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**MENARD DEFENDANTS' MEMORANDUM  
OF LAW IN SUPPORT OF THEIR MOTION  
FOR PARTIAL SUMMARY JUDGMENT TO  
DISMISS ALL OF PLAINTIFF'S CLAIMS  
BY WHICH SHE SEEKS A PORTION OF  
JOHN MENARD'S NET WORTH OR  
ASSETS, OWNERSHIP INTERESTS IN  
THE MENARD COMPANIES, OR ANY  
PART OF THE INCREASE IN VALUE  
OF THE MENARD COMPANIES**

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**INTRODUCTION**

The Menard Defendants move to dismiss all of Plaintiff's claims, regardless of legal theory, by which she seeks to recover a portion of John Menard's net worth or assets, ownership interests in the Menard companies, or a portion of the increase in the value of the Menard companies. To be clear, if Plaintiff provided uncompensated legal or other services to the Menard Defendants, then she, like any lawyer, can seek to recover reasonable fees – measured by the time actually incurred multiplied by an appropriate hourly rate. The Menard Defendants are not seeking to dismiss any such claims. But Plaintiff **cannot** recover a portion of her client's net worth or any increase in the value of Menard, Inc. ("Menard") for the following three reasons, any one of which defeats her claims.

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**Second**, to prevail on a claim under *Watts v. Watts*, 137 Wis.2d 506, (1987), for an equitable division of

assets accumulated during a period of alleged cohabitation, a plaintiff must demonstrate that she had a “joint enterprise” with the defendant. In this case, there was no such joint enterprise between Plaintiff and John Menard, as a matter of law. Rather, Plaintiff had an express contract with Menard to be paid for her services at \$145 per hour, which contract bars her equitable claims for unjust enrichment and quasi-contract under *Watts*. (*See infra* at 13-22.)

In addition, none of the *indicia* identified in *Watts* for establishing a joint enterprise are present here. The undisputed facts show that Plaintiff (1) did **not** cohabit with John Menard, (2) did **not** commingle her finances with him, (3) did **not** jointly purchase property with him, (4) did **not** share expenses with him, and (5) did **not** act as if she had a joint enterprise. (*See infra* at 27-33.) Indeed, with regard to the crucial claim that she cohabited with John Menard, Plaintiff has instead repeatedly sworn under oath, throughout the period 1998 through 2006, that her “home,” “primary residence,” and “principal residence” was Eleva, where she lived with her sister and her mother. There can be no cohabitation, as a matter of law, where Plaintiff maintained a separate residence.

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### **UNDISPUTED FACTS**

#### **I. JOHN MENARD AND THE SUCCESS AND GROWTH OF MENARD, INC.**

John Menard, the oldest of eight children, grew up on a dairy farm outside of Eau Claire, Wisconsin. (*See*

John Menard Dep. at App-772<sup>1</sup>.) In 1958, at age 18, he began building pole barns to work his way through college at the University of Wisconsin – Eau Claire. (*Id.*) Two years later, in 1960, he opened his first retail store, known as Menards Cashway Lumber, which initially sold the excess parts from his pole barn business. (*Id.*) At that time, John F. Kennedy had just become the 35th President, Vince Lombardi was in his second year as the Packer’s coach, gas was 25 cents/gallon, Burt Lancaster won the Academy Award for Best Actor in *Elmer Gantry*, and Ford discontinued the Edsel. Debra Sands was in diapers.

Upon graduation from college, John Menard turned down a lucrative offer from IBM, and devoted his time, energy, resources, and talents to his fledgling retail business. (*See* 1/12/07 Arbitration Tr. at App-243.) Over the next 50 years that business, which became Menard, Inc., steadily grew – one two-by-four, hammer, and light fixture at a time – to over 260 stores in 13 states with over 40,000 employees. (*See* Liupakka Aff. at ¶ 2:App-357.) Menard has succeeded in a fiercely competitive retail market because it has never lost sight of the simple, old-fashioned principle on which John Menard founded the company: provide quality products and services to customers at the *lowest*

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<sup>1</sup> Citations to the record are identified as “App-\_\_\_”, referring to specific page numbers of the Menard Defendants’ Appendix filed herewith. The Menard Defendants’ Appendix also contains the Affidavit of Andrew C. Nordahl, which attaches true and correct copies of the referenced materials.

possible price. “Save big money at Menards” is more than a sales slogan; it is Menard’s corporate philosophy.

Moreover, in an age typified by debt-ridden, over-leveraged and extended conglomerates, expensive high-rise offices, and Wall Street mergers and takeovers, Menard is a welcome throw-back. It is a privately held, hard-working, family-owned business that has no debt, self-funds its steady, organic growth, and continues to operate out of Eau Claire, Wisconsin. It is led by the example of John Menard, who for most of the last 50 years worked 12 to 16 hour days, 6 or 7 days a week, and takes only 7 days of vacation a year. *See Menard, Inc. v. Commissioner of Internal Revenue*, 560 F.3d 620, 623 (2009) To this day, John Menard still personally responds to customer complaints, which is one way he keeps his finger on the pulse of the business. And, like many fathers, it has long been John Menard’s goal to pass his business on to his children. (*See Webster Hart Dep. at App-632-633.*) As a result, most of the Menard stock is held in irrevocable trusts for their benefit. (*Id.* at App-643, 646-647.)

By hard work and unwavering adherence to this simple business model, stockholder equity in Menard has grown steadily in each year of its existence. (*See Liupakka Aff. at ¶ 2:App-357.*) While other home improvement retailers have come and gone (*e.g.*, Builder’s Square, Forest City, Handy Andy, and National Lumber) over the past 50 years, Menard has weathered seven recessions, an oil embargo, fires, credit crises, stock market crashes, housing market busts and booms, and

other economic calamities to become the third largest home improvement chain in the nation.

## **II. DEBRA SANDS AND HER FAILING BUSINESSES**

By 1998, Menard had steadily grown to approximately 138 stores, had revenues of \$3.8 billion, and a rate of return of approximately 18.8%. (*See* Liupakka Aff. at ¶ 2:App-357.) With the nation entering a housing boom, Menard was well positioned for continued market-driven growth. At or about this time, nearly 40 years *after* starting his business, John Menard met and began dating Debra Sands, an attorney, who was then 37 years old. (*See* Pit's. Second Am. Cmplt. at ¶ 10:App-41; Debra Sands Dep. at App-876.)

Debra Sands graduated from William Mitchell College of Law in 1993, and was admitted to practice in Minnesota. (*See* Debra Sands Dep. at App-945.) When she met John Menard, she and her sister, Dawn Sands, were operating two businesses: (1) Prima Group I, which provided political and marketing consulting services, and (2) Prima Trading, which sold gourmet coffee. (*See* Pit's. Second Am. Cmplt. at ¶ 11:App-41.) Immediately prior to law school, Plaintiff had worked in Washington, D.C. for the National Republican Senatorial Committee for approximately five years. (*See* Debra Sands Dep. at App-845-849.) Before that, she had worked in her family's printing business, Eagles Printing. (*Id.*) And prior to that, she had attended the University of Wisconsin – Eau Claire, from which she graduated in 1982 with a B.A. in English. (*Id.*)

In other words, Plaintiff had no background or experience with Menard or in home improvement retailing or merchandising, had never managed a business with revenues in excess of a few thousand dollars a year, and there is no evidence that she ever ran a register or stocked a shelf. She was a lawyer.

In contrast to Menard, Plaintiff's businesses were failing when she met John Menard. She had never billed an hour as a lawyer and had no clients. (See Debra Sands Dep. at App-852-857.) Prima Group had no business or reputation in the political consulting industry. (Olson Dep. at App-802-804; Cottingham Dep. at App-616-617.) Witnesses who were familiar with the Sands sisters from the unsuccessful re-election campaign of Jim Harsdorf, testified that they were not team players and that they would neither hire nor recommend them to run a campaign or raise funds. (See Olson Dep. at App-807-810; Cottingham Dep. at App-620-621.) In fact, from 1995 to 1997, Prima Group and Prima Trading provided Plaintiff with a combined net **loss** of \$2,373. (App-1101, 1111, 1118.) Eagles Printing, the Sands family printing business, was struggling as well, showing no taxable income for the years 1997 and 1998. (See App-1814, 1830.)

In sum, by 1998, Plaintiff and her businesses were in poor financial condition and needed a cash infusion. They would soon find it. Over the course of the next eight years, Menard would hire Dawn Sands as in-house legal counsel, buy in excess of \$500,000 in gourmet coffee from Prima Trading, and purchase in excess of \$3,800,000 in printing services from Eagles Printing.

(*See infra* at 25-27.) As for Debra Sands, Menard or a Menard vendor would pay her in excess of \$385,000 for legal services and she would bill Menard for another \$1,000,000 in legal fees. (*Id.*)

### **III. THE ENGAGEMENT AND NEGOTIATIONS FOR A PRE-MARITAL AGREEMENT**

In December 1998, Debra Sands and John Menard became engaged and began negotiating a premarital agreement, which was a condition to any marriage. (*See* Plt's. Second Am. Cmplt. at ¶ 15:App-42; Hart Dep. at App-632-33; John Menard Dep. at App-797.) At the outset of these negotiations, Webster Hart, John Menard's counsel, told Debra Sands that Menard, and related business entities, would pass to the children and would *not* be part of any premarital agreement. Rather, she would get a cash payment based on the years they were married:

The one thing that sticks in my mind is the fact that I told her that it was John's intention that the business, Menard, Inc. and the related entities, would pass to his children, and she told me that she understood that, and so we then had that basis to go forward with some prenup planning.

And then we talked about the kind of compensation to her, or not the compensation, but a payment to her based on the length of time of the relationship. And so if they were together

for two years, it would be this. If it was four years, it would be that and so forth.

(Hart Dep. at App-632-33.)

At a later meeting, Mr. Hart reiterated to Steve Rubin, Debra Sands' lawyer, that "Menard businesses" were "not something that was going to be considered" in a premarital agreement, because they were going to the children:

Well, John Menard's plan has always been that his children would be the beneficiaries of the Menard assets. They would – his desire in life is to have his children work at the company, grow the company, be the company. And from long before Deb got into the picture, that was the plan. That was the way his estate plan was structured. That's the way he wanted it.

