The Honorable Patrick Oishi
Noted for Hearing: July 29, 2016, 9:00 a.m.
Opposition 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' OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff MacDonald Hoague & Bayless ("MHB") seeks partial summary judgment on three issues. None are warranted.

First, MHB asks the Court to grant summary judgment that Defendant Jack Sheridan breached the Transitional Directorship Agreement ("TDA") by not securing the agreements of his clients to accept representation by MHB once Mr. Sheridan joined the firm. But there is ample evidence – indeed it cannot be disputed – that Mr. Sheridan complied with that obligation in all respects. Indeed, MHB knew this at the time, and if it somehow "forgot" by the time it filed this suit, it could only be because it failed to maintain records of what had transpired.

Next, MHB asks for summary judgment that Mr. Sheridan "has a contractual obligation to divide fees between SLF and MHB for work performed prior to July 1, 2014, on a pro rata basis." Pl. MHB's Mot. for Partial Summ. J. (Dkt. No. 75; "MHB Motion") at 2:13-14. MHB

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contends that this ruling would apply to any client he brought from SLF to MHB, even if the fee was earned by SLF *after* Mr. Sheridan left MHB. However, as set forth in Sheridan's Motion for Partial Summary Judgment (Dkt. No. 53; "Sheridan Motion"), the particular clause on which MHB relies – and the TDA in general – only applies to fees collected while Mr. Sheridan was a stockholder of the firm, not after. The evidence on this issue is so overwhelming that Mr. Sheridan moved for summary judgment that the TDA applies only to fees collected during his tenure at MHB. But if he is *not* entitled to summary judgment on that issue, then at a minimum the evidence gives rise to a question of fact precluding summary judgment in favor of MHB.

Finally, MHB seeks summary judgment that if its remedy is limited to *quantum meruit* (a claim it has not even plead), then its recovery would still be a pro rata share of the contingent fee, citing *McNeary v. American Cyanamid Co.*, 105 Wn.2d 136, 712 P.2d 845 (1986). But *McNeary* is not a *quantum meruit* case; in that case both firms jointly represented the client through the conclusion of the case, and thus both were *contractually* entitled to a share of the contingent fee. The *McNeary* Court addressed only whether a fee splitting agreement between the firms was enforceable, or if the proportion of the work performed by each firm also had to be considered. The case has nothing to do with determining the reasonable value of the services rendered by the firms in that case. Nor does it have anything to do with the present case, where MHB did *not* represent the clients through the conclusion of the case, and its right to a fee is limited to *quantum meruit* rather than a contractual right. Case after case holds that the measure of *quantum meruit* – the value of the services rendered – in such cases is determined by reference to the firm's lodestar.

II. STATEMENT OF FACTS

As most of the facts relevant to the issues raised by the MHB Motion were articulated in support of the Sheridan Motion, Mr. Sheridan incorporates those facts and related declarations by reference. This section will summarize additional evidence generated through discovery.

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A. Mr. Sheridan Complied With the TDA Regarding Transfer of Clients From SLF to MHB When He Joined the Firm; MHB Did Not.

In its first cause of action, MHB claims that Mr. Sheridan breached Paragraph 7 of the TDA by failing to obtain the consent of SLF's clients to have MHB act as their counsel, and failing to amend or supplement the fee agreements to reflect the terms of that representation. First Am. Compl. (Dkt. No. 5) ¶¶ 3.4, 3.6, 4.3, 4.4. The same allegations form the basis in part for MHB's second cause of action for breach of the covenant of good faith, and third cause of action for breach of fiduciary duty. *Id.*, ¶¶ 4.9, 4.14.[1] MHB asserts that it is undisputed that (1) MHB fulfilled all of its obligations to Sheridan under the TDA, (2) that after Mr. Sheridan resigned it reviewed its agreements with the former SLF clients and could find no record of their consent or amendment of fee agreements (even though they knew full well that the firm had represented them for 18 months), and (3) that they asked Mr. Sheridan to provide them and that he did not respond. MHB Motion at 4 (¶¶ 5 & 6) & at 5 (¶¶ 9 & 10). MHB's brief implies that all this happened *before* it sued Mr. Sheridan for this alleged breach.

