THE SUPREME COURT OF THE STATE OF OREGON

RYAN GAYLOR,

Plaintiff-Relator,

v.

K.F. JACOBSEN & CO., INC., an Oregon corporation; and ROSS ISLAND SAND & GRAVEL CO., an Oregon corporation,

Defendants-Adverse Parties.

SC No. S061320

Multnomah Circuit Court
Case No. 1207-09372

MANDAMUS PROCEEDING

DEFENDANTS-ADVERSE PARTIES' ANSWERING BRIEF

Mandamus Proceeding Regarding the Order of the Multnomah County Circuit Court dated April 11, 2013
The Honorable John Wittmayer

Eric J. Fjelstad; OSB No. 892382
Smith & Fjelstad
722 N. Main Avenue
Gresham OR 97030
Telephone: (503) 669-2242
Facsimile: (503) 669-2249
smithandfjelstad@frontier.com

Attorney for Plaintiff-Relator
Ryan Gaylor

Ankur H. Doshi; OSB No. 101668
K. Vathana Sivanesan; OSB No. 060080
on brief
6605 S.E. Lake Road
Portland, OR 97222
Telephone: (503) 546-5118
Facsimile No.: (503) 546-5179
adoshi@pamplincorp.com

Attorneys for Defendants-Adverse Parties K.F. Jacobsen & Co., Inc. and Ross Island Sand & Gravel Co.

Walter J. Ledesma; OSB No. 923687
Hand & Ledesma, PC
PO Box 377
Woodburn, OR 97071
Telephone: (503) 981-0101
Facsimile: (503) 981-4270
Walter@handledemsa.com
Attorney for Amicus Curiae
Oregon Trial Lawyers Association

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I. STATEMENT OF THE CASE

A. Questions Presented and Proposed Rules of Law

1. Did the trial court, based on its judicial discretion, properly disqualify Relator's counsel due to his use of purloined documents throughout litigation, tainting the discovery process?

The trial court properly exercised its judicial discretion in disqualifying Relator's counsel as the trial court reviewed evidence that Relator's counsel had possession of the purloined documents for over 10 months, and subsequently used the documents throughout litigation, tainting the discovery process.

2. Did the trial court, based on its judicial discretion and evidence of the unauthorized removal of numerous documents, properly order Relator to return all documents purloined?

The Alternative Writ of Mandamus does not address this issue, and this issue is not properly before this Court. In any event, the trial court properly exercised its discretion by ordering Relator to return the purloined documents due to overwhelming evidence Relator removed the documents without authorization. Relator failed to provide any legal authority for purloining documents from Adverse Parties.

B. Nature of the Action and Relief Sought

Adverse Parties K.F. Jacobsen & Co., Inc. ("KFJ") and Ross Island Sand & Gravel Co. ("RISG") (collectively, "Adverse Parties") do not accept as accurate Relator's Statement of the Case. Relator filed the instant action via complaint dated July 24, 2012, alleging claims pursuant to violations of Oregon's whistleblowing statute, ORS 659A.199, Oregon's Family Leave Act statute, ORS 659A.150, and common law wrongful discharge. Prior to filing the complaint, Relator purloined numerous documents and electronic files containing confidential information relating to KFJ's business. Relator presented these purloined documents to his counsel, Eric J. Fjelstad ("Fjelstad"), who used them throughout the course of litigation.

Adverse Parties, after repeated requests to Fjelstad to cure Relator's misconduct, moved the trial court for relief. The trial court, by order dated April 9, 2013 and entered April 11, 2013 ("the Order"), ordered Relator to return all purloined documents, and disqualified Fjelstad. Relator petitioned this Court for a writ of mandamus seeking the trial court vacate the Order. This Court granted an alternative writ of mandamus. The trial court did not act, and Relator now seeks a peremptory writ of mandamus.

C. Nature of the Order

Relator seeks interlocutory review via mandamus of the Order that, among other things, disqualified Relator's counsel and required Relator return all purloined documents.

D. Statement of Facts

Adverse Party KFJ is a company specializing in the manufacture, production, and sale of asphalt and asphalt materials to public works projects and private construction projects within the Portland metropolitan area. KFJ is a wholly owned subsidiary of Adverse Party RISG.