And so it was important when we're talking about somebody that was going to be his wife, this is a time as you know, Mr. Menard was not married, it was important that that be something that everybody understood. I wanted to make sure that Steve Rubin understood that, and he did.

(*Id.* at App-637.) And Debra Sands' good friend, Tomisue Hilbert, testified that Debra Sands told her that John Menard "had set up all kinds of different trusts, and that everything was going to the kids." (T. Hilbert Dep. at App-697-698.) As result, Debra Sands understood that "the only thing she was ever going to get was going to be what was going in the prenup." (*Id.* at App-694.)

To this end, Debra Sands provided two draft premarital agreements to John Menard, the first on October 28, 1999, the second on June 28, 2001. (*See* App-989-990, 1602.) Consistent with Mr. Hart's testimony, in each of these drafts Debra Sands proposed that in the event of a divorce she would receive a lump-sum payment from John Menard that would increase for each year they were married. (*Id.*) In particular, she proposed to receive \$3 million if they divorced after one year scaling up to \$42 million if they divorced after 15 years of marriage. (*Id.*) According to Plaintiff, John thought these proposals were "completely 'ridiculous.'" (Plt's. Aff. at ¶ 18:App-349-350; Deb Sands Dep. at App-955.)

In addition to the lump sum payment, Plaintiff wanted to make sure that she would be separately "paid for the legal work that she was doing." (Hart Dep. at App-633-34.) So, the draft agreements she prepared also included the following provision:

In the event that Deb works for Menard's or another of John's entities, she would receive a fair compensation which would be independent of premarital agreement, and would not be considered an advance under the agreement.

(*See* App-989-990, 1602.) Each of the drafts also provided that:

**Gifts** – If John were to make a large gift or other lifetime transfer to Deb, such as real estate, Menard's stock, etc., John and Deb could agree that the gift would be treated as an

advance against payments under the premarital agreement.

(*Id.*) Plaintiff has admitted that the only way she would be able to obtain shares in Menard under her draft agreements was if John Menard “gift[ed] them to her,” which was completely in his discretion. (*Id.*; Debra Sands Dep. at App-948-949.)

Plaintiff actually executed the second draft agreement containing all of these terms, and has testified that it was acceptable to her. (*See* App-1602; Debra Sands Dep. at App-952.) In the cover letter accompanying this agreement, Plaintiff told John Menard that his signing of this agreement would be “a great gesture of love and faith on your part; I understand that and will reward that.” (App-952.)

Plaintiff now concedes that her draft agreements are “inconsistent” with her current claim of a joint enterprise with John Menard to obtain ownership in his companies. (*See* Debra Sands Dep. at App-887-889.) Indeed, they prompt several obvious questions: If Plaintiff already had an agreement with John Menard to share assets then why did she (1) draft these agreements at all, (2) not mention in either of them her alleged joint enterprise with John Menard, (3) provide that the only method by which she could obtain shares in Menard was through a “gift” by John Menard, and (4) negotiate a provision to receive “fair compensation” for work that she now claims she was providing as part of a joint enterprise?

Despite years of negotiations involving lawyers, a professional mediator, and friends, John Menard and Debra Sands could not agree on the terms of a premarital agreement. (See John Menard Dep. at App-755-759.) As a result, they never wed and ceased having any relationship at all by no later than Spring 2006. (See Plt's. Second Am. Cmplt. at ¶ 60:App-49.)

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**VI. JOHN MENARD AND PLAINTIFF DID NOT LIVE TOGETHER AS HUSBAND AND WIFE, BUT MAINTAINED SEPARATE RESIDENCES, AND DID NOT COMINGLE THEIR FINANCES OR JOINTLY OWN PROPERTY**

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As a consequence, Plaintiff made certain that she did not live with John Menard at his home in Eau Claire, instead intentionally maintaining a separate residence in Eleva with her mother and sister. This is clear from the multiple admissions and sworn statements that she made to third-parties throughout the period that she dated John Menard. She also assiduously avoided any comingling of her finances with John Menard and purchased property in her name alone. (See *infra* at 29-32.)

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**C. JOHN MENARD AND DEBRA SANDS KEPT THEIR FINANCES COMPLETELY SEPARATE AND PLAINTIFF WAS NOT RESPONSIBLE FOR ANY LOSSES AT MENARD**

Finally, John Menard and Debra Sands also kept their finances completely separate. They filed separate federal and state tax returns. (*See* Debra Sands Dep. at App-873.) They were each responsible for their own credit cards. (*Id.* at 873-874.) And they not only maintained separate bank and checking accounts, but Plaintiff did not even discuss the amounts of money in her accounts with John Menard. (*Id.* at App-872-873.)

As for assets, Plaintiff and John Menard did not jointly purchase any property. (Debra Sands Dep. at App-873.) In fact, the only property of significance that Plaintiff purchased during the period that she dated John Menard was her mother's house, and she vehemently denies that John Menard has any ownership interest in that house, despite her claim that they had a joint enterprise at that time. (*Id.* at App-863-864.) And in 2005 when John Menard purchased a new Ford Mustang as a gift for Plaintiff, it was registered in her name alone. (App-1803-1804.)

Apart from lacking the traditional *indicia* of a joint enterprise (*i.e.*, joint bank accounts, jointly owned property, a shared residence, shared living expenses, etc.), Plaintiff lacks one more indispensable element – sharing risk. While Plaintiff claims that she had a partnership with John Menard, she has repeatedly testified that she would not be responsible for any losses

of this partnership. (Debra Sands Dep. at App-892, 967-969.) She claims that her joint enterprise was limited to sharing gains, and if any losses occurred they would be John Menard's responsibility. (*Id.*)

**ARGUMENT**

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**II. PLAINTIFF DID NOT HAVE A JOINT ENTERPRISE WITH JOHN MENARD**

In order to recover a portion of John Menard's assets, Plaintiff *must* prove that she had a joint enterprise with him to accumulate such assets through their joint efforts. Without a joint enterprise, Plaintiff is no different than any other lawyer or vendor, who claims that they were not paid for their services and can recover for the value of such services under traditional *quantum meruit* theories. But they cannot obtain an equitable division of the assets accumulated during the period that the services were provided.

**A. WATTS REQUIRES A JOINT ENTERPRISE TO ACCUMULATE ASSETS BEFORE THERE CAN BE ANY DIVISION OF SUCH ASSETS**

This court made clear long ago that the key to an unjust enrichment claim under *Watts* is the existence of a joint enterprise. (7/22/10 Hearing Tr. at 83-85:App-257.1-257.3.) Without a mutual undertaking to accumulate assets through the joint efforts of two cohabiting parties, there is *no* legal or equitable basis to

divide such assets. *Watts*, 137 Wis.2d at 529, 405 N.W.2d at 529. Regardless of the legal theory – breach of contract, promissory estoppel, or unjust enrichment – “*Watts* stands for the proposition that a party seeking a division of assets following a period of cohabitation **must provide evidence of a shared enterprise.**” *Ward v. Jahnke*, 220 Wis.2d 539, 549, 583 N.W.2d 656, 660 (Ct. App. 1998) (emphasis added); see also *Watts*, 137 Wis.2d at 529, 405 N.W.2d at 529; *Ulrich v. Zemke*, 2002 WI App 246 ¶ 11, 258 Wis.2d 180, 654 N.W.2d 458 (holding that “the party claiming unjust enrichment must show that the parties engaged in a joint enterprise or mutual undertaking to accumulate assets”); *Wagge v. Borer*, 188 Wis.2d 324, 330-31, 525 N.W.2d 96, 98-99 (Ct. App. 1994).

Thus, the provision of services alone, without such a joint enterprise, is not enough to support a claim under *Watts* for a division of assets:

[Counter-Plaintiff’s] case to the jury was that [Counter-Defendant] retained a benefit because of her uncompensated housekeeping efforts made in contemplation of marriage. Under *Watts*, her case must fail. [Counter-Plaintiff] presented absolutely no evidence of assets accumulated during their relationship. Without such evidence, we read her case to be that any kind of “benefit” conferred is a fait accompli to an unjust enrichment claim. However, that is not the holding of *Watts*. While [Counter-Defendant] no doubt “benefited” from [Counter-Plaintiff’s] housekeeping services, that is not the type of “benefit” contemplated

by the *Watts* court. ***Watts does not recognize recompense for housekeeping or other services unless the services are linked to an accumulation of wealth or assets during the relationship.*** . . . The *Watts* court defined benefit, for purposes of this kind of action involving unmarried cohabitants, as one which involves a joint accumulation of assets, an unreasonable amount of which is retained by one of the parties.

*Wagge*, 188 Wis.2d at 330-31, 525 N.W.2d at 98-99.

Indeed, lawyers and vendors regularly provide services to clients and companies and do not have the right to seek a division of assets accumulated during the period that they provided such services. The contractor, for example, who provides uncompensated consulting services to Coca-Cola cannot sue to recover a portion of the increase in Coca-Cola's stock price during the period the services were provided. Rather, damages in such an unjust enrichment case are measured by the benefit that the plaintiff actually conferred on the defendant. *See infra* at 63-68. And this value is measured by either: (a) the reasonable value to the other party of what he received in terms of what it would have cost him to obtain it from a person in the claimant's position, or (b) the extent to which the other party's property has been increased in value or his other interests advanced. *See infra* at 63-64.

So, unless there is a joint enterprise to accumulate assets, as recognized in *Watts*, there is no legal basis to require a division of such assets. Without a joint

enterprise, a lawyer who does not get paid for legal services rendered is left with the usual remedy – the recovery of legal fees calculated by multiplying the hours worked times a reasonable hourly rate.