The evidence reveals that this claim should not have been plead, much less that MHB is entitled to summary judgment of breach. First, consider the full text of the clause at issue:

> 7. Notice to Clients: Jack Sheridan agrees to provide notice of his move to MHB to all current or past clients as required by law or ethics rules. *MHB will provide administrative assistance in the process as needed.* Mr. Sheridan will obtain consent from all active clients to have MHB act as counsel, and shall *amend or supplement* all client fee agreements to reflect the terms of the above representation agreement. [2]

Several points bear noting based on this clause, which MHB drafted. First, Mr. Sheridan did not have the power to compel his clients to consent to or to sign anything, but he could certainly ask. Second, neither the notice nor the client's consent had to be written. Third, no new fee agreement was required; rather, only an amendment or supplement sufficient to reflect the terms of MHB's

[1] While the breach of fiduciary duty claim in the First Amended Complaint also alleges a breach by failure to maintain funds in trust, that claim necessarily fails because once Mr. Sheridan left the firm, he was no longer an officer, director or shareholder, and thus no longer owed a fiduciary duty to MHB.

[2] 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. (Dkt. No. 54) ("Sheridan Decl."), Ex. E ¶ 7 (emphasis added).

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representation. Finally, it was *MHB's* responsibility to provide administrative support for the process. Once Mr. Sheridan gave notice, and requested consent and an appropriate amendment or supplement, it was not his job to track who had and had not responded, or to maintain the firm's records. That was MHB's responsibility which it apparently failed to perform (*see infra*).

Even MHB concedes, as it must, that Mr. Sheridan wrote to his clients, including Boyer, Chaussee and Tamosaitis, advising them of his new relationship with MHB, and asking them to acknowledge that MHB would be their new attorneys under the same terms as with SLF. Sheridan Decl. ¶ 11, Exs. F & G. The document that Mr. Sheridan and MHB asked each client to sign, prepared by both he and MHB, not only served to document the clients' consent, but also that the terms of MHB's representation would be on the same terms as with SLF:

> I, _____, acknowledge that Jack Sheridan has become a partner in the law firm of MacDonald, Hoague & Bayless, and that any monies that remain in trust with the Sheridan Law Firm, P.S., or monies that I pay in the future toward costs or fees in my case, will be transferred to the trust account of MacDonald, Hoague & Bayless. . . .
>
> I agree to become a client of MacDonald, Hoague & Bayless, and to permit the members of the firm to share attorney client privileged information. I also acknowledge that Jack will continue as my attorney, and that there is no change in the terms of our fee agreement.

Sheridan Decl., Exs. F & G, at 2. Mr. Sheridan spoke with Mr. Shaeffer, who confirmed that no further amendment or supplement to the fee agreements would be necessary.[3]

What MHB was *supposed* to do, administratively, for Mr. Sheridan's cases was process incoming mail and pleadings, scan any document received – correspondence, pleadings, etc. – so that there was an electronic record, and maintain the hard copy file. This included the responses to the notices sent by Mr. Sheridan. MHB should also have tracked which clients had responded and which did not, and let Mr. Sheridan know if any did not provide whatever documentation MHB wanted. Petrak Decl., Ex. A (Sheridan Dep.) at 184:23-187:21. At no time did MHB ever notify Mr. Sheridan that any clients had not signed the requested document. MHB does not

[3] Decl. of Keith D. Petrak in Opp'n to Pl.'s Mot. for Partial Summ. J. ("Petrak Decl."), Ex. A ("Sheridan Dep.") at 39:13-24.

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dispute that all of SLF's clients transferred their files to MHB, and that it represented them for 18 months without challenge or question by any of them. Simply put, Mr. Sheridan had no reason to think that any of his clients had not signed the document, or otherwise that they had not consented to MHB's representation.

When Mr. Sheridan left the firm, a number of clients opted in writing to have SLF take their cases, rather than remain with MHB. And when that happened, MHB's files were delivered to SLF. Presumably, MHB retained a copy of both the hard copy and electronic files. So when MHB sued him nineteen months later, Mr. Sheridan was surprised by allegations that he failed to procure his clients' consent to MHB's representation and its terms. At that time, MHB had not once raised any issue in that regard. To the extent MHB's motion implies that it asked Mr. Sheridan to provide copies of the fee agreement amendments or supplements prior to filing suit, that is not true. The email upon which MHB relies as proof of that request is dated April 4, 2016, nearly two months *after* MHB filed its complaint, in response to Mr. Sheridan's request that MHB explain the basis for those allegations. Decl. of Julia K. Doyle in Supp. of Pl. MHB's Mot. for Partial Summ. J. (Dkt. No. 74; "Doyle Decl."), Ex. A.

