NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRENT NICHOLSON, an individual; et al., Plaintiffs-Appellants, v. THRIFTY PAYLESS, INC., a California corporation and RITE AID CORPORATION, a Delaware corporation, Defendants-Appellees.	Nos. 15-35180 D.C. No. 2:12-cv-01121-RSL MEMORANDUM* (Filed Jun. 28, 2017)
BRENT NICHOLSON, an individual; et al., Plaintiffs-Appellees, v. THRIFTY PAYLESS, INC., a California corporation and RITE AID CORPORATION, a Delaware corporation, Defendants-Appellants.	No. 15-35242 D.C. No. 2:12-cv-01121-RSL

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the Western District of Washington
Robert S. Lasnik, District Judge, Presiding

Argued and Submitted June 12, 2017
Seattle, Washington

Before: D.W. NELSON, M. SMITH, and CHRISTEN, Circuit Judges.

Thrifty Payless Inc. ("Thrifty") and the Rite Aid Corporation ("Rite Aide") (collectively, "Appellees") terminated leases and guarantees with limited liability companies ("LLCs"),[1] managed by Brent Nicholson ("Nicholson") (collectively, "Appellants"), to build Rite Aid stores. The LLCs appeal the district court's holdings (1) that they were judicially estopped from pursuing claims against Appellees based on representations Nicholson made to the bankruptcy court in his personal bankruptcy proceedings, and (2) that the LLCs' contract-based claims failed as a matter of law. The LLCs also appeal the district court's determination that they are jointly and severally liable for the award of attorney's fees.[2] Nicholson appeals the rulings finding him personally liable for (1) extra rent Thrifty paid to No One to Blaine, LLC ("No One to Blaine"), and (2) attorney's fees. Thrifty cross-appeals the district court's failure to award prejudgment interest on the

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[1] The LLCs are: NMP Concord, LLC; San Pablo Cruise, LLC; Oakley Dokley, LLC; Holy Rose, LLC; Sunnyboy, LLC; Full to the Brem, LLC; Ho Silver-Dale, LLC; Whateverett, LLC; The Right Angeles, LLC; No One to Blaine, LLC; and Poulsbo Holdings, LLC.

[2] Poulsbo Holdings appeals only the district court's attorney's fee award.

extra rent paid to No One to Blaine. We have jurisdiction under 28 U.S.C. § 1291, and we **AFFIRM in part** and **VACATE and REMAND in part**.

1. The district court did not abuse its discretion in judicially estopping Appellants from pursuing their claims. Nicholson listed only six of the LLCs on the schedule submitted to the bankruptcy court and reported that his interests in those LLCs had a current value of $0.00. He also failed to make any attempt to value the LLCs' potential claims against Appellees even though, before the schedule was filed, Appellees had already issued termination notices as to the San Pablo and Oakley Projects. Because the bankruptcy court confirmed the plan based on an incomplete scheduling of assets and knowledge of potential lawsuits, and no explanation was offered as to the decision to list some, but not all, of the suits, the district court did not abuse its discretion in estopping Appellants' claims. *See Ah Quin v. Cty. of Kauai Dep't of Transp.*, 733 F.3d 267, 271 (9th Cir. 2013) ("In the bankruptcy context, the federal courts have developed a basic default rule: If a plaintiff-debtor omits a pending (or soon-to-be-filed) lawsuit from the bankruptcy schedules and obtains a discharge (or plan confirmation), judicial estoppel bars the action."). Because we affirm on this ground, we need not consider whether Appellants' claims failed as a matter of law.

2. We vacate and remand the ruling holding Nicholson personally liable for the attorney's fee award. The parties agree that Washington law controls nine and California law controls two of the leases. *See MRO*

Commc'ns, Inc. v. Am. Tel. & Tel. Co., 197 F.3d 1276, 1281 (9th Cir. 1999) (explaining that when exercising jurisdiction over state law claims, a federal court generally applies state law in determining the right to fees). The parties also agree Nicholson signed the lease agreements and guarantees in his capacity as the managing member of each LLC.

Under California law, "[w]here a contract specifically provides for an award of attorney's fees incurred to enforce the provisions of a contract, the prevailing party in an action on the contract is entitled to reasonable attorney's fees." *Real Prop. Servs. Corp. v. City of Pasadena*, 30 Cal. Rptr. 2d 536, 539 (Cal. Ct. App. 1994). Generally, "attorney's fees are awarded only when the . . . lawsuit is between signatories to the contract." *Id.* "Under some circumstances, however, the reciprocity principles of [California] Civil Code 1717 will be applied in actions involving signatory and nonsignatory parties." *Id.* at 539. "Where a nonsignatory plaintiff sues a signatory defendant for an action on a contract and the signatory defendant prevails, the signatory defendant is entitled to attorney's fees only if the nonsignatory plaintiff would have been entitled to its fees if the plaintiff had prevailed." *Id.* at 541; *see also Brown Bark III, L.P. v. Haver*, 162 Cal. Rptr. 3d 9, 18 (Cal. Ct. App. 2013). The California Court of Appeal has observed "[t]here are two factual scenarios where courts have awarded attorney fees in cases involving a nonsignatory to a contract that contains an attorney fee provision": (1) where the nonsignatory party "stands in the shoes of a party to the contract," and (2) where "the nonsignatory litigant is a third party beneficiary of the contract containing the attorney fee provision." *Richards v. Silva*, No. B267486, 2016 WL 6123917, at *3-4 (Cal. Ct. App. Oct. 20, 2016) (citations and internal quotation marks omitted).

Similarly, under Washington law, "RCW 4.84.330 authorizes attorney fees to the prevailing party in an action on a contract containing an attorney fee provision." *4518 S. 256th, LLC v. Karen L. Gibbon, P.S.*, 382 P.3d 1, 12 (Wash. Ct. App. 2016). "The mutuality of remedy intended by [RCW 4.84.330] supports an award of attorney fees to a prevailing party under a contractual provision if the party-opponent would have been entitled to attorney fees under the same provision had the opponent prevailed. . . ." *P.T. Ika Muda Seafoods, Int'l v. Ocean Beauty Seafoods, Inc.*, 135 Wash. App. 1025, 2006 WL 3059959, at *3 (Wash. Ct. App. 2006). In some circumstances, attorney's fees may be awarded to a nonsignatory under RCW 4.84.330. *Niederle v. T.D. Escrow Servs., Inc.*, 114 Wash. App. 1046, 2002 WL 31648772, at *5 (Wash. Ct. App. 2002) (discussing *Herzog Aluminum, Inc. v. Gen. Am. Window Corp.*, 692 P.2d 867 (Wash. Ct. App. 1984)). *But see 4518 S. 256th*, 382 P.3d at 12 ("One must be a party to the contract, however, to potentially be entitled to [a fee] award.").

Here, the court ruled that because Nicholson asserted claims on a contract with an attorney's fee provision, he opened himself up to a fee award if he did not prevail. Although the court noted that, "[h]ad he prevailed on the claims as asserted (through an alter ego, third-party beneficiary, or other theory), Nicholson would undoubtedly have sought an award of fees from defendants under the contracts," the court did not address whether Nicholson would have been entitled to fees if he had prevailed. Based on the court's sparse analysis, it is unclear whether it considered or applied the legal standards set forth above. We are therefore unable to assess whether the court abused its discretion by holding Nicholson liable for fees based on a contract to which he is not a party.[3] Accordingly, we vacate and remand for the district court to explain why Nicholson is personally liable for the fee award. *See Tessler v. Zadok*, 452 F. App'x 786, 787 (9th Cir. 2011) ("[B]ecause we are unable to discern either the legal or the factual bases for the district court's decision, we are unable to assess whether the district court abused its discretion.")