**B. PLAINTIFF DID NOT HAVE A JOINT ENTERPRISE WITH JOHN MENARD TO ACCUMULATE ASSETS, BUT PROVIDED SERVICES TO MENARD AT AN AGREED RATE FOR WHICH SHE WAS PAID LIKE ANY OTHER LAWYER OR VENDOR**

In this case, the undisputed facts demonstrate that no joint enterprise existed between Debra Sands and John Menard, as a matter of law. While *Watts* did not provide a stringent checklist for establishing a joint enterprise, the Court's analysis of the facts alleged in that case is, nonetheless, instructive. There, plaintiff claimed that "she quit her job and abandoned her career training upon the defendant's promise to take care of her." 137 Wis.2d at 528, 405 N.W.2d at 312. She also allegedly provided "housekeeping, childbearing, childrearing, and other services related to the maintenance of the parties' home, in addition to various services for the defendant's business and her own business, for which she received no compensation." *Id.* In addition, she alleged that the parties lived together as husband and wife, comingling their finances and assets:

According to plaintiff's complaint, the parties cohabited for more than twelve years, held joint bank accounts, made joint purchases, filed joint income tax returns, and were listed

as husband and wife on other legal documents. Courts have held that such a relationship and ‘joint acts of a financial nature can give rise to an inference that the parties intended to share equally.’ [citations omitted] The joint ownership of property and the filing of joint income tax returns strongly implies that the parties intended their relationship to be in the nature of a joint enterprise, financially as well as personally. [citations omitted.]

137 Wis.2d at 529, 405 N.W.2d at 313. Based on all of this, the Wisconsin Supreme Court concluded that plaintiff had pled facts sufficient to state a claim for “breach of an express or implied in fact contract to share with the plaintiff the property accumulated through the efforts of both parties during their relationship.” *Id.*

But in this case. Plaintiff cannot demonstrate any of the indicia identified in *Watts* or its progeny for establishing a joint enterprise. Indeed, in contrast to *Watts*, Plaintiff (1) was paid for the legal services and goods that she provided pursuant to an express contract that she had with Menard at an agreed hourly rate, which bars her from asserting quasi-contract theories; (2) did not commingle her finances, share expenses, or have jointly owned property or joint bank accounts with John Menard; (3) did not cohabit with John Menard, but instead lived with her sister and mother in Eleva; and (4) engaged in conduct that is wholly inconsistent with a joint enterprise. Far from abandoning a lucrative career to work for John Menard,

Plaintiff's businesses were failing and she never made more money than she did during the period that she dated him.

\* \* \*

**2. Plaintiff and John Menard Did Not Comingle Their Finances, Jointly Own Property or Share Expenses**

Not only did Plaintiff have express contracts with Menard that debunk the notion that she had a joint enterprise, but John Menard and Plaintiff's finances were completely separate, which further distinguishes this case from *Watts*. (*See supra* at 32-33.) They did not file joint tax returns. (*Id.*) They did not have any joint bank accounts or credit cards. (*Id.*) They were not listed as husband and wife on legal documents. (*Id.*) Nor did they jointly purchase property. (*Id.*) There simply is no *indicia* of a joint financial enterprise, but every indication that they assiduously avoided comingling their finances.

When, for example, John Menard bought Debra Sands a Ford Mustang as a Christmas gift, it was registered in her name alone. (App-1803-1804.) Likewise, when Plaintiff purchased her mother's house in 2001, she bought it with her sister; John Menard's name appears nowhere in the documentation. (*See supra* at 28-30.) In fact, despite her contention that she and John Menard had a joint enterprise to grow assets, she vehemently denies that he has *any* interest in this asset – or any of her assets. (*Id.*) Apparently, her “joint” enterprise only works in one direction.

Not only were there no joint acts of a financial nature, Plaintiff and John Menard did not share in the profits and the losses, which is a key legal component of a joint enterprise or partnership. *In re Starer case*, 20 Wis. 2d 268, 121 N.W.2d 872 (1963); *Bailey v. Hagen*, 25 Wis. 2d 386, 393, 130 N.W.2d 773, 777 (1964) (emphasis added). Stated differently, parties in a true partnership share in the upside and the downside. Plaintiff, however, asserts that she is not responsible for any “risk and losses of the enterprise”; she is entitled to “share in the increase of the value of all of the assets in total,” but is not responsible for sharing in the “downside.” (See Debra Sands Dep. at App-892, 970, 976.) This is not a joint enterprise or a partnership at all; Debra Sands has nothing to lose. Far from it, under her theory, she gets paid for the services **and** any upside resulting from those services.

Indeed, her own description of John Menard’s alleged promise belies the notion that she had a joint enterprise with him. She claims that “Menard specifically promised Sands, as an inducement, that in exchange for her commitment to assisting Menard and his businesses, Sands would receive as **compensation** therefor an ownership interest in the various Menard business ventures for which she provided assistance.” (Second Am. Cmplt. at ¶ 13:App-41-42; emphasis added.) This is not a “joint enterprise,” but a promise to pay for services with stocks, not unlike an employee seeking compensation through a stock option plan. There is no pooling of resources or sharing of profits and losses. To

the contrary, Plaintiff would be paid whether the value of Menard's shares rose or fell.

The provision of services alone, without a joint enterprise to accumulate assets, is not enough under *Watts*. See *Wagge*, 188 Wis.2d at 330-31, 525 N.W.2d at 98-99. Otherwise, every vendor and employee would claim that they are entitled to a portion of the value of the company for whom they provided services.

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#### **4. Plaintiff's Conduct Was Inconsistent With a Joint Enterprise**

Finally, Plaintiff's conduct is simply inconsistent with her claim that she had a joint enterprise with John Menard. As noted above, Plaintiff was paid (or would have been paid) for the goods and services that she provided pursuant to express contracts, which is inconsistent with her notion that such goods and services were her "sweat equity" in the business.

Likewise, Plaintiff negotiated with third-party vendors to profit off of sales to Menard. (See *supra* at 22-27.) For example, after months of denial, Plaintiff has finally admitted that she had an agreement with Sourcing Solutions, a potential vendor to Menard, by which she would get 50% of the profit on any sales to Menard. (See Debra Sands Dep. at App-901-903.) The deal was potentially worth millions to Plaintiff. (See Laub Dep. at App-720-21.) Mr. Casper, the buyer from Menard who met with Sourcing Solutions, testified that if Plaintiff would be profiting from sales to Menard,

this would not be in Menard's best interests, but in her own best interest, "like any other vendor." (Casper Aff. at ¶ 9:App-266.) Indeed, Plaintiff now admits that she *never* told Mr. Casper that she was going to receive 50% of the profits from these sales from Sourcing Solutions to Menard (Debra Sands Dep. at App-918) and concedes that she was working for herself in this transaction and others like it, not for Menard. (*Id.* at App-913-915.) How is this conduct consistent with Plaintiff's alleged joint enterprise to build the value of John Menard's assets?

In addition, Plaintiff never mentioned this joint enterprise until she filed her lawsuit ten years *after* she claims the joint enterprise commenced, and more than two years *after* she says the joint enterprise ended. If she had a joint enterprise, why didn't she mention it, for example, in the draft pre-marital agreements that she prepared in 1999 and 2001? She submitted two such proposals in which she sought to receive cash payments based on the years she would be married to John Menard. Neither proposal mentions Plaintiff's supposed joint enterprise. And both provided that the only way Plaintiff would get any shares in Menard is if John Menard chose to "gift" them to her. (*See supra* at 7-10.) This too is inconsistent with her alleged joint enterprise.

Moreover, Plaintiff claims that she gave John Menard the idea to sell his shares to trusts for the benefit of his children, in order to save on taxes. She has testified that she attended a meeting in which Kirkland & Ellis proposed to John Menard that he sell all

of his shares in Menard to such trusts to minimize potential estate taxes. (Debra Sands Dep. at App-958-961.) Yet, at no point in that meeting did Plaintiff ever object and say that John Menard could not sell all those shares because a portion of them belong to her pursuant to her joint enterprise. (*See* Debra Sands Dep. at App-964.)

In sum, none of the factors identified in *Watts* to establish a joint enterprise is present in this case. There is no cohabitation, no comingling of assets, no joint property, no sharing of living expenses, and no sharing of profits and losses. In addition, Plaintiff contracted to be paid for the services and goods that she provided and made more money during the years that she dated John Menard than at any other time in her life. As a consequence, any claims by which Plaintiff would obtain a portion of John Menard's assets, a share in his net worth, or a part ownership in Menard should be dismissed.

**III. PLAINTIFF'S CLAIMS MUST BE DISMISSED BECAUSE SHE ADMITTEDLY CANNOT PROVE THE AMOUNT BY WHICH THE VALUE OF JOHN MENARD'S ASSETS SUPPOSEDLY INCREASED BY HER UN-COMPENSATED EFFORTS**

This case is unlike a typical *Watts* case in one other critical respect – Plaintiff and John Menard were *not* high school sweethearts who started with nothing, pooled their resources, and developed a fledgling

business through their joint efforts. John Menard already had a thriving business that had been around for nearly 40 years, when he met Plaintiff. He founded this business and invested his life and resources nurturing and developing it. Through his efforts and those of other team members, Menard had increased in value in every year of its existence, and, by 1998, had grown to approximately 138 stores with revenues of nearly \$3.8 billion and a rate of return of 18.8%. (*See supra* at 4-5.) And with the housing market on the verge of a boom, it was poised for continued strong growth.

There is nothing unjust about John Menard or the Trust benefitting from continued growth of the business, favorable market conditions and dynamics, or the efforts of the nearly 40,000 team members employed by the business. That, after all, is why entrepreneurs start their own businesses – to capitalize on an idea, grow, invest, expand, provide jobs, make profits and, hopefully, pass the business on to their family.

Rather, it is only “so much of the enrichment that is unjust that may be awarded to the plaintiff.” *Robertus v. Candee*, 670 P.2d 540, 543 (Mont. 1983). Recovery is “based upon the inequity of allowing the defendant to retain a benefit [provided by plaintiff] without paying for it” and damages are “measured by the benefit conferred upon the defendant” by the plaintiff’s services. *See Ramsey v. Ellis*, 168 Wis.2d 779, 785, 484 N.W.2d 331, 333 (1992); *Ludyjan v. Cont’l Cas. Co.*, 308 Wis. 2d 398, 405-06, 747 N.W.2d 745, 749 (Ct. App. 2008); *Schwigel v. Kohlmann*, 254 Wis. 2d 830, 838, 647 N.W.2d 362, 367 (Ct. App. 2002).