1. Relator's Employment with KFJ

On May 5, 2008, KFJ hired Relator as an Estimating Technician to prepare estimates of project costs that KFJ used in submitting bids to current or prospective customers (Supplemental Excerpt of Record ("SER") 201). On December 1, 2009, KFJ placed Relator in a new position as a Quality Control Technician[1] (SER 201). In this position, Relator needed access to proprietary and sensitive information about KFJ to conduct his duties. KFJ provided Relator with a computer and the secure login name "*rgaylor*" with a password to access KFJ's computer network (SER 201, 218). The network allowed

[1] Amicus refers to Relator's position as quality control manager. However, Relator's position did not encompass any managerial duties. Relator did not have any authority to "manage, direct, or administer the affairs" of KFJ, nor did he have any supervisory authority over other employees (SER 201).

Relator to access confidential documents containing information on KFJ's operations, quality control data, cost and production data, customers, and other similar data (SER 202). KFJ's Computer Operating & Security Policy ("Computer Policy") instructed Relator to only use his login name/password to access the network and to keep his password confidential (SER 209).

Chuck Hicks ("Hicks"), KFJ's general manager, repeatedly advised Relator that the information he accessed and analyzed as Quality Control Technician was confidential and could be used by competitors to their economic advantage (SER 202). During his time as Quality Control Technician, KFJ provided Relator an office with a lockable door to allow Relator to analyze sensitive confidential data privately (SER 202).

In July of 2011, KFJ transferred Relator from Quality Control Technician to special projects as a Plant Expediter (SER 202-203). Upon his transfer, KFJ did not authorize Relator to access the network or any of the confidential data on the network as it was unnecessary for the Plant Expediter position (SER 203). Mike Rinne ("Rinne") replaced Relator as KFJ's Quality Control Technician (SER 202). Rinne obtained access to a computer and the username "*mrinne*" to access KFJ's network (SER 202, 220).

As Plant Expediter, Relator did not require the use of a computer or access to confidential information (SER 203). Nevertheless, Relator repeatedly

requested access to a computer and to KFJ's network (SER 203). Hicks denied each request, stating Relator was able to complete his functions without access to a computer (SER 203). On November 22, 2011, after Relator again asked for access to a computer, Hicks, along with Human Resources Representative Terri Stahly, and KFJ's President Chuck Steinwandel told Relator explicitly he did not have authorization or consent to access any of KFJ's computers (SER 203).

After KFJ repeatedly denied his requests for access, Relator opted to compromise the network on his own accord. On December 5, 2011, employee Rhett Dailey ("Dailey") observed Relator accessing the computer assigned to Rinne (SER 199). Dailey witnessed Relator using the computer for approximately three to four hours, and reported the use to Hicks (SER 199). Between December 5, 2011 and December 9, 2011, Rinne was in Salem, Oregon receiving training (SER 199, 204). However, KFJ's computer forensic expert, Anton Litchfield ("Litchfield"), indicated the user name *mrinne* was logged into the network on December 5, December 7, and December 9, 2011 (SER 220-222).

On January 6, 2012, KFJ discharged Relator, after numerous warnings and performance issues.

2. The BOLI Complaint

On January 24, 2013, Relator, along with Fjelstad filed a complaint with the Oregon Board of Labor and Industries ("BOLI") alleging discrimination (SER 162-164). During BOLI's investigation, Fjelstad sent a letter to BOLI's investigator containing several confidential documents purloined by Relator from KFJ (SER 165). These documents included voids gyratory worksheets, field worksheets for HMAC, and bills of lading; documents containing sensitive and proprietary information such as composition, energy and personnel costs and usage, as well as quality control (SER 165, a redacted sample of the documents are provided at SER 166-187). Although of little value to the average person, a knowledgeable person, such as a competitor in the asphalt industry, can easily use the confidential information to establish KFJ's manufacturing and production costs and capabilities, and use that knowledge to estimate and undercut KFJ's bids for construction contracts.