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[3] The court's reliance on *Deep Water Brewing, LLC v. Fairway Resources Ltd.* 152 Wn. App. 229 (Wash. Ct. App. 2009), for the broad proposition that, by asserting claims on a contract, Nicholson opened himself up to liability for the fee award, appears to be misplaced. That court explained that although the Kenagys were not third party beneficiaries to certain easement and right-of-way agreements, they could still "enforce the agreements (with attorney fee provisions) as running covenants protecting the view from their restaurant." *Id.* at 278. There are no running covenants here. Nor-contrary to the district court's description of the holding-did the appellate court address whether the lower court "erred in awarding fees based on the doctrine of equitable indemnity." *Id.* at 279. Moreover, equitable indemnity likely does not apply here. *See Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.*, 110 P.3d 1145, 1150 (Cal. Ct. App. 2005); *Manning v. Loidhamer*, 538 P.2d 136, 138-39 (Wash. Ct. App. 1975).

3. The district court did not abuse its discretion by holding the LLCs jointly and severally liable for the attorney's fee award. The court concluded that joint and several liability was appropriate because the LLCs pursued their claims against Appellees in a single lawsuit and an accurate allocation of fees would be impossible. Further, the LLCs were represented by the same counsel and do not seem to have distinguished their respective contributions to the lawsuit. Accordingly, we affirm the ruling holding the LLCs jointly and severally liable for the attorney's fee award. *See Bloor v. Fritz*, 180 P.3d 805, 821 (Wash. Ct. App. 2008) (finding the trial court did not abuse its discretion by not segregating the attorney's fee award where "it would be 'almost impossible' to segregate the time spent on the various claims . . . [and] [t]he claims arose out of the same set of facts and involved interactions between the defendants."); *Friends of the Trails v. Blasius*, 93 Cal. Rptr. 2d 193, 211 (2000).

4. We affirm the district court's ruling finding Nicholson personally liable for extra rent Thrifty paid to No One to Blaine. In the same order in which it judicially estopped the LLCs from pursuing their claims, the court held both Nicholson and No One to Blaine liable for $103,500 in extra rent payments. Because Nicholson failed to contest his personal liability in his response to Thrifty's motion for summary judgment, but rather contested his liability for the first time in his motion for reconsideration of that order, Nicholson has waived this issue on appeal. *See Novato Fire Protection Dist. v. United States*, 181 F.3d 1135, 1142 n.6 (9th Cir.

1999) (explaining that Appellants' "failure to raise the issues in the summary judgment motions waives their right to do so on appeal").

5. The district court erred in not ruling on Thrifty's request for prejudgment interest on extra rent paid to No One to Blaine. In its motion for summary judgment, Thrifty argued that, because its counterclaim was liquidated, Thrifty was "entitled to prejudgment interest as a matter of right" under Washington law. Appellants did not challenge Thrifty's right to prejudgment interest in their opposition to Thrifty's motion. However, the court failed to address if Thrifty was entitled to interest on the counterclaim. We therefore remand for the court to determine if Thrifty is entitled to prejudgment interest under Washington law.

AFFIRMED in part and VACATED and REMANDED in part.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRENT NICHOLSON, an individual; et al., Plaintiffs-Appellants, v. THRIFTY PAYLESS, INC., a California corporation and RITE AID CORPORATION, a Delaware corporation, Defendants-Appellees.	Nos. 15-35180 D.C. No. 2:12-cv-01121-RSL U.S. District Court for Western Washington, Seattle **ORDER** (Filed Jun. 29, 2017)

BRENT NICHOLSON, an individual; et al., Plaintiffs-Appellees, v. THRIFTY PAYLESS, INC., a California corporation and RITE AID CORPORATION, a Delaware corporation, Defendants-Appellants.	No. 15-35242 D.C. No. 2:12-cv-01121-RSL U.S. District Court for Western Washington, Seattle

At the direction of the Court, Each party shall bear its own costs.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Peggy Hall
Deputy Clerk
Ninth Circuit Rule 27-7

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BRENT NICHOLSON, *et al.*, Plaintiffs, v. THRIFTY PAYLESS, INC., *et al.*, Defendants.	No. C12-1121RSL ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (Filed Feb. 5, 2015)

This matter comes before the Court on "Defendants' Motion for Summary Judgment." Dkt. # 88. Summary judgment is appropriate when, viewing the facts in the light most favorable to the nonmoving party, there is no genuine issue of material fact that would preclude the entry of judgment as a matter of law. The party seeking summary dismissal of the case "bears the initial responsibility of informing the district court of the basis for its motion" (*Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)) and "citing to particular parts of materials in the record" that show the absence of a genuine issue of material fact (Fed. R. Civ. P. 56(c)). Once the moving party has satisfied its burden, it is entitled to summary judgment if the nonmoving party fails to designate "specific facts showing that there is a genuine issue for trial." *Celotex Corp.*, 477 U.S. at 324. The Court will "view the evidence in the light most favorable to the nonmoving party . . . and draw all reasonable inferences in that party's favor." *Krechman v. County of Riverside*, 723 F.3d 1104, 1109 (9th Cir. 2013). Although the Court must reserve for the jury genuine issues regarding credibility, the weight of the evidence, and legitimate inferences, the "mere existence of a scintilla of evidence in support of the non-moving party's position will be insufficient" to avoid judgment. *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1049 (9th Cir. 2014); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Factual disputes whose resolution would not affect the outcome of the suit are irrelevant to the consideration of a motion for summary judgment. *S. Cal. Darts Ass'n v. Zaffina*, 762 F.3d 921, 925 (9th Cir. 2014). In other words, summary judgment should be granted where the nonmoving party fails to offer evidence from which a reasonable jury could return a verdict in its favor. *FreecycleSunnyvale v. Freecycle Network*, 626 F.3d 509, 514 (9th Cir. 2010).

Having reviewed the memoranda, declarations, and exhibits submitted by the parties and having heard the arguments of counsel, the Court finds as follows:

A. Judicial Estoppel

On April 22, 2010, plaintiff Brent Nicholson and his wife filed for bankruptcy protection under Chapter 11. Although the bankruptcy proceeding was filed by the individuals, it was clear that the bulk of the couple's assets and liabilities were tied up in the various LLCs Nicholson had created to own and develop properties. In an amended schedule of assets filed on June 18, 2010, Nicholson disclosed six of the LLCs that are plaintiffs in this litigation and reported that his interest in the LLCs had a current value of $0.00. With regards to these six projects, Nicholson explained that each of the entities was "completely underwater based on the value of the property and the amount of secured debt." Nicholson Dep., Ex. 408 at ¶ 14. Defendants had not yet issued termination notices as to these six projects and have not shown that the valuation analysis was defective at the time it was made.