The value of such benefit “may as justice requires be measured by either: (a) the reasonable value to the other party of what he received in terms of what it would have cost him to obtain it from a person in the claimant’s position, or (b) the extent to which the other party’s property has been increased in value or his other interests advanced.” Restatement (Second) of Contracts § 371 (1981).

To the extent that a plaintiff seeks to recover (b) above – the increase in value to the defendant’s property – it is plaintiff’s burden to establish “the amount by which the value of defendant’s property was enhanced by her uncompensated efforts.” *Bingham v. Bridges*, 613 F.2d 794, 796 (10th Cir. 1980) (emphasis added). ***A plaintiff is not entitled to recover the appreciation in the value of a defendant’s property that is attributable to other causes.*** *Id.* (emphasis added); AMJUR Damages 57 (an injured party “is only entitled to recover restitution damages to the extent that the defendant was unjustly enriched as a result of the plaintiff’s actions; other causes for the appreciation of the defendant’s property are not to be taken into account”); *Robertus v. Candee*, 670 P.2d 540, 543 (Mont. 1983).

In *Robertus*, for example, the plaintiff contributed \$29,479.61 in labor and materials for property groundbreaking. After the groundbreaking, the property experienced an increase in market value of as much as \$168,000. The court held that “[p]art of the increase in value of the property is attributable to the property owner’s risk and decision making in a real estate

investment, part is attributable to other improvements to the property and part is attributable to plaintiff's groundbreaking. But it is only the latter part that the defendant is not entitled to, for which he has been unjustly enriched."<sup>7</sup>

This said, there are three traditional ways in which a plaintiff can show the amount by which the value of defendant's property was enhanced by her uncompensated efforts: (1) provide expert opinion as to the amount by which plaintiff's efforts enhanced the value of the property; (2) show the value of the labor/materials supplied by plaintiff and that the resulting property value has been increased by at least the value of such labor/materials; or (3) show "[t]he difference [between the value of the property before and after plaintiff's efforts], less the amount attributable to

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<sup>7</sup> See also *Carlson v. Richardson*, 267 Cal. App. 2d 204, 208 (1968) (holding that there is no unjust enrichment to seller where the increase in property value "resulted from market conditions rather than from any act or forbearance to act" on the part of the purchasers); *Vines v. Orchard Hills, Inc.*, 435 A.2d 1022, 1029 (Conn. 1980) (holding that "[b]enefits to the seller that are attributable to a rising market subsequent to breach rightfully accrue to the seller"); *Simons v. Young*, 93 Cal. App. 3d 170, 185 (4th Dist. 1979) (holding that plaintiff may be entitled to recover increase in rental value of land if he could show both that it was attributable to improvements he had made, and that defendants had been unjustly enriched thereby); *Hunt v. Estate of Hunt*, 348 S.W.3d 103, 111 (Mo. Ct. App. 2011) (holding that increase in property value was not due to purchaser's efforts but "resulted instead from the general increase in the value of lakefront property at the Lake of the Ozarks during this time").

any other factors which might have contributed to the increase.” *Bingham*, 613 F.2d at 796.

While Plaintiff seeks to recover a portion of the increase in value of Menard as damages for unjust enrichment, she makes absolutely no effort to demonstrate whether and to what extent her efforts contributed to that increase versus the thousands of causes at play in this dynamic market. Likewise, all her expert purports to do is measure the difference between the value of John Menard’s property before and after Plaintiff’s alleged efforts, without offering any opinion as to whether this difference is attributable to Plaintiff’s efforts or other factors. Indeed, Plaintiff and her expert fail to do this analysis even though Plaintiff acknowledges that during the period she dated John Menard the country experienced one of the greatest housing booms in its history, which “obviously” contributed to Menard’s success. (See Debra Sands Dep. at App-981.)

\* \* \*

Rather than making any effort to meet her burden, Plaintiff argues instead that under *Watts* she no longer has to prove the amount by which the value of John Menard’s property was enhanced through *her* uncompensated efforts. She claims that it is enough under *Watts* to show the value of John Menard’s assets before and after she provided services, and it is up to the jury to speculate as to how much value she added. This plainly was not the holding of *Watts*.

*Watts* did not create any new actions or legal theories for unmarried cohabitants, but merely recognized that such parties were not barred from asserting existing legal or equitable claims because of their cohabitation. *Watts*, 137 Wis. 2d at 532, 405 N.W.2d at 314. It did not eliminate any of the elements of an unjust enrichment claim, but reiterated that such an action required: “(1) a benefit conferred on the defendant by the plaintiff, (2) appreciation or knowledge by the defendant of the benefit, and (3) acceptance or retention of the benefit under circumstances making it inequitable for the defendant to retain the benefit.” 137 Wis. 2d at 531, 405 N.W.2d at 313.

Since *Watts*, the courts have made clear that Plaintiff still must show what she did to increase the value of the assets. In *Ward v. Jahnke*, 220 Wis.2d 539, 547, 583 N.W.2d 656, 660-61 (Ct.App. 1998), for example, the court held that to prevail on an unjust enrichment claim plaintiff must put forth proof of “specific contributions that directly led to an increase in assets or accumulation of wealth” and that “the assets or property in dispute were ‘acquired through the efforts of both.’” *See also Ulrich v. Zemke*, 2002 WI App 246 ¶ 12, 258 Wis.2d 180, 654 N.W.2d 458 (holding that an asset “acquired by independent means, outside the joint enterprise’s domain” is not subject to equitable division under *Watts*.) Likewise, in *Waage*, 188 Wis. 2d at 332, 525 N.W.2d at 99, counter-plaintiff claimed that the income tax returns showed that counter-defendant experienced more financial growth than she did during the period that they lived together. The court rejected

the argument, holding that “without evidence that [counter-plaintiff’s] contributions enhanced this alleged financial growth,” there was no basis for an unjust enrichment claim. *Id.*

In this case, the benefit that Plaintiff seeks to recover is the increase in the value of Menard and John Menard’s assets resulting from her conduct. Yet, she makes no effort to show how or to what extent she conferred this benefit on him. She simply does not demonstrate how her efforts increased the value of John Menard’s assets or the stock of Menard. Without such evidence there is no way of knowing whether and to what extent John Menard wrongfully or unreasonably retained any benefit or was, as a consequence, unjustly enriched.

And this leads to another problem in Plaintiff’s proof. She can only recover in an unjust enrichment claim for *uncompensated* services. In this case, Plaintiff was compensated for the very services that she now claims benefitted Menard and John Menard. To the extent that she was not, it is her burden not only to show how her efforts increased the value of John Menard’s assets, but how her uncompensated efforts, as distinguished from her compensated efforts, increased that value. Again, however, Plaintiff makes no effort to meet this burden.

As a result, the only remedy available to Plaintiff for unjust enrichment is the reasonable value to Menard or John Menard of the services that Plaintiff provided in terms of what it would have cost them to obtain such services from a person in Plaintiff’s

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position. For a lawyer like Debra Sands, this is the hours actually incurred times a reasonable hourly rate.

**CONCLUSION**

For all the foregoing reasons, the Menard Defendants' Motion for Partial Summary Judgment should be granted and all claims by which Plaintiff seeks to obtain (1) a portion of John Menard's net worth, (2) ownership interests in Menard, or (3) increases in the value of Menard stock, should be denied.

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Menard had an eight-year romantic relationship during which they were in love, engaged to be married, living together, and, through their combined efforts, engaged in a joint enterprise to accumulate and grow assets. During the course of their joint enterprise, Menard's net worth increased by over \$4 billion.<sup>1</sup> The evidence also proves that in exchange for her significant contributions, Menard promised Sands ownership in his various business interests.

The Menard Defendants seek to dismiss Sands's unjust enrichment claim as a matter of law on the grounds that (1) Sands and Menard did not work cooperatively to accumulate and grow assets—i.e., they had no so-called “joint enterprise”; (2) even if the evidence supports Sands's claim of a joint enterprise, she cannot recover damages as a matter of law because she cannot prove, on an-asset-by-asset basis, the amount by which the value of Menard's assets increased as a result of her efforts; and (3) Sands had an express contract for the provision of legal services, which precludes her from bringing a claim for equitable relief.

\* \* \*

The Menard Defendants' motion should be denied for the following reasons:

1. The crux of this case is Sands's straightforward unjust enrichment claim. The evidence is more

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<sup>1</sup> Their relationship ended in 2006 because Sands would not take sides with Menard against her sister, Dawn, in an employment dispute. At that time, Menard barred Sands from their shared home.

than sufficient to establish each of the three elements of this cause of action: (1) a joint enterprise between the parties to accumulate assets and wealth; (2) a benefit conferred on the Menard Defendants by Sands; and (3) the inequity of allowing the Menard Defendants to retain the entirety of that benefit. The evidence proves the closeness of Sands's personal and romantic relationship with John Menard, and that during their eight-year romantic relationship, Sands's significant and continuing efforts resulted directly in the acquisition of valuable property, wealth, and a substantial increase in the net worth of John Menard, who now attempts to retain not merely an unreasonable amount, but *all* of the property, wealth, and increased net worth acquired through the efforts of Sands. The record is replete with evidence proving that during the entirety of their eight-year relationship, Sands served not only as John Menard's constant companion and caregiver, but as his "gatekeeper," business partner, point person, and personal and business advisor and counselor. Moreover, whether Sands and Menard had a joint enterprise for purposes of Sands's unjust enrichment claim is a fact-intensive inquiry, and at a minimum, genuine issues of material fact bar summary judgment on this claim.