In his letter to BOLI, Fjelstad did not state that Relator purloined the documents from KFJ, or that the documents were confidential or sensitive in nature. Fjelstad did not make any attempts to caution BOLI that the documents should not be made available as a public file. BOLI made the documents available to the public, exposing KFJ's confidential information to any number

of competitors.[2] BOLI later dismissed Relator's administrative complaint for lack of evidence on May 18, 2012.

3. The Instant Action and the Purloined Documents

Relator filed the instant action via complaint with the Multnomah County Circuit Court on July 24, 2012 (SER 1). On September 21, 2012 and October 1, 2012, as part of routine discovery requests, KFJ requested Relator produce documents related to the instant action (SER 34-63, 64-71). By letter dated October 23, 2012, Relator produced two CDs, with the following statement:

> Enclosed please find our response to your request for production, as well as two CD's [*sic*] containing responsive documents. CD #1, labeled "Production Documents", contains ... some printouts from K.F. Jacobsen. CD # 2, labeled "Work Data", contains quality control records, test records and other business data.

(SER 72). This letter was KFJ's first and only indication Relator purloined and retained 1,561 company documents, containing confidential data. The information purloined by Relator contained

- KFJ's raw material customers
- Estimates of daily labor costs
- Estimates of energy expenses of projects
- Notes regarding specific events at the production plant
- KFJ's private projects undertaken on behalf of third parties

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[2] Adverse Parties, upon learning about Relator's purloinment of documents, requested BOLI reclassify the submitted documents as confidential (SER 32). BOLI agreed.

- Diagnostic testing, including tests and other quality control data produced and used internally
- Data and reports regarding the volume of material produced
- Data regarding suppliers of components used by KFJ
- Inventory production
- Truck/job totals
- Field worksheets
- Voids worksheets containing quality control information

and similar confidential business information (SER 359-360). Relator also possessed physical confidential documents he removed from KFJ without authority. These documents contained information relating to inventory production totals, customer information, truck/trade secret totals, field worksheets, and void worksheets (SER 359). The majority of these documents were not subject to disclosure to any public entities.

Relator and Fjelstad reviewed and used the confidential information contained within the purloined documents throughout discovery, effectively tainting the entire discovery process. For instance, Relator requested documents relating to estimates of daily labor costs, private project information, internal diagnostic testing, quality control data, data regarding component suppliers, inventory production information, truck/job totals, field work sheets, void work sheets, gyratory data and quality control test data, categories directly mirroring the documents purloined by Relator (*Compare* SER 204 *with* SER 189-190). In Relator's First Set of Discovery Requests,

Production Request No. 45, he sought "All gyratory voids sheets for any asphalt tests of KFJ asphalt that were created in 2010 and 2011." (SER 16, 32, 120) Relator and Fjelstad sought this technical data based on their prior knowledge of the data provided in the documents purloined by Relator.

4. Litchfield's Evidence of Relator's Unauthorized Access to KFJ's Network

Upon learning Relator had purloined documents, Adverse Parties provided Rinne's computer to Litchfield to obtain evidence about any unauthorized use (SER 216). Litchfield established Relator accessed Rinne's computer on November 14, 2011 under the user name *rgaylor* (SER 218). Relator accessed multiple files, including spreadsheets containing proposals and job costs (SER 218-219). Relator also accessed his personal email account "ryanlgaylor@netzero.net" and sent an email minutes after accessing files on KFJ's computer network (SER 220). Litchfield states Relator may have attached files from KFJ's computer network to an email on his ryanlgaylor@netzero.net account and mailed the files either to himself or another person (SER 220).

Litchfield further established Relator likely used Rinne's computer under the username *mrinne*. He noted, based on an analysis of Rinne's computer, the username *mrinne* was used to access the computer during the dates of December 5, December 7, and December 9, 2011, when Rinne was in Salem,

Oregon training (SER 221). The username *mrinne* accessed hundreds of files on KFJ's network during these dates (SER 221, a full list of the files accessed during these dates is available at SER 235-237). The username *mrinne* accessed Relator's personal email account deception4ever@hotmail.com[3] and sent multiple emails from this account (SER 220-221).