Nicholson did not, however, disclose the existence of the other four plaintiff LLCs, namely San Pablo Cruise, Oakley Dokley, Holy Rose, or Sunnyboy, and did not assign a value thereto. At the time the June 18, 2010, schedule was filed, defendants had already issued termination notices as to the San Pablo and Oakley projects. Plaintiffs have not attempted to explain why they failed to disclose companies in which Nicholson had a substantial interest (85% ownership) or why they failed to disclose the potential claims San Pablo Cruise and Oakley Dokley had against Rite Aid.

On June 8, 2011, Nicholson filed a "Periodic Report" disclosing all ten of the plaintiff LLCs and the percentage interest he owned in each entity. No statements regarding the LLCs' values or the value of the debtors' interests in the entities were provided. Nicholson simply noted the date on which the LLCs had lost or soon would lose control of each property and stated that the LLCs would be filing a lawsuit against Rite

Aid Corporation.[1] Defendants had terminated all of the leases at that point.

The Disclosure Statement issued to all creditors and other interested parties who would have to decide whether to accept or reject the debtor's proposed plan of reorganization again failed to disclose the existence of San Pablo Cruise, Oakley Dokley, Holy Rose, or Sunnyboy. Plaintiffs rely on a reference in the Disclosure Statement to the June 8, 2011, filing to fill the void, but offer no explanation for why these assets were not affirmatively disclosed in this important document. With regards to the six LLCs that were disclosed, Nicholson justified a valuation of $0.00 using the following analysis:

> The values have been determined by the Debtors based on their opinion of the market value of the limited liability company interests. This opinion has been based on information supplied by real estate and business brokers, but the Debtors have not hired any appraisers to make the determinations. In general the calculation of the market value was made based on an analysis of the gross value of the underlying assets owned by each entity less the outstanding debt owned by the entity. The Debtors' percentage interest in that net value figure for the entity is then further discounted based on application of

[1] Although Full to the Brem, LLC, and Nicholson's interest therein is disclosed in a chart on page 2 of the report (Decl. of Richard G. Birinyi (Dkt. # 92), Ex. 2), the Court has been unable to locate a form "Valuation Estimate" for that entity.

> traditional marketability and minority interest adjustments because any person buying the Debtors' interest in a limited liability company would become only the owner of an economic interest and would have no right to participate in management of any of the entities.

Decl. of Richard G. Birinyi (Dkt. # 92), Ex. 3 at 12. This valuation methodology appears to be faulty in a number of respects, one of which is relevant to the judicial estoppel analysis. Nicholson fails to disclose, much less take into consideration, the claims asserted in this litigation. The methodology simply tallies up the assets owned by each LLC minus its outstanding debts. The only reference to a potential claim is found in a separately-filed document, the June 8, 2011, report, that itself contains no information regarding the nature or value of the claim.[2]

The Liquidating Plan of Reorganization approved by the Honorable Karen A. Overstreet, United States Bankruptcy Judge, on August 8, 2011, again fails to disclose the existence of San Pablo Cruise, Oakley Dokley, Holy Rose, or Sunnyboy and the claims asserted in this

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[2] The method for calculating Nicholson's personal interest in the assets of each LLC is also unlikely to generate an accurate valuation of the disclosed LLCs. First, Nicholson failed to acknowledge his right to recover loans or advances made to the entities in his personal capacity. Second, Nicholson apparently discounted his ownership interests in each LLC by 80% on the unsupported supposition that funds could not be accumulated by the Liquidating Trustee for disbursement to creditors unless there were a sale of the ownership interest in the LLC.

litigation. Decl. of Richard G. Birinyi (Dkt. # 92), Ex. 8. The plan recognizes that the six disclosed LLCs, defined as "Exempt Asset Entities" in Schedule 2.26 of the plan, may have undefined "Damage Claims" against third parties, but abandons those claims to Nicholson in exchange for 10% of his share of any "Net Entity Litigation Proceeds" obtained in litigation.[3]

"Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position." *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001). "In the bankruptcy context, the federal courts have developed a basic default rule: If a plaintiff-debtor omits a pending (or soon-to-be-filed) lawsuit from the bankruptcy schedules and obtains a discharge (or plan confirmation), judicial estoppel bars the action." *Ah Quin v. County of Kauai Dept. of Transp.*, 733 F.3d 267, 271 (9th Cir. 2013). Such a rule generally comports with the Supreme Court's analysis in *New Hampshire v. Maine*, 532 U.S. 742 (2001), because the positions taken are inconsistent ("there is

[3] Counsel for the Trustee interpreted the plan of organization as precluding the Trustee from directly pursuing claims held by the Exempt Asset Entities. Decl. of Daniel R. Merkle (Dkt. # 93) at ¶ 7. Although one could argue that ¶ 7.12 of the plan contemplates that the term "Damage Claims" includes claims held by the Exempt Asset Entities and gave the Liquidating Trustee the option of directly pursuing those claims for the benefit of the creditors or abandoning those claims, the Trustee apparently believed that the claims asserted herein had been abandoned to the debtors upon confirmation.

not a claim" vs. "there is a claim"), the bankruptcy court accepted the prior representation (by allocating resources, discharging debts, and/or reorganizing debtors in reliance thereon), and the debtor obtained an unfair advantage (creditors did not have a chance to assess and benefit from the undisclosed assets before discharge or reorganization). *Ah Quin*, 733 F.3d at 271. Barring litigation of claims that were not disclosed in bankruptcy also furthers the underlying goal of judicial estoppel, which is "to protect the integrity of the judicial process" by prohibiting parties from "playing fast and loose with the courts." *New Hampshire*, 532 U.S. at 749-50; *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990).

Plaintiffs argue that (1) there were no inconsistent statements because all ten LLCs and their potential claims were disclosed in the June 8, 2011, report; (2) Nicholson's valuation of his interests in the LLCs was reasonable; (3) neither the presiding judge nor the Liquidating Trustee was misled regarding the existence and nature of the claims asserted in this litigation; (4) a final decree has not been entered in the bankruptcy proceeding and the bankruptcy court retains jurisdiction to ensure that the purposes and intent of the plan are carried out; (5) plaintiffs have not obtained an unfair advantage in this litigation; and (6) it would be unfair to the LLCs, Nicholson's partners, and the bankruptcy creditors to invoke judicial estoppel. Each argument is considered below.

(1) Adequacy of Disclosures in Bankruptcy Proceeding

The bankruptcy code places an affirmative duty on the debtor to carefully, completely, and accurately schedule his assets and liabilities. *See* 11 U.S.C. § 521(1); *Cusano v. Klein*, 264 F.3d 936, 945-46 (9th Cir. 2001). Nicholson repeatedly and without explanation failed to disclose four LLCs in which he had a substantial interest, repeatedly and without explanation failed to disclose the claims asserted in this litigation, and, in the one document where the LLCs and the potential lawsuit were disclosed, made no attempt to value the claims. Even if the June 8, 2011, periodic report contained a full, fair, and accurate disclosure of Nicholson's personal interests in the claims asserted here (it did not), such a disclosure was buried amidst hundreds of other documents in which he was not so forthcoming. Nicholson filed key documents, including schedules, disclosure statements, and the plan itself, that contained statements inconsistent with the claims asserted in this litigation, all the while knowing that his creditors and the bankruptcy court would rely on those documents when evaluating the debtors' ability to make good on his debts. *See Hamilton*, 270 F.3d at 784 (providing notification of claims to the trustee by mail or otherwise is insufficient where debtor "is required to have amended his disclosure statements and schedules to provide the requisite notice, because of the express duties of disclosure imposed on him by 11 U.S.C. § 521(1), and because both the court and [his] creditors base their actions on the disclosure statements and schedules."). Nicholson's repeated failures to disclose the existence of four of the plaintiff LLCs and/or the claims asserted in this litigation are inconsistent statements for purposes of the judicial estoppel analysis.