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## ARGUMENT

### **I. LEGAL STANDARD**

The Court is no doubt well aware of the standards followed in Wisconsin on motions for summary

judgment. Summary judgment is a drastic remedy. *Grams v. Boss*, 294 N.W.2d 473 (Wisc. 1980). The Court may render summary judgment only if the record shows that “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Wis. Stat. § 802.08(2). The Court cannot grant summary judgment unless the moving party demonstrates its right to judgment “with such clarity as to leave no room for controversy.” *Envi-rollogix Corp. v. City of Waukesha*, 531 N.W.2d 357, 366 (Wis. Ct. App. 1995), *rev. denied*, 537 N.W.2d 570 (Wis. 1995); *see also Poston v. U.S. Fidelity & Guaranty Co.*, 320 N.W.2d 9, 19 (Wis. Ct. App. 1982) (“Summary judgment is a drastic remedy to be applied only when it is **perfectly plain** that there is no substantial issue to be tried.”) (emphasis added).

“If the material facts are in dispute, if competing inferences might be drawn from the facts, or if the application of the controlling law to the facts is uncertain, summary judgment should not be granted.” *Rach v. Kleiber*, 367 N.W.2d 824, 827 (Wis. Ct. App. 1985). Any reasonable doubt as to the existence of a genuine issue of material fact should be resolved against the moving party. *Id.* Furthermore, all reasonable inferences must be viewed in the light most favorable to the non-moving party, here Sands. *Thomas v. Mallett*, 701 N.W.2d 523 (Wis. 2005), *abrogated on other grounds by State v. Henley*, 787 N.W.2d 350 (Wis. 2010). This includes inferences relating to witness credibility and the weight to be accorded to particular evidence. *Bay View Packing Co. v. Taff*, 543 N.W.2d 522, 529 (Wis. Ct.

App. 1995) (quotation omitted). Where more than one inference may result from the facts, the Court is not to resolve the competing inferences on summary judgment, but instead is to leave the determination to the finder of fact. *Poston*, 320 N.W.2d at 9.<sup>18</sup>

## **II. TRIABLE ISSUES OF FACT PRECLUDE SUMMARY JUDGMENT ON SANDS'S UNJUST ENRICHMENT CLAIM**

As an initial matter, the Menard Defendants misstate and misconceive the legal framework that governs this case. They simply do not understand, or refuse to understand, the law of unjust enrichment under *Watts v. Watts*, 405 N.W.2d 303 (1987), and its progeny. As the Wisconsin Supreme Court made clear in *Watts*, under Wisconsin law, an action for unjust enrichment is based upon proof of three elements: (1) a benefit conferred on the defendant by the plaintiff, (2) knowledge by the defendant of the benefit, and (3) acceptance or retention of the benefit by the defendant under circumstances making it inequitable for the defendant to retain the benefit. *Watts*, 405 N.W.2d at 313

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<sup>18</sup> For example, the Menard Defendants here ask the Court to conclude that because Sands used the Eleva address in various financial and personal matters (*e.g.*, checks and other bank records, her driver's license), she did not live with John Menard at the Lamplighter address. Sands has responded under oath that she did live with Menard and that she employed the Eleva address as a mailing address for the sake of convenience. This conflict in the record creates a paradigmatic issue of fact precluding summary judgment, to the extent cohabitation may be material to any of Sands's claims.

(citing *Puttkammer v. Minth*, 266 N.W.2d 361, 363 (Wis. 1978)). An action for recovery based on unjust enrichment is “quasi-contractual” and “is grounded on the moral principle that one who has received a benefit has a duty to make restitution where retaining such a benefit would be unjust.” *Id.* at 313 (citing *Puttkammer*, 266 N.W.2d at 363). Quasi contracts are obligations created by law to prevent injustice. *Id.* (citing *Shellse v. City of Mayville*, 271 N.W.2d 643 (Wis. 1937)).

As later explained by the Wisconsin Court of Appeals, in nonmarital unjust enrichment actions, such as this, proof of the above three elements is demonstrated by showing: (1) an accumulation of assets, (2) acquired through the efforts of the claimant and the other party, and (3) retained by the other party in an unreasonable amount. *Ulrich v. Zemke*, 654 N.W.2d 458, 462 (Wis. Ct. App. 2002) (citing *Waage v. Borer*, 525 N.W.2d 96, 98 (Wis. Ct. App. 1994)).

Contrary to this well-established law, the Menard Defendants contend that for Sands to prevail on her unjust enrichment claims, she must prove not only the elements stated by the case law, but also that she cohabited with Menard. All Sands is required to do, though, is “put forth facts which indicate a shared enterprise and that the assets or property in dispute were acquired through the efforts of both.” *Ward v. Jahnke*, 583 N.W.2d 656, 660 (Wis. Ct. App. 1998). The record here is replete with evidence indicating a shared enterprise between Sands and Menard and the accumulation of wealth as a result of their joint efforts. As detailed above, during the entirety of their

eight-year relationship, Sands served not only as Menard's constant companion and caregiver, but as his "gatekeeper," business partner, point person, and personal and business advisor and counselor.

While Sands offers abundant evidence proving that she lived with Menard, she is **not required** to do so to prevail on her unjust enrichment claim. Even the Menard Defendants themselves recognize this:

***Watts did not create any new actions or legal theories*** for unmarried cohabitants, but merely recognized that such parties were not barred from asserting existing legal or equitable claims because of their cohabitation.

(Def. S.J. Mot. at 67) (emphasis added). Exactly so. As explained in *Watts*, until 1983 unmarried cohabitation was subject to **criminal** sanctions under Wisconsin law. *Watts*, 405 N.W.2d at 310. The law reflected the public policy in favor of marriage and the general view that unmarried cohabitation was immoral. In moving to dismiss the plaintiff's unjust enrichment claim in *Watts*, the defendant argued that cohabitation was a **bar** to an unjust enrichment claim, not an essential element of such a claim as the Menard Defendants now contend, and that the Court should "leave the parties to an illicit relationship" "essentially as they are found, providing no relief at all to either party." *Id.* at 314. The Wisconsin Supreme Court rejected this argument:

As we have discussed previously, allowing no relief at all to one party in a so-called 'illicit' relationship effectively provides total relief to

the other, by leaving that party owner of all the assets acquired through the efforts of both. Yet it cannot seriously be argued that the party retaining all the assets is less ‘guilty’ than the other. Such a result is contrary to the principles of equity. Many courts have held and ***we so hold that unmarried cohabitants may raise claims based upon unjust enrichment*** following the termination of their relationships where one of the parties attempts to retain an unreasonable amount of the property acquired through the efforts of both.

*Id.* at 314 (emphasis added).

On the same day it issued its decision in *Watts*, the Wisconsin Supreme Court reached the same holding in *Lawlis v. Thompson*, 405 N.W.2d 317 (Wis. 1987). In *Lawlis*, the principal question posed on appeal was “whether a party to a nonmarital cohabitation, ***by reason of that cohabitation, is precluded***, by legislative or public policy, from making a claim she might otherwise have for restitution, on the theory of unjust enrichment from the other party to the cohabitation . . .” *Id.* (emphasis added). The Court concluded that such a party to a nonmarital cohabitation is not precluded from bringing such a claim. *Id.* In fact, in *Lawlis*, the Wisconsin Supreme Court held that the plaintiff alleged “a recognized legal basis for her claim, unjust enrichment, ***which relies not at all upon the cohabitational relationship*** for its jurisprudential foundation.” *Id.* at 321 (emphasis added). The Court reiterated that unjust enrichment is a “well-recognized

and long accepted theory in Wisconsin jurisprudence,” and held that “[t]hus this court concludes in this case and in *Watts*, that causes of action and judicial remedies are not necessarily barred **because** of the cohabitational relationship.”

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here is for the Menard Defendants properly to read and accurately to state the holdings in *Watts* and *Lawlis*.

In any event, even if cohabitation were a requirement of Sands’s unjust enrichment claim and the Menard Defendants’ cited cases had the slightest precedential value, summary judgment would not be appropriate because, as the Menard Defendants’ cases show, “[w]hether cohabitation exists is a question of fact for the trial court,” *Harrison*, 2006 Ohio 4948, at \* 12 (emphasis added); *Cravens*, 2009 Ohio 1733, at \*9; *Knight*, 500 So.2d at 1115. The record here is more than sufficient to establish a question of fact as to whether Sands and Menard cohabited.

To prevail on her unjust enrichment claim, Sands also need not prove that she jointly owned real estate with Menard, that she and Menard shared bank accounts, or that she and Menard jointly filed taxes, which of course unmarried couples are prohibited from doing anyway. In *Ward*, the couple “kept all of their finances separate. They never held joint savings or checking accounts, purchased items together, took on any joint debt, loaned each other money, or inquired as to how much money the other was earning.” 583

N.W.2d at 658. These facts did not stop the court from finding a joint enterprise.

Further, the Menard Defendants misunderstand the law if their contention is that in order to prove a joint enterprise, Sands needs to prove that she was dedicated exclusively to Menard. She contends that she was, but *Watts* and its progeny clearly do not require exclusivity as an element of a joint enterprise. In *Watts* itself, for the last five years the couple were together, the plaintiff “worked 40-60 hours per week at a business she started with the defendant’s sister-in-law . . .” outside the alleged joint enterprise. 405 N.W.2d at 307. Nowhere did the Wisconsin Supreme Court find that this negated a joint enterprise, or that the joint enterprise ceased when the plaintiff was spending that much time on a business outside the joint enterprise.

Finally, the Menard Defendants attempt to impose a partnership law standard on the *Watts* joint enterprise between Sands and Menard, *i.e.*, that a joint enterprise cannot exist if Sands engaged in any activity contrary to the interests of the joint enterprise. That is clearly not the law. A *Watts* claim is one of unjust enrichment, not of a breached partnership agreement. The issue is whether, through a joint enterprise, Sands conferred a benefit on Menard with his knowledge, which it is inequitable for him to retain. The record shows that this is exactly what occurred, or at the very least creates issues of fact precluding summary judgment: to wit, (1) did Sands and Menard have a joint enterprise; (2) did the joint enterprise confer a benefit on Menard; (3) did Menard have knowledge of the

benefit; and (4) is it equitable for Menard to retain the entire benefit.