Relator, in his own declaration, stated he knew other employee's passwords and that he was not allowed to access a particular computer (SER 144). Relator was aware from his prior position that, under KFJ's Computer Policy, he was only to use his own user name and password to access computers and the network at KFJ (SER 202, 209). Aside from an attempt to circumvent detection, there was no reason for Relator to use the *mrinne* user name to access the computer during the period of December 5-9, 2011 (SER 220-221).

Litchfield also reviewed the CDs provided by Relator. While Relator claimed he "copied only documents that were used in old jobs" (SER 145), Litchfield noted the CDs contained many documents that were current on or after July 2011, and not from "old jobs" as Relator claimed (SER 217-218). Litchfield identified files as part of jobs from the week of July 5-8, 2011 as well as files part of jobs from June 29 and 30, 2011 (SER 218). Litchfield also

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[3] Litchfield established that the email address deception4ever@hotmail.com belonged to Relator by identifying a posting on a John Deere tractor website where he used his full name and identified his email address as deception4ever@hotmail.com (SER 220-221, 233).

found several similarities to the documents accessed by username *mrinne* during the period of December 5-9, 2011, leading him to opine the files were taken during this period (SER 221-222).

5. Adverse Parties Move for Sanctions Due to Improper Conduct of Relator and Fjelstad

Adverse Parties provided Relator and Fjelstad with several opportunities to remedy the use of purloined documents. On November 15, 2012, November 19, 2013, and January 4, 2013, Adverse Parties demanded the return of all originals and copies of purloined documents (SER 31, 146,151-152). At this stage, Relator and Fjelstad had retained the 1,561 purloined documents for over 11 months, and potentially longer. Even with notice that the documents had been obtained via potentially illegal means, Relator and Fjelstad steadfastly refused to return them.

On February 19, 2013, Adverse Parties moved the trial court for relief due to improper conduct of Relator (SER 7). Adverse Parties, citing ORCP 1B and 36A, along with the inherent authority of the trial court, sought the preclusion of the use of purloined confidential documents, the disqualification of Fjelstad and the return of any and all purloined property.

Relator opposed the motion, primarily arguing that the documents purloined were not confidential in nature (SER 331). On reply, Adverse Parties noted several particularly disturbing admissions in Relator's opposition.

Of note, Adverse Parties stated Relator did not deny the improper taking of KFJ's documents, nor did Fjelstad deny the purloined documents were used to draft the complaint and discovery requests (SER 348). Relator provided no authority to justify, excuse, or defend his improper taking of the documents and the subsequent use of the purloined documents (SER 348). Adverse Parties outlined that all of the actions admitted by Relator and Fjelstad in his opposition constituted misconduct (SER 350). Further, Adverse Parties provided evidence that the majority of the purloined documents were confidential (SER 359). In a declaration, Hicks stated he reviewed the approximately 3,000 pages of purloined documents and established that only 286 pages of the documents purloined were submitted by KFJ to public agencies (SER 359-360). The vast majority of the remaining documents were not intended for public release. Relator did not provide evidence to refute this claim.

6. Oral Argument and the Order of the Trial Court

On March 25, 2013, the trial court held oral arguments on Adverse Parties' motion. The trial court expressed confusion by Relator's position that he had the right to take the documents simply because some of the documents were publically available:

> **THE COURT:** Here's the question: Does the plaintiff assert the plaintiff had a right to remove documents, either in hard copy or electronic media, from defendant's premises, whether or

not defendant had – had a legitimate business reason or authority to use those documents for business purposes?

This is what – you argue that you have the right to have those documents and your client had a right to remove them.

MR. FJELSTAD: Yes.

THE COURT: What's the basis of that?

MR. FJELSTAD: There was no protection of the documents and the documents were public.

* * *

THE COURT: How – what makes them public if they're on defendant's computer?

MR. FJELSTAD: Because they had to be turned over to public entities.

THE COURT: Well, wouldn't your client, then have a right to go get them from a public entity instead of to take them off of defendant's computer?