(2) Reasonableness of Valuation

Plaintiffs argue that the $0.00 valuation assigned to the six disclosed LLCs (and to all of the plaintiff LLCs in the June 8, 2011, periodic report) was appropriate because (a) the value of the property owned by each LLC was less than its outstanding debt and (b) it is a common practice to assign high stakes litigation zero value and leave it to the creditors, trustee, and/or court to investigate the actual value of the claims. With regards to the first argument, the issue is not whether the assets on each LLC's books were greater or less than its debts, but whether Nicholson appropriately accounted for the existence of the LLC's known claims against defendants. He did not. As for the second argument, plaintiffs seem to be arguing that a debtor can arbitrarily value an unliquidated claim because, once the existence of the claim is disclosed, the obligation to investigate and accurately value the asset is foisted onto the other parties in the bankruptcy proceeding. While a perfect valuation of a potential claim cannot be expected or demanded (*see Ingram v. Thompson*, 141 Wn. App. 287, 293 (2007)), a good faith effort based on the debtors' familiarity with the facts giving rise to the cause of action is necessary to effectuate the purposes of the disclosure requirements. "Causes of action are separate assets which must be formally listed" and valued on the schedules. *Cusano*, 264 F.3d at 947. A debtor cannot affirmatively state that a claim has no value, rather than that the value is unknown, on the assumption that someone else will figure out that the statement is a lie. *See Harris v. Fortin*, 183 Wn. App. 522, 333 P.3d 556, 560 (2014). In this case, Nicholson ignored the existence of the claims entirely and did not even attempt to calculate their value before announcing that the LLCs were worthless. Such "valuation" is not reasonable.

(3) Knowledge of the Court and the Liquidating Trustee

Plaintiffs argue that the bankruptcy court was aware of the claims that were subsequently asserted in this litigation and did not, therefore, accept Nicholson's prior inconsistent omissions and statements. To the extent plaintiffs are relying on the June 8, 2011, periodic report as the source of Judge Overstreet's supposed knowledge, the argument fails. As noted above, a disclosure in a single, unremarkable document is insufficient under the Bankruptcy Act, especially where the disclosure has been excluded from the documents on which judges, creditors, and trustees typically rely. The June 8, 2011, periodic report does not give rise to a reasonable inference of knowledge in the circumstances presented here. Plaintiffs provide no other evidence suggesting that Judge Overstreet was told or otherwise knew about these claims before she confirmed the debtors' proposed plan of reorganization on

August 8, 2011. There is some indication that the Liquidating Trustee had additional information regarding the existence and nature of the claims, but it is unclear what the Liquidating Trustee was told. In addition, any additional information seems to have been disclosed in meetings held after the plan of reorganization was confirmed by Judge Overstreet, and there is no indication that she was aware of any additional information before confirming the plan. The only reasonable inference from the record is that Nicholson succeeded in persuading Judge Overstreet that the LLCs had no viable claims arising out of the termination of the lease agreements and/or that any potential claims were worthless.

(4) Bankruptcy Court Retains Jurisdiction

Plaintiffs argue that, because a final decree has not yet been entered, any disputes regarding the appropriate allocation of Net Entity Litigation Proceeds can be determined by the bankruptcy court. Even if the Court were to assume that the presiding bankruptcy judge has the power to rewrite the terms of the plan to require Nicholson to turn over something more than 10% of the net proceeds from the litigation or to add entities to Schedule 2.26, preventing a party from gaining an unfair advantage is only one of the goals of the doctrine of judicial estoppel. Courts also invoke judicial estoppel in order to promote the orderly administration of justice, to protect the dignity of judicial proceedings, and to ensure that those who game the system are not rewarded. *See Hamilton*, 270 F.3d at 782. The fact that the bankruptcy judge might, if the issue were properly raised in the future, reform the order of confirmation to take the newly disclosed information into account is of little solace. Nicholson has not moved to reopen the bankruptcy proceeding to correct the disclosures, and a reevaluation of the reorganization plan remains unlikely. Plaintiffs are currently prosecuting inconsistent claims for millions of dollars before this Court, which must therefore decide whether those claims should be permitted to go forward. If the relevant factors tip in favor of estoppel, the mere possibility that another court may yet be able to undo the systemic harm Nicholson has caused will not stay this Court's application of the doctrine.

(5) Unfair Advantage or Detriment in this Litigation

The unfair advantage that is relevant to the judicial estoppel analysis is not, as plaintiffs would have it, an advantage in the second litigation. As recently discussed by the Ninth Circuit, a debtor receives an unfair advantage from a misrepresentation or omission when it obtains a discharge or plan confirmation without giving creditors a fair opportunity to lay claim to the hidden assets. *Ah Quin*, 733 F.3d at 271. In this case, Nicholson failed to disclose the existence of four LLCs in which he had an 85% interest, failed to disclose that the ten plaintiff LLCs had claims arising out of the lease terminations, and made no attempt to value those claims at any stage of the bankruptcy proceeding. The creditors had no reason to suspect that by agreeing to the plan proposed by the debtors, the multi-million dollar claims of San Pablo Cruise, Oakley Dokley, Holy Rosa, and Sunnyboy (the LLCs excluded from the list of Exempt Asset Entities) would automatically revert back to Nicholson[4] or that they were limiting themselves to 10% of the substantial recovery now sought by the other six LLCs. Nicholson downplayed his assets and obtained a plan of reorganization based on falsehoods of omission. He has been unfairly advantaged vis-à-vis his creditors.

(6) Privity and Fairness

Plaintiffs argue that, on balance, the Court should not use its equitable powers to bar the claims asserted in this litigation because to do so would be unfair to the LLCs (none of which made representations in Nicholson's personal bankruptcy proceeding), Nicholson's partners (who generally hold a minority interest in the LLCs), and Nicholson's creditors (who currently stand to recover 10% of any net litigation proceeds obtained by Full to the Brem, High Ho Silverdale, NMP Concord II, No One to Blaine, The Right Angeles, and Whateverett). The argument regarding the LLCs and

[4] Nicholson has apparently stated in discovery that he will turn over 10% of any and all net proceeds from this litigation to the Liquidating Trustee, despite the fact that only six of the ten plaintiff LLCs are on Schedule 2.26 of the plan. Nevertheless, the plan itself does not require such generosity: the undisclosed LLCs are not "Exempt Asset Entities" required to turn over 10% of their share of the "Net Entity Litigation Proceeds." Pursuant to ¶ 7.1 of the plan of reorganization, these hidden assets revested in the debtors upon confirmation.