In response to discovery requests, Mr. Sheridan searched his files, *including the files that had been maintained by MHB and transferred to him when he left the firm!* In those MHB files, Mr. Sheridan found consent forms signed by every one of the clients, save one. Petrak Decl., Exs. B & A (Sheridan Dep.) at 38:4-44:2, 111:6-15. The only one not located was for Dr. Tamosaitis, but there is ample undisputed evidence that he, too consented in a fashion that met the terms of Paragraph 7 of the TDA. *Id.*; *see also* Petrak Decl., Ex. A (Sheridan Dep.) at 160:16-164:4; Supplemental Decl. of Jack Sheridan in Supp. of Defs.' Opp'n to MHB Mot. for Summ. J. ("Supplemental Sheridan Decl.").

The only way MHB could have missed these documents is if it (1) didn't scan copies of these documents when they were received, and/or (2) didn't retain copies of the electronic and hard copy files when Mr. Sheridan left, and/or (3) simply didn't thoroughly search them prior to

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filing suit. If the first, MHB breached Paragraph 7 of the TDA; if any of the three, MHB did not have a basis to bring the claim. As to Mr. Tamosaitis, if he signed and returned the document, MHB also breached Paragraph 7 of the TDA by not competently maintaining the files; if he didn't, then MHB breached by not letting Mr. Sheridan know that Mr. Tamosaitis' form had not been received.

B. MHB Recognizes That the TDA Does Not Apply to Fees Collected After July 1, 2014, When It Removed Mr. Sheridan As a Director.

MHB seeks summary judgment, that Mr. Sheridan has a contractual obligation under the TDA to "divide fees from any recovery in all matters he brought to MHB for all work performed prior to July 1, 2014, on a pro rata basis, based on the amount of hours spent by Sheridan and his staff on each matter before January 1, 2013, and the amount of hours spent by MHB on the same matter between January 1, 2013, and, at a minimum, July 1, 2014." MHB Motion at 7:15-20. MHB contends that Mr. Shaeffer "advised Mr. Sheridan that with respect to future fees, MHB and Sheridan 'had an agreement about this in place when [Sheridan] joined'" (by selectively excerpting Shaeffer's June 19, 2014 email). MHB Motion at 4 ¶ 8 (alteration in original) (citing Decl. of Joseph R. Shaeffer in Supp. of MHB's Mot. for Partial Summ. J. (Dkt. No. 73; "Shaeffer Decl.") ¶ 9 & Ex. C). MHB also claims that Shaeffer later "expressed his view that contingent fees should be allocated pursuant to the formula set forth in the TDA. MHB Motion at 4 ¶ 8.

Discovery has shed further light on this contention and reveals its duplicity. The relevant evidence begins almost a year earlier, six months after Mr. Sheridan joined the firm when he first indicated that he wanted to leave. Sheridan Decl., Ex. H. At that time, Mr. Sheridan proposed an agreement regarding how fees would be addressed on cases that produced a recovery after he left. At that time, he proposed that they jointly represent some clients, in which case the fees would be split 50/50 between the firms. On other cases, "MHB has an hourly interest in work

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done on cases – not a percentage (quantum meruit approach)." Sheridan Decl., Ex. I.[4] At no time did MHB respond, orally or in writing, to the proposal claiming that time that the TDA governed, and thus there was no need to reach a new agreement.

Mr. Sheridan was persuaded to stay, but ultimately decided to leave the following June. On June 19, he informed Shaeffer that he planned to leave on July 31,[5] to give ample time for the firm to make whatever arrangements it wanted to deal with the transition. Petrak Decl., Ex. C at MHB001224. Shaeffer's responding email, from which MHB selectively quotes, states "*We will need to discuss future fees generated by the cases. I think* we had an agreement about this in place when you joined." *Id.* (emphasis added). MHB quotes the non-italicized portion, so as to portray this as a definitive statement. But based on the preceding sentence and phrase "I think," a jury could infer this as an expression of uncertainty. If it was a definitive statement, there would be nothing to discuss.

A few days later, after he and Shaeffer met,[6] Mr. Sheridan addressed the notion that the TDA governed in a pithy email: "My reading of the [TDA] leads me to conclude that we were boneheads. We did not provide for what happens if we divorce, only marry." Petrak Decl., Ex. D at 41. After explaining his analysis, Mr. Sheridan then went on to address what was a *proposal* by MHB regarding how future fees would be allocated – pro rata, just as they had agreed for fees collected during his tenure at the firm in the TDA. He declined:

> [T]his is like indentured servitude. You sit back while I do all the work, pay the overhead that supports the work, front all the cash, and take all the risks, and if I win you may get a percentage payout that could be the lion's share of the fee recovery. I, in effect, continue in your employ without any benefits of employment until the last case is resolved—which could be years. It was a bad plan with my former partner and is not one I intend to repeat.