**III. SANDS'S DAMAGES ARE READILY AS-  
CERTAINABLE AND NEED NOT BE  
PROVED ON AN ASSET-BY-ASSET BASIS**

In Section III of their Motion, the Menard Defendants persist in their misreading and misstatement of the law of unjust enrichment. They contend that Sands's unjust enrichment claim "must be dismissed because she . . . cannot prove the amount by which the value of [Defendants'] assets supposedly increased by her uncompensated efforts." (Def. S.J. Mot. at 63; *see also id.* at 3.) Defendants' contention is flawed for two reasons. *First*, once liability is established, Sands need not "prove damages with mathematical precision; rather, evidence of damages is sufficient if it enables the jury to make a fair and reasonable approximation." *W.H. Fuller Co. v. Seater*, 595 N.W.2d 96, 99 (Wis. Ct. App. 1999) (citation and quotation omitted). Here, the record contains extensive evidence detailing the contributions Sands made to Menard's various businesses by reason of which defendants have been unjustly enriched. (*see, e.g.*, App. 123-164.) Sands has also retained an expert to demonstrate the increase in value of the defendants' assets during Sands's relationship with Menard. (Expert Report of Joseph D. Kenyon: App-3189-282.) This is more than sufficient to show the measure of damages, which depends on the totality of the circumstances. *Ramsey v. Ellis*, 484 N.W.2d 331,

333-34 (Wis. 1992), *rev. denied*, 542 N.W.2d 154 (Wis. 1995); *W.H. Fuller Co.*, 595 N.E.2d at 100.

*Second*, and more important, unjust enrichment damages in a *Watts v. Watts* case in no sense require asset-by-asset analysis or proof. Indeed, the law is directly to the contrary. *Ulrich v. Zemke*, 654 N.W.2d 458, 463 (Wis. Ct. App. 2002).

**A. Sands Has Proffered Sufficient Evidence To Enable A Trier Of Fact To Make A Fair And Reasonable Approximation Of Defendants' Unjust Gains**

As an initial matter, liability and damages are separate issues. In their Section III, the Menard Defendants challenge the sufficiency of the evidence to establish Sands's damages, and to establish "whether and to what extent [Sands's] efforts contributed" to defendants' increase in wealth during the course of her relationship with Menard. (Def. S.J. Mot. at 65.) The Menard Defendants misconceive and misstate the applicable law. To avoid summary disposition, Sands must simply provide enough evidence to enable a jury to make a fair and reasonable approximation of her damages. *W.H. Fuller Co.*, 595 N.W.2d at 100; *Ramsey*, 484 N.W.2d at 335-36. She has done so through the extensive evidence of her efforts on behalf of John Menard and his businesses from 1998 through 2006, and through her proof of the increase in value of those ventures and assets during that time. This is all the law requires Sands to show. Once she has made this

showing, the amount of the increase attributable to her efforts and her fair share of the increase are matters left to the trier of fact.

In *Ulrich*, an unjust enrichment case involving an unmarried couple, evidence of the benefit received took the form of witness statements as to the nature and quality of the relationship between the couple, the services each party provided, and appraisals of property owned and acquired by the couple. 654 N.W.2d at 464-65. The proper legal standard then required the court to analyze the character of the parties' relationship by taking into account the totality of the circumstances, including what each party contributed by way of property or services, which resulted in an increase in wealth. *Ulrich*, 654 N.W.2d at 463; *see also W.H Fuller Co.* 595 N.E.2d at 100. The court was then equitably to divide the increased wealth between the parties. *Id.*

Unjust enrichment damages are measured by defendant's unjust gain, not by the value of plaintiff's efforts. *See W.H. Fuller Co.*, 595 N.W.2d at 99 (holding that damages for unjust enrichment comprise the value of the benefit conferred) (citing Wis. J. I-Civil § 3028; *Watts*, 405 N.W.2d at 313). As explained by the Wisconsin Supreme Court:

. . . recovery for unjust enrichment is based upon the inequity of allowing the defendant to retain a benefit without paying for it. . . . Accordingly, damages in an unjust enrichment claim are measured by ***the benefit conferred upon the defendant*** . . .

*Ramsey*, 484 N.W.2d at 333-34 (emphasis added). The measure of damages for unjust enrichment is, therefore, the benefit received by the defendant as opposed to “the reasonable value of the services.” *Id.* at 333.

Much like the instant case, the Court of Appeals in *W.H. Fuller* wrestled with the measure of damages under contract and unjust enrichment theories. 595 N.W.2d at 98-99. The trial court had found that although no written contract or contract implied in fact existed between the parties, the defendant was unjustly enriched. *Id.* at 98. In assessing damages, however, the trial court erroneously ruled that the damages depended on the value of the plaintiff’s services. *Id.* at 100. Instead, the trial court should have determined the value of the benefit received. *Id.*

As detailed above, there is abundant evidence that shows Sands provided services, without compensation, that helped defendants acquire and grow assets throughout the course of her relationship with Menard. Those assets acquired or increasing in value during the period of the relationship must be divided equitably between the parties. *Ulrich*, 654 N.W.2d at 463. Sands’s evidence is sufficient for the jury to make a fair and reasonable approximation of the equitable amount due to Sands. *Id.* at 464-65; *see also W.H. Fuller Co.*, 595 N.W.2d at 99.

**B. An Asset-By-Asset Analysis Of Unjust Enrichment Damages Is Unnecessary And Constitutes Legal Error**

Once an unjust enrichment claim has been established, analyzing the increase in wealth on an asset-by-asset basis constitutes legal error. *Ulrich*, 654 N.W.2d at 463. The trial court in *Ulrich* calculated damages for unjust enrichment on an asset-by-asset basis, analyzing personal property and each of three parcels of land purchased and improved during the course of the relationship between the parties. *Id.* at 461. In so doing, the trial court excluded the third parcel from the damages calculation because the plaintiff had “failed to demonstrate a ‘shared enterprise between the parties to justify an award to her part of the [third parcel].’” *Id.* The Court of Appeals found that the trial court committed legal error when it proceeded on an “asset by asset” basis. *Id.* at 463. Once the plaintiff established the relationship giving rise to her unjust enrichment claim, equity required that *all* assets accumulated during the relationship be shared equitably. *Id.* at 462. “A division of property otherwise would allow one party to benefit by retaining an unreasonable amount of property acquired through the efforts of both.” *Id.* at 462-63. As the Court of Appeals stated:

The circuit court, therefore, erred by analyzing Ulrich’s unjust enrichment claim asset by asset. The proper legal standard requires the court to instead analyze the character of the parties’ relationship by inquiring whether the relationship was a joint enterprise which encompassed the accumulation of assets. A court

makes this determination by considering the total circumstances of the parties' relationship, specifically whether the parties' contributed property and services to the relationship producing an increase in wealth. *See id.* Any assets acquired during the time period when the parties' [sic] acted as a joint enterprise must be divided equitably between the parties unless the court determines that the contested asset was acquired by independent means, outside the joint enterprise's domain.

*Id.* at 463. The same is true here.

Defendants' reliance on *Ward v. Jahnke*, 583 N.W.2d 656 (Wis. Ct. App. 1998), is misplaced. (*See* Def. S.J. Mot. at 67.) The Court of Appeals in that case was not suggesting that a plaintiff needed to create an asset-by-asset accounting; rather, the Court held that the character of the relationship between the parties had changed and that assets accumulated after the change were not subject to the unjust enrichment claim. *Ulrich*, 654 N.W.2d at 463 (citing *Ward*, 583 N.W.2d at 661). The Menard Defendants' reliance on *Waage v. Borer*, 525 N.W.2d 96 (Wis. Ct. App. 1994) is similarly flawed. In *Waage*, the dispute was liability for unjust enrichment, not proof of damages with the particularity urged by defendants here. *See Waage*, 525 N.W.2d at 98. The law is clear that once Sands proves that her relationship with Menard maintained its character to accumulate assets throughout the entire period from 1998 to 2006, Sands will be entitled to an equitable division of **all** assets accumulated during that time. *Ulrich*, 654 N.W.2d at 463; *see also Leonard v. Lynn*, App.

No. 2009-AP-2026, 2010 Wisc. App. LEXIS 709 (Sept. 2, 2010) (unpublished).

The unpublished Court of Appeals decision in *Leonard v. Lynn* is particularly apposite.<sup>20</sup> In *Leonard*, the plaintiff and defendant were romantically involved for a little over seven years. *Id.* at \*1. During that time the couple accumulated over \$3 million in assets. The defendant in *Leonard* did not dispute liability. Instead, similar to what defendants argue here, the defendant in *Leonard* claimed that certain assets were acquired outside the scope of the relationship, or otherwise attempted to minimize plaintiff's role in accumulating certain assets. The trial court found that the plaintiff focused on management and other services for only some of the assets that the parties acquired during their relationship, but nevertheless divided the assets equally. The Court of Appeals affirmed the 50/50 split because “[i]t was reasonable, for example for the circuit court to find that [plaintiff] enabled the enterprise to function by performing tasks that [defendant] was either uninterested in performing or that he could not perform as well.” *Id.* at \*18. In so holding, the Court carefully explained the meaning and proper application of its decision in *Ulrich*:

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<sup>20</sup> The decision in *Leonard v. Lynn* may be cited for its “persuasive value” pursuant to Wisc. Stat. §809.23(3)(b): “In addition to the purposes specified in par. (a), an unpublished opinion issued on or after July 1, 2009, that is authored by a member of a three-judge panel or by a single judge under s. 752.31(2) may be cited for its persuasive value.”

*Ulrich*, cited by both parties, is useful for illustrating the proper approach to asset division. As is the case here, *Ulrich* dealt with an unjust enrichment claim following the termination of a relationship between unmarried cohabitants. In *Ulrich*, we concluded that the parties “acted as a joint enterprise” to accumulate assets. We stated the applicable rule as follows: ‘**Any assets acquired during the time period when the parties acted as a joint enterprise must be divided equitably between the parties** unless the court determines that the contested asset was acquired by independent means, outside the joint enterprise[]’s domain.’

