that expressly. It was negotiated, drafted and signed in contemplation of Mr. Sheridan *joining* the firm, not leaving it. Its subject matter and objective was to address Mr. Sheridan's expressed desire, and condition to joining the firm, that he receive a share of fees generated on cases he brought to the firm that recognized his prior investment of his own time and money into them. At no time during the negotiation of the TDA did MHB express such a desire were he to leave the firm. *See generally* Shaeffer and Crawford depositions.

Further, the terms of the TDA are entirely addressed to matters related to him joining the firm, or as a stockholder of the firm—which is consistent only with paragraph 2 controlling the division of fees generated *during* Mr. Sheridan's tenure at MHB, and not after. For example, the TDA states that "Mr. Sheridan won't do any work or provide any professional advice except as a Director of MHB, and subject to this agreement." Ex. E ¶ 9. That would not be the case were he to leave the firm. It requires that MHB's share of fees divided under the TDA "be distributed per the Director Compensation Plan" so that Mr. Sheridan would also share in the fee generated by his work for the firm, and not just his independent work. But he receives no distributions after leaving MHB, at which time he ceased to be a director.

Finally, most revealing is what is *not* stated in the TDA that would have been had the parties intended it to control after Mr. Sheridan left MHB. The TDA states that fees be divided pro rata based on work performed by SLF prior to January 1, 2013, and by MHB after January 1,

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2013. *But there is no provision that Mr. Sheridan would get pro rata credit for work he performed after he left the firm!* Thus, for example in the *Boyer* matter, the pro rata division would be based only on the value of the time invested by SLF prior to January 1, 2013 ($24,213), and by MHB after January 1, 2013 ($145,995), while ignoring the value of time SLF and Mr. Sheridan invested actually trying the case to victory ($112,710). MHB would receive approximately 85 percent of the *Boyer* fee ($265,000), and Mr. Sheridan only 15 percent ($46,000), when the most critical work – the trial itself – was done after he left MHB.

Subsequent Acts and Conduct of the Parties. Equally if not more revealing is the conduct of MHB and Mr. Sheridan after he left the firm. Of course, Director Ford admitted repeatedly that no contract governed the issue of MHB's entitlement to a share of the Tamosaitis fee. But the evidence of subsequent conduct that undermines MHB's claims goes much further. After leaving MHB, Mr. Sheridan recovered money for his clients in two other cases, *Boyer* and *Chaussee.* In both cases, MHB requested only quantum meruit based on the hours that it had put into each case. And in one of those cases – *Chaussee* – MHB did *not* include even it its quantum meruit demand fees that the court refused to award, thus acknowledging that if a court would not award such fees, they are not compensable even in quantum meruit. But, most significantly, in *neither* case did MHB claim that the TDA controlled, even though applying the terms of the TDA would have produced somewhat larger fees in both cases.

Even when *Tamosaitis v. URS* settled, MHB did not assert any rights under the TDA. Its initial accounting only claimed entitlement based on its actual time invested in the case – quantum meruit – and not a pro rata share of the total fee. Nor did MHB invoke rights under the TDA when Mr. Sheridan refused, on behalf of Tamosaitis, to pay MHB quantum meruit for work on the *BNI* case that could not have been requested as prevailing party fees in the *URS* case. Even then, MHB's Chairman repeatedly acknowledged that no contract controlled the issue, and instead argued that the firm's quantum meruit fee might be even higher than it had initially demanded. Indeed, the first time MHB asserted rights under the TDA was in briefing in the *URS*

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case related to fee allocation, and then again when it filed this suit.

MHB's Interpretation Simply Is Not Reasonable. Finally, MHB's interpretation of the TDA as requiring a pro rata division of fees generated after Mr. Sheridan left the firm, leads to absurd results. For example, as noted above, the terms of the TDA give no credit to Mr. Sheridan for the value of work he performed after leaving the firm. Thus, as in the *Boyer* matter, MHB would receive the bulk of the fee even though the vast majority of the work – and the work that produced the fee – happened after the client discharged MHB and rehired Mr. Sheridan.

Similarly, the TDA contemplates that Mr. Sheridan would share in fees paid to MHB by virtue of distributions under the Director Compensation Plan. Thus, MHB would have to pay Mr. Sheridan his share based on his prior ownership interest, even though he has been bought out of the firm and is no longer a director. Yet, that is contrary to the express terms of the Buy-Sell Agreement.

By the same token, if the TDA's term extends past Mr. Sheridan's departure from MHB, it would extend as to all terms, not just the fee provision. This would include the term requiring that Mr. Sheridan not do "any work or provide any professional advice except as a Director of MHB, and subject to this agreement." Ex. E ¶ 9. Of course, this is contrary to the premise of the issue, i.e., that Mr. Sheridan no longer has any capacity with the firm.

The undisputed evidence leads to but one interpretation of the TDA: as Chairman Ford admitted over and over again, neither the TDA nor any other contract governs the division of fees after Mr. Sheridan left MHB. Nor had Mr. Sheridan breached the TDA by refusing to pay MHB a larger share of the Tamosaitis fee, or in any other fashion. There is no evidence that Mr. Sheridan breached any contract with MHB, and its first cause of action for Breach of Contract should be dismissed.

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B. MHB's Breach of Covenant of Good Faith and Fair Dealing Claim Fails As a Matter of Law.

MHB's second cause of action is based on an alleged breach of the implied duty of good faith and fair dealing inherent in any contract. But an implied duty claim cannot be maintained separately from the terms of the contract in which the duty is implied. *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 177, 94 P.3d 945 (2004). Since the TDA does not govern in regard to fees generated after Mr. Sheridan left the firm, its implied duty of good faith likewise ends at that point. Mr. Sheridan breached no implied duty of good faith under the TDA by refusing to pay MHB a larger share of the Tamosaitis fee. Nor is there other evidence of any breach. MHB's second cause of action should be dismissed.

VI. CONCLUSION

For all of the foregoing reasons, the Defendants' Motion for Partial Summary Judgment should be granted, and MHB's First and Second Causes of Action dismissed.

DATED this 29th day of June, 2016.

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on the 29th day of June, 2016, a true copy of the foregoing was served on each and every attorney of record herein via King County E-Service:

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

DATED in Seattle, Washington, this 29th day of June, 2016.

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