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[4] In deposition, MHB tried to get Mr. Sheridan to agree that the reference to "quantum meruit approach" was a description of word "percentage" that preceded the parenthetical. Mr. Sheridan didn't bite; he testified to the obvious: that "quantum meruit" described the full sentence and what he was proposing – i.e., an hourly interest, not a percentage. Petrak Decl., Ex. A (Sheridan Dep.) at 31:1 – 34:6.

[5] Mr. Sheridan did not ask to resign as a director effective July 1, and remain as an employee for another month, as MHB suggests. Rather, in response to his notice, MHB held a director's meeting without Mr. Sheridan and voted him out as a Director effective July 1. Petrak Decl., Ex. A (Sheridan Dep.) at 83:22-86:21.

[6] *See* Petrak Decl., Ex. A (Sheridan Dep.) at 87:11-93:15, 196:23-198:24.

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Id. at 42. He then explained the law absent an agreement – *quantum meruit* for MHB in which it would have an interest in its lodestar – and suggested that MHB would be better off reaching an agreement with him. He made two proposals: (1) that cases with immediate settlement value or which were being worked by other partners stay with MHB, and that the two firms walk away from each other's cases, or (2) that they partner on some cases, sharing the fee 50/50, and receive *quantum meruit* for those cases on which it did not partner (in the process, rejecting yet *another* proposal by MHB for a new agreement). *Id.* at 42-43. In Shaeffer's following email to the other MHB directors, he described his response: that instead of 50/50 on the *Hertz* case where Mr. Sheridan had proposed that both firms continue to represent the client jointly, he had argued that MHB be paid pro rata. There was no reference to the TDA or that it would apply as to cases where there was no joint representation going forward. *Id.* at 41.

Once Mr. Sheridan explained on June 22 why the TDA didn't control, MHB never argued the point further to Mr. Sheridan. An example is an email exchange with the MHB Director Kay Frank in late June, 2014, in which she recognized that a pro rata division of fees was only a proposal in regard to the *Hertz* case, where they were contemplating joint representation. Mr. Sheridan posed several questions, among others:

- Do we have an agreement regarding the 50/50 split for HP and Rufin?
- Is MHB walking away from any cases, or is your position that you get the hourly fee for time worked at MHB?
- Can you confirm that MHB no longer takes the position that it has an interest in the percentage of any recovery?

Petrak Decl., Ex. E at MHB001230. Ms. Kay's responses:

- It is my understanding that Katie does not want to continue with Rufin, but wants to talk further about continuing with the Hertz group.
- I don't believe we discussed that MHB would walk away from any cases.
- Re %, I don't think there is a final decision on that *and it would only apply to the Hertz case, right?*

Id. at MHB001128-29 (emphasis added); *see also* Petrak Decl., Ex. A (Sheridan Dep.) at 115:7-

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122:12, 130:11-131:17, 132:17-133:13.

As discussed in the Sheridan Motion, MHB's course of conduct thereafter corroborates that it did not contend that the TDA applied to fees collected after Mr. Sheridan left the firm. The *Boyer* case went to trial two months later, in September 2014, and resulted in a $75,000 verdict in favor of Mr. Boyer. 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. Sheridan Decl., Ex. P. MHB did *not* claim a pro rata share of the fee under the TDA, which would have been as much as $265,000, since the TDA fee allocation clause gives no pro rata credit to SLF for time its attorneys invested on the case after January 1, 2013. The *Chaussee* case went to trial eight months after Mr. Sheridan left MHB, in March 2015. 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! Id.* Ex. V. Once again MHB did *not* claim a pro rata share of the fee under the TDA, which would have been as much as $194,000.

Finally, in anticipation of settlement of the *Tamosaitis* lawsuit in federal court against URS, once again MHB submitted an accounting of the fee it sought – its hourly fees and costs, albeit also including time spent on an appeal of a separate case in state court of the dismissal of claims against a different defendant (BNI), which appeal was unsuccessful. *Id.*, 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. Id.*, Ex. JJ (Crawford Dep.) at 22:12-24:6, 24:25-25:16, 38:5-40:3. Nor did MHB in any way suggest to Mr. Sheridan that this was a compromise proposal; rather, it was submitted as its "Final Accounting." And when Mr. Sheridan responded that time spent on the BNI appeal was not compensable under *quantum meruit* – reasonable fees would not include those that could not be awarded as prevailing party fees by the court – MHB Director Crawford

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agreed with that analysis of MHB's right to compensation:

> Indeed – and [Mr. Sheridan's analysis] appears correct. My analysis was the same, and I certainly didn't speak with Jack about it: what would happen on a fee petition.