Here, given the stipulation [of a joint enterprise], we bypass the step of determining the existence of a joint enterprise. *Ulrich* instructs, then, that all assets acquired by the parties during that joint enterprise time period are to be part of the division, unless outside the joint enterprise’s domain. **Put another way, to the extent Richard assumes that an asset-by-asset approach is appropriate, he fails to come to terms with Ulrich’s focus on the overall scope of the joint enterprise.** [citing *Ulrich*] (adopting an approach that unjust enrichment division may be determined by “considering the overall scope of their joint enterprise and dividing the property accordingly”). **Richard labors under the misconception that each and every task by Elizabeth must have a direct income-producing effect. The nature of a cooperative relationship, like**

***the one in this case, however, involves a range of issues, both business and domestic, where one party may facilitate the accumulation of assets by freeing the other party to focus on the more direct income-producing activities.*** [citing *Ulrich*] (concluding that it was “immaterial that [the plaintiff] did not directly participate in the acquisition and maintenance of [a disputed property]” for that property to be included in the unjust enrichment division where the plaintiffs “contribution to the relationship” enabled the property’s purchase). ***This facilitating behavior can reasonably be viewed equally as valuable as the direct income-producing activity.***

*Id.* at \*4-6 (internal citations omitted) (emphasis added).

Similarly here, Sands performed multiple functions that Menard was either uninterested in performing or that he could not perform as well. Likewise, Sands, by acting as “gate-keeper” for Menard, certainly can be found to have “facilitate[d] the accumulation of assets by freeing the other party [here Menard] to focus on the more direct income-producing activities.” (See, e.g., App-123-164.)

*Ulrich* and *Leonard* both expressly hold that once the joint enterprise is established by the evidence, there is no requirement that Sands show her participation in the acquisition or appreciation of each specific asset. She need only show that its acquisition or appreciation fell within the scope of her joint

enterprise with Menard. This she has done, extensively, thoroughly, and persuasively. The record in this case shows that Sands was involved in every aspect of Menard's personal life and his businesses during their relationship, and that their joint venture included the totality of those businesses, from the Menard stores, to the auto and horse racing, to the companies in England, to the private equity fund. It also shows Sands performing innumerable domestic and personal services for Menard to provide him with a comfortable and congenial environment from which he could emerge refreshed and restored to undertake the business activities of their joint venture. This is all the law requires to entitle Sands to an equitable share of joint enterprise assets.

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R.App. 51a

STATE OF WISCONSIN  
COURT OF APPEALS, DISTRICT III

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**APPEAL No. 2015AP000870**

DEBRA K. SANDS,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

v.

JOHN R. MENARD, JR., MENARD, INC. AND  
MENARD THOROUGHBREDS, INC.,

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS,

WEBSTER HART AS TRUSTEE OF THE JOHN R. MENARD,  
JR. 2002 TRUST AND RELATED TRUSTS, ANGELA L. BOWE  
AS TRUSTEE OF THE JOHN R. MENARD, JR. 2002 TRUST  
AND RELATED TRUSTS, ALPHONS PITTERLE AS TRUSTEE  
OF THE JOHN R. MENARD, JR. 2002 TRUST AND  
RELATED TRUSTS, MIDWEST MANUFACTURING CO.,  
WOOD ECOLOGY INC., COUNTERTOPS INC., TEAM  
MENARD INC., MENARD ENGINE GROUP, MENARD  
COMPETITION TECHNOLOGIES LTD, MC TECHNOLOGIES  
INC., MENARD ENGINEERING LTD, ULTRAMOTIVE LTD  
AND MERCHANT CAPITAL LLC,

DEFENDANTS.

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On Appeal From the Circuit Court  
of Eau Claire County  
Circuit Court Case No. 08 CV 990  
Honorable Paul J. Lenz, Presiding

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**COMBINED BRIEF OF RESPONDENTS  
AND CROSS-APPELLANTS**

---

Michael D. Freeborn*	G. Richard White
Brian P. Norton*	(WI Bar No. 1013573)
Andrew C. Nordahl*	WELD RILEY, S.C.
FREEBORN & PETERS, LLP	3624 Oakwood Hills Parkway
311 South Wacker Drive	Eau Claire, Wisconsin 54702
#3000	(715) 839-7786
Chicago, Illinois 60606	(715) 839-8609 (facsimile)
(312) 360-6000	<i>Attorneys for Respondents</i>
* <i>Pro Hac Vice</i> Order at	<i>and Cross-Appellants</i>
Idx.57	

\* \* \*

**II. Statement of Facts**

\* \* \*

As a result, most of the Menards stock is held in irrevocable trusts for their benefit. (*Id.*, App-643, 646-647.)

By 1998, Menards had grown to approximately 138 stores, had revenues of \$3.8 billion, and a rate of return of approximately 18.8%. (Idx.292, App-357.) At or about this time, nearly 40 years *after* starting his business, John Menard met Debra Sands, an attorney, who was then 37 years old. (Idx.217, ¶10; Idx.293, App-876.) She had graduated from law school in 1993, and was admitted to practice law in Minnesota. (Idx.293, App-945; Idx.292, App-428.)

Sands began providing legal services to John Menard and Menards in October 1997 and continued

to do so until sometime in early 2006. (Idx.292, p.588; Idx.46, Idx.100, ¶45.) According to Sands, she began dating John Menard on November 6, 1997, moved into his home in August 1998, and became engaged to him in December 1998. (Idx.293, App-895; Idx.292, App-588; Idx.217, ¶¶15-16.)

John Menard admits that he and Sands dated, that he loved her, that they were engaged, and that they spent significant time together. He disputes, however, that she ever cohabited with him, and asserts that she continued to live with her mother and sister in Eleva, Wisconsin.<sup>2</sup> Regardless, it is undisputed that the two had no children, never commingled their finances, never filed joint tax returns, had no joint bank accounts, did not share living expenses, and did not jointly own any real or personal property. (Idx.293, App-869-873.)

\* \* \*

Sands contends that the *Watts* holding stands on two principles: (1) that no contract is required to enforce a claim for unjust enrichment; and (2) that it would be grossly unjust to allow one of the cohabitants to retain all of the wealth cumulated by their joint

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<sup>2</sup> While cohabitation is a disputed issue, it is undisputed that during the discovery process Sands engaged in conduct aimed at preventing the Menard Defendants from obtaining evidence that showed she lived in Eleva, Wisconsin, during the relevant period. (Idx.355; Idx.357.) The trial court's sanction for this abuse was that the jury would be given an adverse inference instruction concerning such misconduct. (Idx.355, p.6; Idx357.) Sands has not appealed this order.

enterprise. (Sands Br. at 29-30.) From these principles, Sands claims that the Court should read *Watts* to create an exception to SCR 20:1.8(a), obviating the need for written consent where the lawyer allegedly cohabits with the client. Sands misreads *Watts*.

To be clear, the plaintiff in *Watts* was not a lawyer and the case did not involve the application of SCR 20:1.8(a). Nor did *Watts* create any new cause of action for unmarried cohabitants. Rather, it recognized that such parties were not barred from asserting existing legal or equitable claims because of their cohabitation. See *Watts*, 137 Wis. 2d at 532, 405 N.W.2d at 314. Sands, however, wants to expand *Watts* beyond these contours by using her alleged cohabitation offensively to argue that it *relieves* her from having to comply with existing laws, in this case SCR 20:1.8(a). Nothing in *Watts* supports this position.

Indeed, the facts of *Watts* bear little resemblance to this case. *Watts* involved two high school sweethearts, who lived together, raised a family together, and built a business together, as part of a joint enterprise, for which plaintiff received *no* compensation. *Watts* “stands for the proposition that a party seeking a division of assets following a period of cohabitation **must provide evidence of shared enterprise.**” *Ward v. Jahnke*, 220 Wis.2d 539, 549, 583 N.W.2d 656, 660 (Ct. App. 1998) (emphasis added); see also *Watts*, 137 Wis.2d at 529, 405 N.W.2d at 529; *Ulrich v. Zemke*, 2002 WI App 246 ¶11, 258 Wis.2d 180, 654 N.W.2d 458.

Here, in contrast, Sands admittedly had an attorney-client relationship with John Menard first. Critically, she also claims that for her legal and non-legal services John Menard promised she “would receive **as compensation** . . . an ownership interest in the various Menard business ventures for which she provided assistance.” (Idx.217, ¶13, emphasis added.) In addition, the following undisputed facts distinguish this case from the joint enterprise in *Watts*:

- Sands billed for her services at the rate of \$145 per hour, and was paid in excess of \$200,000 for them, while she claimed that another \$1,000,000 in fees were “outstanding” (Idx.229, ¶8; Idx.293, App-973; Idx.453, Ex. A, 101; Idx.453, Ex. D, ¶5);
- Sands and John Menard did not comingle their finances, share expenses, or have jointly owned property or joint bank accounts (Idx.293, App-869-873);
- John Menard already had an existing successful business that had been operating for nearly 40 years when he met Sands (293, App-772-773; Idx.292, App-357);
- Sands testified that she was not responsible for any “risk and losses of the enterprise” (Idx.293, App-891-892, App-970);
- Sands denied that John Menard was entitled to any share in the assets that she accumulated during the relevant period (Idx.293, App-864); and

- Sands made more money during the period that she dated John Menard than she did before or after (Idx.290, 26-27.)

This case looks nothing like a joint enterprise, but rather is, as Sands alleges, a contract to be compensated for services with shares. *Watts*, however, y [sic] does not recognize compensation for services, unless the services are linked to an accumulation of wealth as part of a joint enterprise. *See Wagge v. Borer*, 188 Wis. 2d 324, 330-31, 525 N.W.2d 96, 98-99 (Ct. App. 1994).

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R.App. 57a

**STATE OF WISCONSIN  
IN THE COURT OF APPEALS  
DISTRICT III**

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**APPEAL NO. 2012AP002377**

Debra K. Sands,  
Plaintiff-Appellant,

v.