Whether he had a business purpose, an opportunity and – authority, I should say, to use them for his job or not, what authority is there for the proposition that your client has the right to take them off of defendant's computer even though they might have been in some public forum somewhere else? To self-help?

(SER 378-379 Tr. 13:5-14:11). The trial court repeatedly expressed concern that Relator essentially argued he had the right to purloin documents from KFJ based on Relator's claims that some of the purloined documents were publically available, and KFJ had taken no steps to secure the documents.

> **THE COURT:** Did he have a right to [take the documents]? That's the question. Did he have a right to do what he did, not why couldn't he do it.
>
> **MR. FJELSTAD:** He had a right because there was no corresponding right of the –
>
> **THE COURT:** Okay.
>
> **MR. FJELSTAD:** -- of the employer.
>
> **THE COURT:** I – I – here, just a second. I don't see it that way. I see that he had no authority to do what he did. I'm happy to give you a chance to tell me why you think I'm wrong about that, but that's my starting point.
>
> . . . [H]e took these documents while he worked for defendant company without permission from defendant company to take these documents. And your argument is they were public, therefore, they were not protected, therefore, he had the right to take them. Is that right? Is that basically your argument?
>
> **MR. FJELSTAD:** And because the defendant had done nothing to protect them. There were no confidentiality agreements. There was nothing –
>
> **THE COURT:** All right. I reject that out of hand.

(SER 379-380 Tr. 14:20-15:21). The trial court concluded that Relator's position that he had a right to take KFJ's documents was incredible (SER 384 Tr. 19:16-19). Even though Relator contended the contents of the documents were relevant and not confidential, the trial court, in its discretion, did not reach this issue as Relator had failed to provide any authority for his right to purloin documents (SER 388 Tr. 23:13-23). The trial court noted the egregious nature

of the removal of the documents, and that Relator had not established any authority supporting his claim that he had the right to remove them from KFJ (SER 388 Tr. 23:13-23).

In defending himself from disqualification, Fjelstad argued that he believed Relator obtained the documents legitimately. The court was disinclined to accept that argument. The court stated Fjelstad should have proceeded in a different manner upon receipt of more than 1,500 purloined documents:

> **MR. FJELSTAD:** Okay.
>
> Your Honor, but all I can ask . . . is what position was I in? I was in a position where my client said there was – there was no confidentiality . . . . I was in a position where he said he took the documents legitimately. There's no indication that any of these documents are anything but public.
>
> * * *
>
> **THE COURT:** Let me answer your question. Your question was what should you have done, ... Here's what – here's my answer to your question.
>
> You should have never looked at [the documents]. You should have asked your client if he took them off the premises of defendant while he was employed and, if the answer to that was yes, you should have said they're to be put in a sealed envelope – put in a sealed envelope and returned immediately without you seeing them.

(SER 385-386 Tr. 20:18-21:18). The trial court, in the exercise of its discretion, acknowledged and agreed the disqualification of counsel was a drastic remedy

which exacts harsh penalties from parties as well as punishing counsel (SER 392 Tr. 27:4). Nevertheless, in light of the egregious nature of the removal of documents from KFJ, and the extensive use of the documents by Fjelstad as set forth in Adverse Parties' motion, the court agreed with Adverse Parties that Fjelstad should be disqualified from the case (SER 402 Tr. 37:5-9). Fjelstad requested further clarification as to the reasons for disqualification, which the court provided:

> **MR. FJELSTAD:** Your Honor, I'd like – I apologize, but I'd like Your Honor to again express the basis for my disqualification.
>
> **THE COURT:** I think it's clear to me that you have – in representation of your client, you have benefitted from your client's improper conduct to the defendant – detrimental to the defendant and there's no –
>
> **MR. FJELSTAD:** How so?
>
> **THE COURT:** By having the benefit of the knowledge of the contents of over 1,500 documents that you shouldn't have had the knowledge of in the work that you've been able to do on behalf of your client so far in this case. And that's really as far as I think I need to go and that's as far as I'm going to go. So that's where we are.