Petrak Decl., Ex. F.[7] Even then, MHB did not contend the TDA applied for several more months. Starting in 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 what he was belatedly trying to claim had been an ostensible "compromise." Ford repeatedly admitted that the issue was governed by principles of *quantum meruit*, not contract, and the only debate was what a *quantum meruit* recovery was:

> 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.

[7] Mr. Crawford left MHB last year, and gave MHB the opportunity to review his production before he produced it to Mr. Sheridan. Counsel for MHB "reserve[ed] its right to assert the claim of attorney-client privilege over portions of [the] materials…. [and] a claim of attorney work product doctrine over that portion of the documents which post-dates MHB's anticipation of litigation.…" but did not advise him what "portions" were affected, and "[left] it to [Mr. Crawford] to decide whether to disclose these documents to Mr. Sheridan." Petrak Decl., Ex. G at 1-2. Having received no direction not to produce any particular documents, and seeing no basis to withhold them, Mr. Crawford proceeded with the production. Even if this email were somehow privileged (it is not), by allowing the production, MHB waived that privilege. *State v. Ackerman*, 90 Wn. App. 477, 486-87, 953 P.2d 816 (1998) (privilege waived if there is voluntary disclosure of privileged communication to third party) (*citing State v. Warner*, 125 Wn.2d 876, 892 n.8, 889 P.2d 479 (1995). After the hearing regarding MHB's request for a prejudgment writ of attachment, where MHB objected to the introduction of this document on grounds of privilege, Mr. Crawford communicated further with his former partners: "If [MHB's counsel] believed any particular document was privileged, or was work product, then she should have said so. It is not up to me to guess. I produced them to Sheridan *after* receiving this message." Petrak Decl., Ex. G. Mr. Ford's response: "Clearly you did nothing wrong by producing these documents after giving our lawyer the chance to review them *and getting the green light from her to do so.*" *Id.* (emphasis added). Any right to assert a claim of privilege or work product was waived when MHB gave Mr. Crawford the "green light" to produce the documents.

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* * *

> *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.

Sheridan Decl., Ex. FF at 14, 12, 6, 2 (emphases added). Significantly, even internally, no one suggested at that time that the TDA governed the issue. *Id.*, Ex. JJ (Crawford Dep.) at 26:1-10.

III. STATEMENT OF ISSUES

1. Did Mr. Sheridan breach the notice to clients provision of the TDA? No; indeed, as a matter of law he performed, and MHB's breach of contract, bad faith and fiduciary duty claims should be dismissed to the extent predicated on this allegation.

2. Does the TDA govern the allocation of fees generated after Mr. Sheridan left MHB? No. The overwhelming undisputed evidence is that it did not. The Court should grant Mr. Sheridan's motion for partial summary judgment in this regard. At the very least, questions of fact preclude summary judgment in MHB's favor on this issue.

3. Under *quantum meruit*, is MHB entitled to a pro rata allocation of the contingent fee pursuant to *McNeary v. American Cyanamid Co.*, 105 Wn.2d 136, 712 P.2d 845 (1986)? No. *McNeary* is not a *quantum meruit* case. Ample case law establishes that *quantum meruit* recovery in such circumstances is limited to the firm's reasonable lodestar?

IV. EVIDENCE RELIED UPON

1. Declaration of John P. Sheridan in Opposition to Plaintiff's Motion for Prejudgment Writ of Attachment and in Support of Defendants' Motion for Partial Summary Judgment (Dkt. No. 54);

2. Declaration of Keith D. Petrak in Opposition to Plaintiff's Motion for Partial Summary Judgment;

3. Supplemental Declaration of John P. Sheridan;

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4. Testimony of Mel Crawford;[8] and

5. The record herein.

V. ARGUMENT

A. Mr. Sheridan Did Not Breach the TDA's "Notice to Clients" Clause.

As set forth above, the evidence of Mr. Sheridan's performance – to the letter – with Paragraph 7 of the TDA regarding notice to his clients cannot be disputed. He gave each client the required notice, in writing even though the TDA did not require that. He got each client's consent to MHB's representation in writing, even though the TDA did not require that. And the document each signed served to amend or supplement the existing fee agreements to confirm the terms of MHB's representation. The only client for whom that document is missing is Dr. Tamosaitis, and that this document cannot be located falls squarely at MHB's feet, either for misplacing it, or for not notifying Mr. Sheridan that it had been not been returned signed. In any event, there is ample evidence of Dr. Tamosaitis' agreement on all required matters by declaration.

Not only should the Court deny MHB's motion in this regard, but in light of the undisputed evidence, the Court should further dismiss MHB's various claims to the extent predicated on this clearly false allegation.