John R. Menard, Jr., Menard, Inc., Menard  
Thoroughbreds, Inc., Webster Hart as Trustee of the  
John R. Menard, Jr. 2002 Trust and Related Trusts,  
Angela L. Bowe as Trustee of the John R Menard, Jr.  
2002 Trust and Related Trusts and Alphons Pitterle  
as Trustee of the John R. Menard, Jr. 2002 Trust and  
Related Trusts,

Defendants-Respondents,

Midwest Manufacturing Co., Wood Ecology Inc.,  
Countertops Inc., Team Menard Inc., Menard Engine  
Group, Menard Competition Technologies LTD,  
MC Technologies Inc., Menard Engineering LTD,  
UltraMotive LTD and Merchant Capital LLC,

Defendants.

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**APPEAL NO. 2015AP870**

Debra K. Sands,  
Plaintiff-Appellant-Cross-Respondent,

v.

John R. Menard, Jr., Menard, Inc.,  
Menard Thoroughbreds, Inc.,

Defendants-Respondents-Cross-Appellants,

R.App. 58a

Webster Hart as Trustee of the John R. Menard, Jr. 2002 Trust and Related Trusts, Angela L. Bowe as Trustee of the John R. Menard, Jr. 2002 Trust and Related Trusts and Alphons Pitterle as Trustee of the John R. Menard, Jr. 2002 Trust and Related Trusts, Midwest Manufacturing Co., Wood Ecology Inc., Countertops Inc., Team Menard Inc., Menard Engine Group, Menard Competition Technologies LTD, MC Technologies Inc., Menard Engineering LTD, UltraMotive LTD and Merchant Capital LLC,  
Defendants.

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ON APPEAL FROM THE CIRCUIT COURT  
FOR EAU CLAIRE COUNTY  
THE HONORABLE PAUL J. LENZ, PRESIDING  
CIRCUIT COURT CASE NO. 2008CV000990

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**COMBINED BRIEF AND APPENDIX OF  
APPELLANT AND CROSS-RESPONDENT**

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Charles K. Maier (WI SBN 1053042)	Mel C. Orchard, III ( <i>Pro Hac Vice</i> )
Daniel R. Shulman ( <i>Pro Hac Vice</i> )	THE SPENCE LAW
Richard C. Landon ( <i>Pro Hac Vice</i> )	FIRM, LLC
GRAY, PLANT, MOOTY, MOOTY & BENNETT, P.A.	15 South Jackson Street
500 IDS Center, 80 South Eighth Street	Post Office Box 548 Jackson, WY 83001
Minneapolis, MN 55402	Telephone: (307) 733-7290
Telephone: 612-632-3000	Facsimile: (307) 733-5248
Facsimile: 612-632-4444	

Attorneys for Plaintiff-Appellant Debra. K. Sands

\* \* \*

The Menard Defendants distinguish Sands' case from *Watts v. Watts* as involving a lawyer and looking "nothing like a joint enterprise." (Respondents' Brief, pp. 36-37.) Both cases, however, arose from long-term cohabitations, eight-plus years here and 12 in *Watts*. In *Watts*, the couple held themselves out as husband and wife and produced two children, while here Sands and Menard were engaged to be married, and would have had children if not for Sands' miscarriages. In both cases, the women performed domestic services, hosted business associates of their partners, and worked extensively in their partners' businesses. In both cases, the defendant promised the plaintiff he would take care of her and she would share in the increased wealth. *Watts*, 405 N.W.2d at 306-07. (A117-330; Idx. 291 at App-88-122.) Sands' legal training makes her more worthy of recompense, not less, inasmuch as she arguably brought more value to the joint enterprise because of it.

The Menard Defendants attempt to distinguish the *DiLuglio* and *Milo Fields* cases by arguing that the agreements the lawyers sought to enforce in those cases were documented. (Respondents' Brief, pp. 39-40.) A cursory reading reveals this had nothing to do with the result or issue – client waiver, ratification, or estoppel to raise non-compliance with the Rule as a defense in a suit by the lawyer.

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R.App. 60a

STATE OF WISCONSIN  
SUPREME COURT

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**APPEAL No. 2012AP002377**

DEBRA K. SANDS,

PLAINTIFF-APPELLANT-PETITIONER,

v.

JOHN R. MENARD, JR. AND MENARD THOROUGHBREDS,  
INC., WEBSTER HART AS TRUSTEE OF THE JOHN R.  
MENARD, JR. 2002 TRUST AND RELATED TRUSTS,  
ANGELA L. BOWE AS TRUSTEE OF THE JOHN R.  
MENARD, JR. 2002 TRUST AND RELATED TRUSTS,  
ALPHONS PITTERLE AS TRUSTEE OF THE JOHN R.  
MENARD, JR. 2002 TRUST AND RELATED TRUSTS,

DEFENDANTS-RESPONDENTS,

MIDWEST MANUFACTURING CO., WOOD ECOLOGY INC.,  
COUNTERTOPS INC., TEAM MENARD INC., MENARD  
ENGINE GROUP, MENARD COMPETITION TECHNOLOGIES  
LTD, MC TECHNOLOGIES INC., MENARD ENGINEERING  
LTD, ULTRAMOTIVE LTD AND MERCHANT CAPITAL LLC,

DEFENDANTS,

MENARD, INC.,

DEFENDANT-RESPONDENT-CROSS-PETITIONER.

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R.App. 61a

**APPEAL No. 2015AP000870**

DEBRA K. SANDS,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT-  
PETITIONER,

v.

JOHN R. MENARD, JR. AND MENARD THOROUGHBREDS,  
INC.,

DEFENDANTS-RESPONDENTS-CROSS APPELLANTS,

WEBSTER HART AS TRUSTEE OF THE JOHN R. MENARD,  
JR. 2002 TRUST AND RELATED TRUSTS, ANGELA L. BOWE  
AS TRUSTEE OF THE JOHN R. MENARD, JR. 2002 TRUST  
AND RELATED TRUSTS, ALPHONS PITTERLE AS TRUSTEE  
OF THE JOHN R. MENARD, JR. 2002 TRUST AND RELATED  
TRUSTS, MIDWEST MANUFACTURING CO., WOOD ECOL-  
OGY INC., COUNTERTOPS INC., TEAM MENARD INC.,  
MENARD ENGINE GROUP, MENARD COMPETITION  
TECHNOLOGIES LTD, MC TECHNOLOGIES INC., MENARD  
ENGINEERING LTD, ULTRAMOTIVE LTD AND MERCHANT  
CAPITAL LLC,

DEFENDANTS,

MENARD, INC.,

DEFENDANT-RESPONDENT-CROSS-APPELLANT-  
CROSS-PETITIONER.

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On Appeal From the Circuit Court  
of Eau Claire County  
Circuit Court Case No. 08 CV 990  
Honorable Paul J. Lenz, Presiding

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**RESPONSE BRIEF OF  
DEFENDANTS-RESPONDENTS-  
CROSS-APPELLANTS**

---

Michael D. Freeborn*	G. Richard White
Brian P. Norton*	(WI Bar No. 1013573)
Andrew C. Nordahl*	WELD RILEY, S.C.
FREEBORN & PETERS, LLP	3624 Oakwood Hills Parkway
311 South Wacker Drive	Eau Claire, Wisconsin 54702
#3000	(715) 839-7786
Chicago, Illinois 60606	(715) 839-8609 (facsimile)
(312) 360-6000	<i>Attorneys for Defendants-</i>
(312) 360-6574 (facsimile)	<i>Respondents-Cross-Appellants</i>
* <i>Pro Hac Vice</i> Order at	
Idx.57	

\* \* \*

Next, Sands claims that this Court should read *Watts* to create an exception to SCR 20:1.8(a), obviating the need for written consent where the lawyer allegedly cohabits with the client. The plaintiff in *Watts*, however, was not a lawyer and the case did not involve the application of SCR 20:1.8(a). Nor did *Watts* create any new cause of action for unmarried cohabitants. Rather, it recognized that such parties were not barred from asserting existing legal or equitable claims because of their cohabitation. *See Watts*, 137 Wis. 2d at 532, 405 N.W.2d at 314. Sands, however, wants to expand *Watts* by using her alleged cohabitation offensively to argue that it *relieves* her from having to comply with existing laws, in this case SCR 20:1.8(a). Nothing in *Watts* supports this position.

Indeed, the facts of *Watts* bear little resemblance to this case. *Watts* involved two high school sweethearts, who lived together, raised a family, and built a business, as part of a joint enterprise, for which plaintiff received *no* compensation. *Watts* “stands for the proposition that a party seeking a division of assets following a period of cohabitation *must provide evidence of shared enterprise.*” *Ward v. Jahnke*, 220 Wis.2d 539, 549, 583 N.W.2d 656, 660 (Ct. App. 1998) (emphasis added); *see also Watts*, 137 Wis.2d at 529, 405 N.W.2d at 529; *Ulrich v. Zemke*, 2002 WI App 246 ¶11, 258 Wis.2d 180, 654 N.W.2d 458.

Here, in contrast, John Menard already had a business, the two did not comingle their finances or jointly own property (*see supra* at 12), and Sands admittedly was paid in excess of \$200,000 for her legal services, while she claimed that another \$1,000,000 in fees were “outstanding.” Indeed, Sands made more money during the period that she had a personal relationship with John Menard than she did beforehand. (*See* Idx.290, pp. 26-27.)

In addition, Sands claimed that for her legal and non-legal services John Menard promised she “would receive *as compensation* . . . an ownership interest in the various Menard business ventures for which she provided assistance.” (Idx.217, ¶13, RA138-139, emphasis added.) To this end, Sands also testified that she was not responsible for any “risk and losses of the enterprise” (Idx.293, App-891-892, RA173-174; Idx.293, App-970), and she denied that John Menard was

entitled to any share in assets that she accumulated during the relevant period (Idx.293, App-862-864).

Thus, this relationship looks nothing like a joint enterprise, but rather is, as alleged by Sands, some kind of stock option for compensation of services rendered. *Watts*, however, does not recognize compensation for services, unless the services are linked to an accumulation of wealth as part of a joint enterprise. *See Wagge v. Borer*, 188 Wis. 2d 324, 330-31, 525 N.W.2d 96, 98-99 (Ct. App. 1994).

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