their other investors is based solely on the fact that the LLCs "were not parties to the Nicholson bankruptcy." Dkt. # 91 at 9. Estoppel doctrines are generally applied "not only against actual parties to prior litigation, but also against a party that is in privity to a party in a previous litigation." *Wash. Mut., Inc. v. U.S.*, 636 F.3d 1207, 1216 (9th Cir. 2011). When a person owns most or all of the shares in a corporate entity and controls its affairs, there is a presumption that the entity and the individual have a commonality of interest and, therefore, privity. *In re Gottheiner*, 703 F.2d 1136, 1140 (9th Cir. 1983). Plaintiffs do not dispute that Nicholson had a significant majority interest in eight of the ten LLCs, managed the business affairs of the LLCs, and acted as their virtual representative in both an operational and a litigation capacity. "Because the doctrine of judicial estoppel is intended to protect the courts, we are particularly mindful that the '[i]dentity of parties is not a mere matter of form, but of substance.'" *Milton H. Green Archives, Inc. v. Marilyn Monroe, LLC*, 692 F.3d 893, 996 (9th Cir. 2012) (quoting *Chicago, Rock Island & Pac. Ry. Co. v. Schendel*, 270 U.S. 611, 620 (1926)). In the circumstances of this case, it is not unfair to bind the LLCs and their minority members by Nicholson's acts. *See Lia v. Saporito*, 909 F. Supp.2d 149, 178-79 (E.D.N.Y. 2012) (applying judicial estoppel to bar LLC's claim because the claim was inconsistent with its managing member's prior representations).

Fairness to the creditors is, of course, a concern in the judicial estoppel analysis in that courts typically consider whether the debtor gained an unfair advantage over them in the bankruptcy proceeding. Where an asset is hidden or grossly undervalued in the schedules resulting in a discharge of debts and the abandonment of the asset back to the debtor, the creditors are undoubtedly harmed.[5] This case is different, however, because the plan of reorganization gives the creditors a continuing, albeit modest, interest in the claims of six of the LLCs. Thus, allowing the claims to go forward may result in a recovery for the creditors, whereas barring the claims ensures that the creditors receive nothing. As was the case in *Ah Quin*, if the Court does not permit this civil action to go forward, the creditors lose out while defendants, who allegedly

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[5] In *Biesek v. Soo Line R.R. Co.*, 440 F.3d 410, 413 (7th Cir. 2006), Judge Easterbrook challenges this basic presumption, arguing that using judicial estoppel to wipe out a claim is "another blow on the victims of bankruptcy fraud," *i.e.*, the creditors, and is not an equitable application of the doctrine. "Instead of vaporizing assets that could be used for the creditors' benefit, district judges should discourage bankruptcy fraud by revoking the debtors' discharges and referring them to the United States Attorney for potential criminal prosecution." *Id.* Judge Easterbrook did not follow his own suggestion in that case, however, nor has undoing bankruptcy discharges or plan confirmations become the remedy of choice in other courts. (The Ninth Circuit has noted that where *the debtor* moves to reopen the bankruptcy proceedings and correct the prior misstatements, the integrity of the judicial system remains intact and judicial estoppel may not be appropriate. *Ah Quin*, 733 F.3d at 275-76. As far as the record shows, Nicholson has not made any attempt to correct the underlying bankruptcy record in this case.) At a later point in the *Biesek* opinion, Judge Easterbrook notes that, if the trustee had abandoned a seemingly worthless or low value asset to the debtor who then seeks to bring suit in his or her own name, "*[t]hen* it would have been necessary to consider judicial estoppel." *Id.* (emphasis in original). That is exactly the situation we have here.

breached various obligations to the LLCs, are relieved of the responsibility to defend and/or pay the consequences for their actions. 733 F.3d at 275.

While the Court is reluctant to deprive the creditors of their only chance of recovering any assets related to the plaintiff LLCs, the balance of the interests and equities at stake nevertheless suggests that estoppel is appropriate. Nicholson's omissions and misstatements before the bankruptcy court were clearly inconsistent with his position in this litigation, they were accepted by the bankruptcy court, and they bestowed upon Nicholson an unfair advantage. *New Hampshire*, 532 U.S. 750-51. These factors tip the balance of equities decidedly in favor of barring Nicholson's efforts to collect millions of dollars in this action. On the other side of the scale is the fact that the creditors will lose the chance to recover 10¢ on the dollar if Full to the Brem, High Ho Silverdale, NMP Concord II, No One to Blaine, The Right Angeles, or Whateverett succeed on their claims (after litigation costs are deducted and other members of the LLCs are paid). "[T]he doctrine of judicial estoppel is concerned with the integrity of the courts, not the effect on parties," however. *Ah Quin*, 733 F.3d at 275. By hiding claims in the amount of $59,000,000 (with a personal interest of approximately $40,000,000), Nicholson was able to convince the creditors and the bankruptcy court to approve his proposed plan of reorganization. The fact that the plan gives the creditors a small interest in this litigation should not be enough to excuse or insulate the intentional and remarkably inconsistent statements at issue here. Either the bankruptcy court was misled or this Court is being misled. Nicholson cannot have it both ways. Having failed to reopen the bankruptcy proceeding to correct the asset valuation, he is estopped from taking a position in this litigation that is inconsistent with that on which Judge Overstreet relied in confirming his plan of reorganization.

B. Breach of Contract and Good Faith and Fair Dealing Claims

In the alternative, the Court finds that plaintiffs' contract-based claims fail as a matter of law. Plaintiffs allege that, by issuing the various termination letters, defendants positively and unequivocally repudiated any intent to perform their obligations under the lease agreements. An anticipatory repudiation releases the other party from any obligation to perform or tender performance under the contract. *Refrigeration Eng'g Co. v. McKay*, 4 Wn. App. 963, 967 (1971) (citing 4 A. Corbin, Contracts § 977). An award of damages arising from the repudiation will only be available, however, if plaintiffs were in a position to perform their obligations under the leases, such that it can fairly be said that the repudiation caused the loss. *See Carlson v. Leonardo Truck Lines, Inc.*, 13 Wn. App. 795, 803-05 (1975). Where the non-repudiating party still had time to comply with a condition precedent but was effectively released from its obligation to do so by the repudiation, the burden shifts to the repudiating party to demonstrate that the repudiation did not contribute materially to the non-occurrence of the condition precedent. *Puget Sound Serv. Corp. v. Bush*, 45 Wn. App. 312, 318 (1986).

Regardless of where the burden is placed, the evidence shows that the repudiation of the leases (*i.e.*, the issuance of the termination letters), did not materially contribute to or otherwise cause plaintiffs' inability to finance and deliver the buildings as specified in the agreements. All of the plaintiff LLCs except Oakley Dokley had lost control of the properties that were the subject of the leases before defendants tendered the notices of termination. With regards to Oakley Dokley, the LLC had defaulted, a foreclosure sale had been scheduled, and the LLC had declared bankruptcy when the notice of termination issued.[6] Because the location of the stores was a material element of the lease agreements, the loss of the properties meant that plaintiffs were unable to perform under their contracts. The losses preceded the termination letters and were in no way caused by the repudiation. In these circumstances, no reasonable jury could infer that, by declaring the deal over, defendants had caused plaintiffs' losses. *See Hammes Co. Healthcare, LLC v. Tri-City Healthcare Dist.*, 801 F. Supp.2d 1023, 1038 (S.D. Cal. 2011) (finding that plaintiff's failure to secure the

[6] Less than a month after the bankruptcy court dismissed the bankruptcy petition, the property was sold at a trustee's sale. Defendants sent a second notice of termination, presumably because the one issued while the bankruptcy proceeding was open violated the automatic stay. In any event, Oakley Dokley had for months been unable to make payments on the promissory note and was clearly unable to retain control of the site when the first termination letter was sent.

requisite ground lease meant that it could not perform its primary obligation under the contract – the construction and delivery of a building – and that defendant's anticipatory breach did not cause plaintiff's damages).