B. The TDA Does Not Apply to Fees Collected After July 1, 2014.

MHB's motion for summary judgment that any fees collected on cases Mr. Sheridan brought to MHB – even if collected long after Mr. Sheridan left the firm – should be denied for the reasons set forth in the Sheridan Motion. Rather than repeat those arguments here, Mr. Sheridan incorporates the arguments in that brief by reference. To summarize, the overwhelming evidence of the context in which the TDA was prepared and signed, of the negotiations that preceded its execution, the language of the document itself,[9] and the parties' subsequent conduct,

[8] As the Court has recognized is permitted, Mr. Sheridan reserves the right to call Mr. Crawford to testify briefly at the summary judgment hearing.

[9] *See also* Petrak Decl., Ex. A (Sheridan Dep.) at 21:2 – 27:22.

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is that the parties did not intend the TDA to apply to fees collected after Mr. Sheridan left the firm. Further evidence generated through discovery, as discussed above, only corroborates that intent. The Court should grant Mr. Sheridan's motion. But if the Court denies that motion, then the evidence Mr. Sheridan offered in support of it, as supplemented in this response to the MHB motion, creates questions of fact that preclude granting MHB's motion in this regard.

C. MHB's Recovery in *Quantum meruit* – Which Claim It Has Not Pled – Is Limited to Its Lodestar, and Is Not Based on the Contractual Contingent Fee.

The final issue on which MHB seeks summary judgement is that *if* its recovery is limited to *quantum meruit*, then *as a matter of law* it is still entitled to a pro rata allocation of the contingent fee under that doctrine, citing *McNeary v. American Cyanamid Co.*, 105 Wn.2d 136, 712 P.2d 845 (1986) and the factors set forth in RPC 1.5(a).

MHB's argument has many flaws, starting with the fact that it has not even pled a claim for recovery in *quantum meruit*. Its pleads claims for breach of the TDA, breach of the covenant of good faith and fair dealing, breach of fiduciary duty, for an accounting, for declaratory relief, for unjust enrichment and for constructive trust. Nowhere in the eleven pages of MBA's complaint – not once – is the phrase "*quantum meruit*" uttered, much less a claim pled. This is likely because MHB does not have a *quantum meruit* claim against Mr. Sheridan; such a claim lies only against the client, Dr. Tamosaitis. But the fact that MHB did not even seek to recover in *quantum meruit* is further evidence that its recovery under that theory is not as it now contends; if it were, MHB would have plead the claim. In any event, MHB cannot seek summary judgment on a claim it has yet to plead, and its motion should be denied on this basis alone.

But MHB's problems with this argument hardly end there. When Mr. Sheridan left MHB, and various clients signed forms electing in writing to have him continue handling their cases instead of MHB, those clients terminated MHB as counsel. *See Barr v. Day*, 124 Wn.2d 318, 329, 879 P.2d 912 (1994) (citing *Belli v. Shaw*, 98 Wn.2d 569, 577, 657 P.2d 315 (1983)) (no special formality is required to discharge attorney; any act of client indicating unmistakable

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purpose to sever relations is sufficient). It has long been the law in Washington that a client may discharge his attorney at any time with or without cause. *Id.* (citing *Kimball v. Pub. Util. Dist. No. 1*, 64 Wn.2d 252, 257, 391 P.2d 205 (1964)). Where that occurs in the context of a contingent fee agreement prior to when the fee is earned, it is also well settled that the attorney is not entitled to the contractual contingent fee (having not satisfied the contract), but rather only to the reasonable value of the services rendered – i.e., *quantum meruit*. *Id.* (citing *Ross v. Scannell*, 97 Wn.2d 598, 647 P.2d 1004 (1982) and *Ramey v. Graves*, 112 Wash. 88, 91, 191 P. 801 (1920)); *see also Belli*, 98 Wn.2d at 577 n.1.[10] *Quantum meruit* means "as much as he deserves" and is premised on desirability of avoiding unjust enrichment, such that the law implies a promise to pay a reasonable amount for labor and materials in the absence of an express obligation to do so. *Barr*, 124 Wn.2d at 330 n.3.