(SER 403-404 Tr. 38:13-39:3). The court, in its response, made patently obvious to all parties that the court considered and exercised its discretion in granting the drastic remedy of disqualifying Fjelstad due to the egregious nature of the action of Relator and Fjelstad. The trial court granted Adverse Parties'

motion for, among other things, the return of all documents taken by Relator, as well as the disqualification of Fjelstad from representation of Relator. The court signed the Order on April 9, 2013 (SER 406-408).

7. The Mandamus Proceeding

On April 29, 2013, Fjelstad sought to stay the Order to file a petition for mandamus review. The stay was granted, and Relator filed a petition with this Court on May 10, 2013. This Court granted an Alternative Writ of Mandamus on August 7, 2013 ordering the trial court to vacate the "order entered on April 11, 2013, that disqualifies relator's counsel and his law firm from continuing to represent relator," or show cause (SER 409). The trial court did not act on the Alternative Writ of Mandamus.

Relator's brief seeking a peremptory writ followed. Amicus party, the Oregon Trial Lawyers Association ("OTLA"), by leave of this Court, filed subsequent amicus curiae brief with this Court.

E. Timeliness

Adverse Parties do not contend the mandamus proceeding was untimely.

F. Basis of Jurisdiction

Adverse Parties contend this Court does not have jurisdiction to review the Order in a mandamus proceeding, as it is well established that a writ of mandamus shall not undertake to control judicial discretion. ORS 34.110; *see*

Johnson v. Craddock, 228 Or. 308, 314, 365 P. 2d 89 (1961); *Olds v. Kirkpatrick,* 183 Or. 105, 110, 191 P.2d 641, 643 (1948). Further, Adverse Parties contend Relator's second Assignment of Error relating to the Order required the return of purloined documents was not alleged in the Alternative Writ of Mandamus, and therefore is outside of this Court's jurisdiction to review.

1. A Writ of Mandamus Shall Not Serve to Control Judicial Discretion

Relator contends jurisdiction is proper under ORS 19.205(2) and ORS 34.250(1). ORS 19.205(2) is inapplicable as it specifically deals with this Court's jurisdiction of appeals. ORS 34.250(1) provides procedural details into this Court's mandamus process. This Court has original jurisdiction in mandamus proceedings pursuant to the Oregon Constitution, art. VII, § 2. ORS 34.110, however, provides a writ of mandamus in judicial proceedings shall not be issued to "control judicial discretion" except in cases where there is a "claim of fundamental legal error underlying a trial court's exercise of discretion." *State ex rel. Keisling v. Norblad*, 317 Or. 615, 623, 860 P.2d 241 (1993). This Court thoroughly established through prior precedent that attorney disqualification is a matter within judicial discretion. Further, attorney disqualification is properly appealed after entry of final judgment; not pursuant to a mandamus proceeding.

In *State ex rel. Bryant v. Ellis,* 301 Or. 633, 640, 723 P.2d 811 (1986), this Court specifically recognized the trial court had discretion to disqualify an attorney from a matter, and warned future parties that a mandamus proceeding was not the proper procedure to appeal a disqualification order made by a trial court. This Court reviewed a petition for mandamus in *Bryant* after a trial court denied the relator's motion to disqualify counsel due to a conflict of interest. *Id.* at 635. This Court ruled trial courts in Oregon did have discretionary authority to disqualify counsel based on common law equitable principles. *Id.* at 639.

In deciding *Bryant*, this Court specifically warned parties considering future petitions for mandamus due to attorney disqualification that "[w]e do not mean to invite future petitions for mandamus whenever a party is dissatisfied with a court's grant or denial of relief against a lawyer any more than against any other respondent; normally appeal after judgment will be an adequate remedy." *Id.* (emphasis added) *citing Duke v. Franklin*, 177 Or. 297, 162 P.2d 141 (1945) (appeal of judgment assigning error to prior order denying disqualification of counsel) *and cf. Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 101 S.Ct. 669 (1981) (orders denying motions to disqualify counsel are not appealable prior to final judgment pursuant to 28 U.S.C. §1291). In *Collatt v. Collatt*, 99 Or. App. 463, 782 P.2d 456 (1989), the Oregon Court of

Appeals considered plaintiff's Assignment of Error of an order disqualifying counsel after a judgment dismissing the action.