In an effort to rebut defendants' evidence, plaintiffs identify a number of reasons why they were unable to retain control of the properties identified in the leases. The gist of the arguments is that the lending and investing communities did not want to lend on the projects because they were concerned about Rite Aid's financial condition. Plaintiffs enumerate the efforts they made to locate funding sources for the projects prior to the foreclosures, all of which were unavailing. Essentially, plaintiffs' evidence shows that they were unable to perform under the contract (*i.e.*, they were unable to retain control of properties, complete the landlord's work, and deliver the buildings) because the global economy was in the midst of a liquidity crisis and Rite Aid, plaintiffs' chosen business partner, was not well-placed to compete in the new environment. Risks associated with financing the projects were assigned to plaintiffs under the lease agreements, however, and, defendants have shown that the difficulties plaintiffs encountered preceded and were not the result of defendants' anticipatory repudiation.

Plaintiffs are essentially arguing that, because the delivery dates for many of the projects had been extended into the future, defendants are unable to prove that plaintiffs would not have been able to obtain financing and re-acquire the lost properties following the foreclosures in the absence of the repudiation. As discussed above, however, defendants have provided evidence that the properties were lost, that plaintiffs could not build and deliver the buildings, and that the repudiation had nothing to do with those facts. If left unrebutted, defendants' evidence clearly warrants summary judgment under Washington law. Plaintiffs, as the non-moving parties, have the burden of coming forward with evidence sufficient to raise a genuine issue of material fact. As described by defendants, the only "evidence" that the repudiation caused plaintiffs' losses is Nicholson's seemingly unfounded optimism that "if defendants had just agreed to change the terms of their leases in multiple unspecified ways and had given them more time, they might possibly, after having defaulted on all their prior land purchase contracts and loans, have been able to come up with new financing that had eluded them during two prior years of fruitless desperate searching." Dkt. # 96 at 7. Plaintiffs' hypothesizing is insufficient to allow this question to go to the jury: mere speculation does not create a genuine issue of fact regarding plaintiffs' inability to fulfill the conditions precedent when they had already lost the ability to develop the specified properties. *See Record Realty, Inc. v. Hull*, 15 Wn. App. 826, 829-30 (1976) (a broker seeking payment of his commission following an anticipatory repudiation must do more than simply rely on the existence of an offer of purchase: he must also present evidence of the purchaser's financial condition sufficient to show that he was able to pay the purchase price). Because a reasonable jury could not conclude that plaintiffs would have obtained the benefit of their bargain but for the anticipatory breach, plaintiffs' contract-based claims fail as a matter of law.[7]

C. Washington Consumer Protection Act Claims

Plaintiffs have provided no new evidence that could support a finding that defendants' allegedly unfair or deceptive acts impacted the public interest. Their Consumer Protection Act claims therefore fail as a matter of law.

D. Collateral Estoppel

The Court declines to decide the collateral estoppel issue defendants raised regarding the claims of NMP Concord, LLC.

E. Thrifty's Counterclaim

At the 30(b)(6) deposition, plaintiff No One to Blaine, LLC's representative acknowledged that defendant Thrifty overpaid interim rent by the amount of $103,500. Whether the parties contemplated an amendment to the lease is irrelevant and does not give rise to a genuine issue of fact regarding the existence or amount of the overpayment. Thrifty is therefore

[7] The promissory estoppel claims are based in tort, and defendants make no effort to show that the causation analysis that applies to anticipatory repudiations governs the tort claim.

entitled to judgment against Nicholson and No One to Blaine, LLC, in the amount of $103,500.[8]

For all of the foregoing reasons, defendants' motion for summary judgment (Dkt. # 88) is GRANTED. Plaintiffs' remaining claims are hereby DISMISSED with prejudice and judgment in the amount of $103,500 shall be entered in favor of defendant Thrifty Payless, Inc., and against plaintiffs Brent Nicholson and No One to Blaine, LLC. The Clerk of Court is directed to enter judgment accordingly. The parties' motions in limine (Dkt. # 105 and # 107) are DENIED as moot.

Dated this 5th day of February, 2015.

/s/ Robert S. Lasnik
Robert S. Lasnik
United States District Judge

[8] Plaintiffs do not contest dismissal of Nicholson's individual claims against both defendants or the dismissal of plaintiffs' quantum meruit claim, Poulsbo Holdings' promissory estoppel claim, or plaintiffs' Unfair Competition Law claim against defendant Thrifty. Dkt. # 91 at 28.

United States District Court
WESTERN DISTRICT OF WASHINGTON

BRENT NICHOLSON, *et al.*,

JUDGMENT IN A CIVIL CASE

v.

THRIFTY PAYLESS, INC., *et al.*,

CASE NUMBER: C12-1121RSL

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_x_ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

THE COURT HAS ORDERED THAT

Judgment in the amount of $103,500 is entered in favor of defendant Thrifty Payless, Inc., and against plaintiffs Brent Nicholson and No One to Blaine, LLC.

February 5, 2015

William M. McCool
Clerk

/s/Tasha MacAdam
By, Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BRENT NICHOLSON, *et al.*, Plaintiffs, v. THRIFTY PAYLESS, INC., *et al.*, Defendants.	No. C12-1121RSL ORDER GRANTING IN PART MOTION FOR ATTORNEY'S FEES (Filed Apr. 27, 2015)

This matter comes before the Court on "Defendants' Motion for an Award of Attorney Fees and Expenses." Defendants have asserted a claim for fees and costs in the amount of $2,084,670.11 under two contractual fee-shifting provisions and RCW 4.84.330. Plaintiffs agree that defendants are entitled to an award of reasonable attorney's fees and do not contest the hourly rates charged by defendants' lawyers and support staff. Plaintiffs oppose the motion insofar as defendants seek to recover fees and costs not authorized by the contract and object to the amount of the requested fees on the grounds that tasks were not appropriately staffed, the hours spent on certain tasks were unreasonable and/or duplicative, and defendants block billed activities in such a way that the Court is unable to determine how much time was spent on particular activities and claims. Plaintiffs also argue that each LLC can be held liable only for its apportioned share of any fee award and that plaintiff Nicholson, who was not a party to the leases or guarantees, is not responsible for any fees.

Each of the plaintiff LLCs signed or, in the case of Poulsbo Holdings, LLC, negotiated a lease with defendant Thrifty Payless, Inc., that contained the following provision:

> In the event that any suit or action is instituted by either of the parties hereto against the other to enforce compliance with any of the terms, covenants or conditions of this Lease or for damages for breach of this agreement, the non-prevailing party shall, in addition to costs and disbursements provided by statute, pay to the prevailing party such actual attorney's fees incurred in such suit or action, including appeal from any judgment rendered therein.