This is the majority rule in the United States, and the cited policy reason for permitting only *quantum meruit* recovery by a lawyer discharged on a contingent fee basis is to protect the client's critically important right to terminate the lawyer without question.[11] "The right to discharge is of little value if the client must risk paying the full contract price for services not rendered upon a determination by a court that the discharge was without legal cause. The client may frequently be forced to choose between continuing the employment of an attorney in whom he has lost faith, or risking the payment of double contingent fees equal to the greater portion of any amount eventually recovered. . . . Unless [such attorney's compensation is limited to] the

[10] The only exception is where the attorney is discharged so close to the point that the fee was earned so as to be deemed to have substantially performed the contract; in such cases the contractual contingent fee is due. *See, e.g.*, *Taylor v. Shigaki*, 84 Wn. App. 723, 728-30, 930 P.2d 340 (1997) (client may not deprive lawyer of contingency fee by discharging him just short of completion of contract, and where lawyer has substantially performed the fee is earned). MHB does not assert that it substantially performed its contract in regard to any of the clients that elected Mr. Sheridan as their counsel over MHB.

[11] George L. Blum, Annotation, *Limitation to Quantum Meruit Recovery Where Attorney Employed Under Contingent-Fee Contract Is Discharged Without Cause*, 56 A.L.R. 5th 1 (2000) (cites cases from 29 states and numerous federal courts which support the rule); *see also*, Tiffanie S. Clausewitz, *On the Trail to Increased Client Protection: Attorney Contingent Fee Contract Termination in Light of Hoover v. Walton*, 39 St. Mary's L.J. 539, 548 (2008); *see, e.g., Fracasse v. Brent*, 6 Cal.3d 784, 494 P.2d 9 (1972); *Trend Coin Co. v. Fuller Feingold & Mallah, P.A.*, 538 So. 2d 919 (Fla. Dist. Ct. App. 1989); *Plaza Shoe Store, Inc. v. Hermel, Inc.*, 636 S.W.2d 53 (Mo. 1982); *Adkin Plumbing & Heating Supply Co. v. Harwell*, 606 A.2d 802 (N.H. 1992).

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reasonable value of services rendered to the time of discharge, clients will often feel required to continue in their service attorneys in whose integrity, judgment or capacity they have lost confidence." *Fracasse*, 494 P.2d at 12-13.

Citing *McNeary*, MHB asks the Court to hold as a matter of law that its *quantum meruit* recovery should nevertheless still be a pro rata share of the contingent fee – i.e., its contractual fee under the contingent fee agreement prior to when the clients discharged MHB. This contention, of course, flies in the face of the policy rationale for limiting its recovery to *quantum meruit*. Thus, it comes as no surprise that *McNeary* does *not* support this argument, **because *McNeary* is not a *quantum meruit* case!**

In *McNeary*, a Minneapolis firm (Kantor) represented a client in a medical malpractice case, but when settlement efforts were unsuccessful, engaged a Seattle firm to jointly represent the client in the ensuing lawsuit. They expected to share the work equally and agreed to split the fee 50/50. The client signed a new retainer agreement engaging *both firms*, agreeing to pay a 40% contingent fee. *McNeary*, 105 Wn.2d at 139. Neither firm was ever discharged; while Sullivan tried the case, Kantor attended, conferred with Sullivan and the client, and assisted in preparing witnesses. *Id.* at 140. However, the work division was not close to 50/50 as had been originally contemplated. After a successful trial, the case settled, resulting in a contingent fee of $382,000. *Id.* at 140-41.

Thus, having never been discharged, Kantor had a *contractual* right to a share of that contingent fee. Its recovery was *not* limited to *quantum meruit* since it continued to represent the client when the fee was earned and the contract satisfied. Indeed, the trial court found, and the Supreme Court affirmed, that Kantor "retained ongoing responsibility to the clients and rendered ongoing services in processing the handling [of] the case." *Id.* at 141. The issue addressed by the *McNeary* court was not what Kantor should be paid in *quantum meruit*; it was whether to enforce the 50/50 fee sharing agreement. Under the facts of that case, the Court held that dividing fees between firms "jointly participating in handling a case" must take into account the proportionate

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shares of services; if there was a "substantial division of services" the fee sharing agreement could be enforced even if the agreed division was not directly proportional to the work performed by each." *Id.* at 142.

McNeary addressed fee sharing between firms who *jointly* represented a client and satisfied the contractual contingency entitling them to a fee. It has nothing to do with what a predecessor attorney discharged prior to satisfying the contractual contingency is entitled to recover in *quantum meruit*. In such cases the fee is not a function of the amount recovered or the contingent fee under the contract, but rather is limited to the reasonable value of such attorney's services. Indeed, several cases suggest that *McNeary's* proportional standard effectively giving the discharged attorney an interest in the contingent fee would *not* apply in such cases.