Relator's Assignments of Error are exactly the type of claims this Court warned in *Bryant* would be subject to appellate review only after final judgment, not a mandamus proceeding. Relator seeks relief as "a party dissatisfied with a court's grant . . . of relief against a lawyer." *Bryant*, 301 Or. at 640. Relator should have sought relief after a final judgment via appeal instead of the instant mandamus proceeding. As such, Adverse Parties respectfully request this Court deny Relator's request for a peremptory writ and dismiss the issued Alternative Writ of Mandamus due to its lack of jurisdiction.

2. <u>This Court Does Not Have Jurisdiction to Review Relator's Second Assignment of Error As It Was Not Alleged in the Alternative Writ of Mandamus</u>

It is well established that, in a mandamus proceeding, the alternative writ of mandamus has the same function as the complaint and sets forth Relator's clear right of relief in this proceeding. *See State ex rel. Kashmir Corp. v Schmidt*, 291 Or. 603, 633 P.2d 791 (1981); *Int'l Transp. Equip. Lessors, Inc. v. Bohannon*, 252 Or. 356, 360, 449 P.2d 847 (1969). A court's jurisdiction in mandamus is limited to the conditions of the issued alternative writ of mandamus *See Woodburn v. Domogalla*, 1 Or. Tax 292, 303 (1963) *rev'd on*

other grounds sub nom. City of Woodburn v. Domogalla, 238 Or. 401, 395 P.2d 150 (1964).

Relator, in his initial petition to this Court for mandamus review, requested relief on two Assignments of Error: (1) disqualification of Fjelstad; and (2) the return of all purloined documents to Adverse Parties. This Court issued an alternative writ of mandamus that granted relief only to Relator's first Assignment of Error. This Court's Alternative Writ of Mandamus commanded Judge Wittmayer to "vacate your order entered on April 11, 2013, that disqualifies relator's counsel and his law firm from continuing to represent relator" (SER 409). By limiting the Alternative Writ of Mandamus specifically to the order disqualifying Relator's counsel, this Court denied Relator's petition seeking relief as to his second Assignment of Error. Relator did not move this Court for reconsideration or rehearing of the second Assignment of Error.

As Relator's second Assignment of Error was not addressed within the Alternative Writ of Mandamus, this Court is without jurisdiction to now review it. Relator's petition, which requested relief for both Assignments of Error, became legally defunct upon issuance of the Alternative Writ of Mandamus by this Court, and Relator did not take any action to amend the Alternative Writ of Mandamus to grant relief to Relator's second Assignment of Error. *See Kashmir Corp.,* 291 Or. at 606.

G. Summary of Argument

Adverse Parties contend Relator fails to provide any evidence to show that the trial court abused its discretion in disqualifying Fjelstad and in ordering the return of the documents. The record established through Adverse Parties' motion for relief and oral argument is replete with examples of misconduct by Relator and Fjelstad. Relator does not deny that he purloined documents from KFJ, and Adverse Parties provided extensive evidence showing that the documents contained confidential information.

Relator argues that this Court should take a balancing test approach to balance the equities and prejudice incurred in disqualifying counsel. Adverse Parties contend that such a test does not necessarily establish that the trial court abused its discretion in this matter, and, in any event, the balancing of equities favors disqualification. Adverse Parties established that Relator purloined documents, Fjelstad made extensive use of those purloined documents throughout the litigation without mitigating any potential misconduct, and caused detriment to Adverse Parties. While Relator raises prejudice that he would suffer due to disqualification, such prejudice is self-inflicted. Throughout Relator's argument, Relator does not establish any evidence to show that the trial court abused its discretion in ordering disqualification.

Relator further argues that the trial court abused its discretion in ordering the return of the documents. Such argument is not properly before this Court. Nevertheless, Relator's position ignores multiple authorities indicating the return of purloined documents is proper. Relator further relies on a balancing test set forth in *Quinlan v. Curtiss-Wright Corp.*, 204 N.J. 239, 8 A.3d 209 (2010). Adverse Parties contend that *Quinlan* is inapplicable, and in any event, the balancing test would favor return of the documents.