Dkt. # 125-1 at 2. The guarantees executed by each LLC and defendant Rite Aid Corporation similarly had a provision requiring the losing party to "pay all costs provided by statute and reasonable attorney's fees as may be awarded by any court of competent jurisdiction." Dkt. # 125-1 at 3.[1] The parties agree that the "lodestar" method is the starting point for contractual fee calculations. The lodestar fee is determined by multiplying the hours reasonably expended in the litigation by each lawyer's reasonable hourly rate of

[1] The guarantees ran solely in favor of the plaintiff LLCs, but are treated as bilateral fee-shifting provisions under RCW 4.84.330 and Cal. Civ. Code 1717(a).

compensation. *Morgan v. Kingen*, 166 Wn.2d 526, 539 (2009). The burden of demonstrating that a fee is reasonable is on the fee applicant, who must provide documentation sufficient to "inform the court, in addition to the number of hours worked, of the type of work performed and the category of attorney who performed the work (*i.e.*, senior partner, associate, *etc.*)." *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597 (1983). *See also Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151 (1993).

In general, fees should be awarded only for services related to causes of action which allow for fees. *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 743-44 (1987). The court should also "discount hours spent on unsuccessful claims, duplicated or wasted effort, or otherwise unproductive time." *Pham v. City of Seattle*, 159 Wn.2d 527, 538 (2007). However, "[w]hen a plaintiff's claim for relief involves a common core of facts and related legal theories, there is no precise rule or formula for taking into account the degree of success in a fee award" (*Brand v. Dep't of Labor and Indus.*, 91 Wn. App. 280, 292 (1998)), and "[t]he determination of the fee award should not become an unduly burdensome proceeding for the court or the parties" (*Absher Constr. Co. v. Kent Sch. Dist.*, 79 Wn. App. 841, 848 (1996)). Once the lodestar fee amount is calculated, "[t]he burden of justifying any deviation from the lodestar rests upon the party proposing it." *Berryman v. Metcalf*, 177 Wn. App. 644, 666 (2013).

Having reviewed the memoranda, declarations, and exhibits submitted by the parties, the Court finds as follows:

A. Scope of Contractual Fee-Shifting Provision

Despite the language of the fee provisions in the leases and guarantees, defendants argue that they are entitled to $260,050.11 in non-fee expenses, including expert witness fees and travel expenses. The contracts entitle the prevailing party to an award of fees: to the extent costs are recoverable, the contracts specify that the governing statutes control. Neither the words used nor the structure of the provision support defendants' argument that the phrase "attorney's fees" provides a second, alternative avenue through which costs could be recovered. The Court finds that there is no ambiguity in the contractual language and no indication that the parties intended to alter or otherwise expand the statutory cost-shifting rules when they used the phrase "attorney's fees."[2] To the extent defendants have asserted a contractual claim for costs, they are

[2] Defendants' reliance on non-contractual cases in which litigation expenses are shifted by statute or on public policy grounds is misplaced. The contract cases cited by defendants, such as *Yenidunya Investments, Ltd. v. Magnum Seeds, Inc.*, 2012 WL 538263, at * 3 (E.D. Cal. Feb. 17, 2012), are distinguishable in that they involve contracts reflecting the parties' intent to award both fees and costs to the prevailing party.

entitled only to those costs that are recoverable under the relevant statutes.[3]

Defendants also seek to recover fees incurred defending against plaintiffs' noncontract claims. As noted above, when a party prevails on claims that are subject to a contractual fee-shifting agreement as well as claims for which there is no such agreement, the fee award should generally be limited or apportioned to honor the limited scope of the parties' agreement. In this case, however, the vast majority of plaintiffs' claims were based on the underlying contention that defendants' breach of their contractual obligations and/or the covenant of good faith and fair dealing injured plaintiffs. The non-contract claims were based on the same core facts as the contract claims, were argued through the lens of the contracts' requirements, and sought the same damages through different legal theories. Most of the claims either failed because there was a contract or survived until the contract-based claims were dismissed. Having again reviewed the record in this matter, the Court finds that the facts of this case and the way it was litigated do not support an allocation or apportionment to non-contract claims.

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[3] Defendants made no effort to establish the amount of costs recoverable under statute. The Court has therefore adopted plaintiffs' concession that the amount is $23,653.45. Dkt. # 127 at 6 n.3.

B. Improper Staffing

Plaintiffs argue that some or all of the hours spent on this litigation were unreasonable because they were billed by attorneys doing document handling or administrative tasks that could have been assigned to a paralegal. The identified tasks were often billed as part of a block billing entry, with 334.1 total hours associated with those blocks. Did. # 129 at 2 and Ex. B (pink entries).

Some of plaintiffs' objections are not well-taken. It is not clear, for example, why plaintiffs included time entries from Birch Frost, a paralegal, in their tally. Nor have they provided any justification for excluding hours that attorneys spent revising documents that would be filed with the Court, providing guidance to the paralegals in the performance of their duties, or key citing and updating case references in memoranda. To the extent the attorneys spent time creating chronologies, organizing documents for depositions, preparing witness notebooks, and/or discussing courtesy copies, however, the Court finds that those hours were not reasonably billed at the attorneys' rates. Where a document handling or administrative task was billed by an attorney in a single entry along with other, reasonable tasks, the Court has used its best judgment to reduce the billable time by a percentage that reflects the various tasks described and the context in which they were performed. The total reduction based on improper staffing is $28,477.24.

C. Excessive Hours

Plaintiffs argue that defendants overworked the case, "repeatedly filed overlong briefs, and often had two associates working on the same project." Dkt. # 127 at 10. By way of an example, plaintiffs provide a chart listing all time entries in June – August 2012 in which the words "complaint" or "answer" appear, totaling 97.7 hours. Dkt. # 129, Ex. C. In those hours, defense counsel opened a new file, reviewed the complaint, reviewed discovery filed in the state court action, removed the case to federal court, reviewed and considered the implications of plaintiff Nicholson's bankruptcy filing, researched affirmative defenses, obtained an extension of time in which to answer, reviewed client documents, and drafted the answer, affirmative defenses, and counterclaims. Spending twelve working days to accomplish these tasks is not presumptively unreasonable, and plaintiffs have not shown it to be so. The Court has not independently evaluated the time spent researching, drafting, and revising summary judgment motions filed in 2013 or the related replies. Dkt. # 129 at 2 and Ex. B (green entries).

D. Duplicated Efforts

Plaintiffs take issue with the number of attorneys defendants involved in certain activities, such as reviewing the complaint and meeting with client representatives when the matter was filed, strategizing regarding case management and a plan for discovery, and attending plaintiff Nicholson's deposition and the summary judgment hearing. Plaintiffs also apparently think that having a partner review an associate's work before it is filed or having the senior partner review key documents and prepare an outline ahead of a deposition is unreasonable. Dkt. # 129 at 2 and Ex. B (yellow entries). The Court disagrees. No reduction to these time entries will be made.

Plaintiffs have, however, identified what appear to be two duplicative time entries at Dkt. # 129-1 at 48 and 50. A reduction of $456.00 is appropriate.

E. Block Billing

Contrary to plaintiffs' argument, the billing entries adequately set forth the number of hours worked, the type of work performed, and the attorney and billing rate associated with the work performed. *Bowers*, 100 Wn.2d at 597. To the extent entries describe more than one activity,[4] the Court was able to make deductions for un-billable tasks based on the entries and conservative, but reasonable, assumptions regarding the relative time various tasks require. No further deductions for "block billing" are appropriate.