For example, in *Barr v. Day*, 124 Wn.2d 318, 879 P.2d 912 (1994), an client hired an attorney on a contingent fee basis, but discharged the attorney well before any recovery was made. However, when the discharged attorney threatened to delay the case in chief by litigating whether he was entitled to a contingent fee or *quantum meruit*, the successor attorney associated the former attorney "apparently … to guarantee him a share of any resulting contingency fee." *Id.* at 329-330 & n.2. The *Barr* court held that the client had effectively discharged the attorney, that the attorney had not substantially performed the contingency when he was discharged, and that there was "no colorable basis for the 'fee split dispute.'" *Id.* at 328-30 & n.1. It limited the discharged attorney's recovery to *quantum meruit. Id.* at 330.

Similarly, in *Ross v. Scannell*, 97 Wn.2d 598, 647 P.2d 1004 (1982), an attorney agreed to represented a client to enforce a real estate purchase and sale agreement for a contingent fee based, in part, on any commission or finder's fee the client might receive upon the eventual sale of the property in question. The trial was successful; the court ordered specific performance and awarded $32,000 in damages. However, additional work was necessary in order to complete the acquisition. Due to a dispute about what fee would be owed when the property later sold (the attorney claimed a right share in the profits of a sale, not just the commission), the attorney

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withdrew before the client acquired title, and other counsel finished the acquisition. The attorney sued to recover the full contingent fee, including his claimed interest in the profits from the sale of the property. The court held that the attorney had not substantially completed the contingency, that the term "damages" in earlier cases discussing what an attorney discharged before completing the contingency was entitled to was "inexact," and that appropriate term was a "recovery" of reasonable value of the services rendered. *Id.* at 608-09.

MHB cites not one case where predecessor counsel discharged before satisfying the contractual contingency was nevertheless entitled to an interest – pro rata or otherwise – of a contingent fee earned by successor counsel. Nor does MHB cite a case holding that predecessor counsel is entitled, in *quantum meruit*, to any multiplier or other enhancement to the firm's lodestar. The *quantum meruit* fee awarded in every Washington case Mr. Sheridan has found that reflects the fee awarded was limited to the firm's lodestar, as best as could be determined based on the evidence. *See, e.g.*, *Kimball*, 64 Wn.2d at 256-58; *Krein v. Nordstrom*, 80 Wn. App. 306, 308-09, 311, 908 P.2d 889 (1995) (trial court did not abuse discretion in determining lodestar based on evidence);[12] *cf. Plaza Shoe Store, supra*, 636 S.W.2d 53 (holding that discharged attorney may recover only in *quantum meruit*, as determined based on hours and rates).

Should MHB pursue a quantum meruit recovery in the course of this case, its recovery is not measured by what the client received or the contingent fee; it is measured by the reasonable value of the services MHB rendered in support of the recovery made on behalf of the client in question. Obviously, RPC 1.5 would apply to limit recovery of *unreasonable* fees – e.g., in the case of *Tamosaitis v. URS*, fees for time spent on an unsuccessful appeal of the dismissal of a different defendant, that can be easily segregated from work that related both to those claims and to claims against URS that settled. But the reasonable value of that work is a different question

[12] *See also Rogers Walla Walla, Inc. v. Ballard*, 16 Wn. App. 92, 99-100, 553 P.2d 1379 (1976) (in noncontingent fee case, court set fees "apparently on a quantum meruit basis, i.e., on the basis of billable hours times the rate of the [person] doing the work. We believe that both the method of setting the fees and the amount awarded were reasonable.")

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than whether a contingent fee – which often can substantially exceed a lodestar calculation – is reasonable under RPC 1.5's various factors. MHB did not meet the contractual contingency for any of the clients who chose Mr. Sheridan as counsel over MHB. It is not entitled to a share of any contingent fee from any recovery for those clients, and RPC 1.5(a)'s factors as would be applied to a contingent fee would not apply in such cases.

VI. CONCLUSION

For all of the foregoing reasons, MHB's Motion should be denied. The Court should dismiss as a matter of law MHB's contract, good faith covenant and fiduciary duty claims to the extent based on an alleged breach of the Notice to Clients section of the TDA. It should deny MHB's motion that Mr. Sheridan has a contractual obligation under the TDA to pay MHB a pro rata share of contingent fees earned after Mr. Sheridan left the firm, and grant Mr. Sheridan's motion on the same issue, dismissing MHB's First and Second Causes of Action in their entirety. Finally, the Court should deny MHB's motion that its *quantum meruit* recovery is governed by *McNeary*, or for any other reason should be a pro rata share of contingent fees earned by Mr. Sheridan after leaving MHB.

DATED this 18th day of July, 2016.

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on the 18th day of July, 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 18th day of July, 2016.

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