[4] The Washington State Court of Appeals, Division 1, recently noted an absence of Washington authority barring "block billed entries – entries that describe more than one activity." *Xavier v. Allstate Ins. Co.*, 2015 WL 783342, at * 3 (Wn. App., Feb. 23, 2015).

F. Apportionment Among LLC Plaintiffs

Based on the above analysis, the Court finds that the lodestar amount for attorney's fees in this case is $1,819,340.21. Plaintiffs have not attempted to show that a deviation from the lodestar amount is warranted, but argue that each of the eleven plaintiff LLCs can be held responsible for only 1/11th of the recoverable fees and that plaintiff Nicholson, who was not a party to any of the contracts, cannot be held liable at all. In the context of this case, the Court rejects both contentions.

The plaintiff LLCs chose to pursue their claims in a single lawsuit. The choice was sensible: most of the discovery, research, and writing involved in this case applied to all or groups of projects. Although some site-by-site discovery and briefing were necessary, for the most part the consolidation of virtually identical claims allowed the parties and the Court to address the legal theories and factual issues together and avoided the multiplicity of costs and fees that would have been incurred had the parties filed separate pleadings and motions as to each development project.

Given how the case was litigated, it would be unreasonable to expect defense counsel to have separately billed their time on a project-by-project basis when plaintiffs chose to file suit together. Plaintiffs' proposal to arithmetically divide the lodestar amount by eleven recognizes that an accurate allocation of fees is impossible. But a simple division of the fees incurred would provide an undeserved windfall to each LLC and increase the potential that defendants would go partially or wholly uncompensated. Each LLC chose to bring an action "on the contract," thereby triggering its obligation to pay fees to the prevailing party. The proposed allocation would limit each of their liabilities to only a fraction of the reasonable fees incurred in defense of the claims asserted, an outcome that could not be reasonably expected based on the contractual language. Defendants will, of course, be able to recover their fees only once, but they may recover them from any or all LLCs that are found to have assets.

G. Nicholson's Liability

Plaintiff Nicholson argues that he cannot be held liable for attorney's fees on the contracts because he signed them as the managing member of each LLC, because he did not assert a breach of contract claim, and because he would not have been able to recover his fees had he prevailed. Dkt. # 127 at 2. In normal circumstances, the Court would not hold the managing member of an LLC liable for attorney's fees owed by the LLC absent a showing that the corporate veil should be pierced.[5] The LLC and its managing member are distinct legal entities, and defendants were well aware of the corporate forms Nicholson used to conduct business, understood that the LLCs were single-asset entities, and could have insisted that Nicholson take on

[5] Defendants' belated, one-sentence request that the Court "exercise its equitable power to pierce the corporate veil and hold Nicholson personally liable for the fee award" has not been considered. Dkt. #130 at 4.

individual responsibilities under the leases and guarantees had that been their intent.

In this case, however, Nicholson opted to assert claims on a contract that contained a clear attorney's fee provision, opening himself up to an award of fees if he did not prevail. *See Deep Water Brewing, LLC v. Fairway Resources Ltd.*, 152 Wn. App. 229, 278-79 (2009) (holding sole shareholder of contracting party liable for attorneys fees under the doctrine of equitable indemnity despite dismissal of all contract claims against him personally); *Herzog Aluminum, Inc. v. Gen. Am. Window Corp.*, 39 Wn. App. 188, 192-94 (1984) (initiating an action "on a contract" triggers a contractual obligation to pay attorney's fees to the prevailing party even if it is ultimately determined that the contract is unenforceable); *Johnson v. Myers*, 2014 WL 2214045, at * 2 (N.D. Cal. May 28, 2014) (where every plaintiff was invested in the outcome of the contract claim and aspired to win money thereby, it would be inequitable to limit defendants' attorney's fees recovery to the assets of only one plaintiff). All of the named plaintiffs, including Nicholson, asserted the contract, good faith and fair dealing, and related tort/statutory claims against defendants. Had he prevailed on the claims as asserted (through an alter ego, third-party beneficiary, or other theory), Nicholson would undoubtedly have sought an award of fees from defendants under the contracts. That the contract claims were abandoned at some undefined point in this litigation does not alter the fact that Nicholson, individually, sued "on the contracts," thereby exposing himself to the fee provision contained therein.

For all of the foregoing reasons, defendants' motion for an award of attorney's fees is GRANTED in large part. Defendants are awarded fees and certain costs in the amount of $1,819,340.21 for successfully defending against plaintiffs' claims. All twelve named plaintiffs are jointly and severally liable for that amount.

Dated this 27th day of April, 2015.

/s/ Robert S Lasnik
Robert S. Lasnik
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BRENT NICHOLSON, *et al.*, Plaintiff, v. THRIFTY PAYLESS, INC., *et al.*, Defendants.	CASE NO. C12-1121RSL ORDER DENYING MOTION FOR RECONSIDERATION (Filed Mar. 18, 2015)

On February 18, 2014, the Court granted defendant Thrifty Payless, Inc.'s motion for summary judgment on its counterclaim against plaintiffs Nicholson and No One to Blaine, LLC, for an overpayment of rent. Nicholson filed a timely motion for reconsideration, arguing that the liability belongs solely to plaintiff No One to Blaine, LLC.

This argument was raised for the first time on reconsideration. If plaintiffs intended to draw distinctions between Nicholson and No One to Blaine, LLC, they should have and could have done so while this matter was still pending and before judgment was entered. Had this argument been timely asserted, defendant would have had a full and fair opportunity to show that Nicholson converted the funds, that piercing the corporate veil was appropriate, or that some other circumstance justified holding Nicholson liable for the overpayment made to No One to Blaine, LLC. "Motions for reconsideration are not a vehicle for a litigant to attempt a second bite at the apple by raising facts or arguments available to him or her prior to entry of summary judgment." *Karpenski v. Am. Gen. Life Companies.*, *LLC*, 999 F. Supp.2d 1235, 1239 (W.D. Wash. 2014). Plaintiff's motion for reconsideration is therefore DENIED.

Dated this 17th day of March, 2015.

/s/ Robert S Lasnik
Robert S. Lasnik
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

<table>
<tr><td>BRENT NICHOLSON, an individual; et al.,
Plaintiffs-Appellants,
v.
THRIFTY PAYLESS, INC., a California corporation and RITE AID CORPORATION, a Delaware corporation,
Defendants-Appellees.</td><td>No. 15-35180
D.C. No. 2:12-cv-01121-RSL Western District of Washington, Seattle
ORDER
(Filed Aug. 25, 2017)</td></tr>
<tr><td>BRENT NICHOLSON, an individual; et al.,
Plaintiffs-Appellees,
v.
THRIFTY PAYLESS, INC., a California corporation and RITE AID CORPORATION, a Delaware corporation,
Defendants-Appellants.</td><td>No. 15-35242
D.C. No. 2:12-cv-01121-RSL Western District of Washington, Seattle</td></tr>
</table>

Before: D.W. NELSON, M. SMITH, and CHRISTEN, Circuit Judges.

Judges M. Smith and Christen voted to deny the petition for rehearing en banc. Judge Nelson recommended denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed.R. App. P. 35.)

The petition for rehearing en banc is denied.

SO ORDERED.