Relator fails to set forth any evidence to establish that the trial court abused its discretion upon issuance of the Order. As such, Adverse Parties submit that this Court should hold that the trial court acted within its discretion, and deny Relator's request for a peremptory writ.

II. CONSOLIDATED RESPONSE TO ASSIGNMENTS OF ERROR

A. Preservation

Relator properly preserved his first Assignment of Error alleging the trial court abused its discretion by disqualifying Fjelstad. Adverse Parties contend Relator failed to preserve the second Assignment of Error for mandamus review, and therefore this Court is without jurisdiction to review the second Assignment of Error.

B. Standard of Review

Both of Relator's Assignments of Error were made under the trial court's discretion in judicial proceedings under ORCP 1B and 36A, as well as the trial court's inherent authority in law and equity to grant relief for abuse of discovery. *Bryant*, 301 Or. at 639. "It has long been recognized that courts have inherent equitable authority over their own process, to prevent abuses, oppression and injustices. This authority includes the power to sanction parties who attempt to use in litigation materials improperly obtained outside the discovery process." *Herrera v. Clipper Group, L.P.*, 97-CIV-560 (SAS) 1998 WL 229499 *1 (S.D.N.Y. May 6, 1998); *see also Lynn v. Gateway Unified Sch. Dist.*, 2:10-CV-00981-JAM, 2001 WL 6260362 *5 (E.D. Cal. Dec. 15, 2011) ("When a party wrongfully obtains documents outside the normal discovery process, a number of sanctions are available. These include dismissal of the

action, the compelled return of all documents, restrictions regarding the use of documents at trial, disqualification of counsel, and monetary sanctions."); *Richards v. Jain,* 168 F. Supp. 2d 1195, 1200 (W.D. Wash. 2001) ("Where the asserted course of conduct by counsel threatens to affect the integrity of the adversarial process, [the court] should take appropriate measures, including disqualification, to eliminate such taint").

"'Discretion' generally refers to the authority of the trial court to choose among several legally correct outcomes." *EMC Mortgage Corp. v. Davis*, 174 Or. App. 524, 528, 26 P.3d 185 (2001) *citing State v. Rogers*, 330 Or. 282, 312, 4 P.3d 1261 (2000). A trial court generally exceeds its discretion when its ruling falls outside the range of legally correct or permissible results. *Richardson v. Fred Meyer, Inc.,* 211 Or. App. 421, 431, 155 P.3d 881 (2007). This Court does not interfere with the discretion of trial court in matters of practice before it, unless the trial court exercises discretion capriciously or oppressively. *Mitchell v. Campbell*, 14 Or. 454, 458, 13 P. 190 (1886); *see also Baker v. Jensen*, 135 Or. 669, 295 P. 467 (1931).

Relator must establish the trial court abused its discretion in disqualifying Fjelstad and ordering the return of purloined documents. While this Court has recognized abuse of discretion has no hard and fast meaning, "a familiar but non-exclusive test for determining whether discretion has been abused is

whether the decision reached was 'clearly against reason and evidence.'" *EMC Mortgage Corp.*, 174 Or. App. at 528 *quoting Liberty Northwest Ins. Corp. v. Jacobson*, 164 Or.App. 37, 45-46, 988 P.2d 442 (1999). A court clearly abuses its discretion where the evidence provided in the record is undisputed and does not rationally support the decision under review. *EMC Mortgage Corp.*, 174 Or. App. at 528 *citing Lambert v. American Dream Homes Corp.,* 148 Or. App. 371, 377, 939 P.2d 661 (1997).

Relator must establish that the evidence presented through motion practice and at oral argument did not rationally support the Order. The undisputed evidence presented by Adverse Parties indicated Relator purloined a substantial number of documents from KFJ, and Fjelstad used the documents purloined. These purloined documents were obtained outside the normal discovery process, and therefore subject to any number of sanctions available to address the misconduct. *See Lynn* at *5. Adverse Parties submit that the trial court administered proper judicial discretion in its decision to disqualify Fjelstad and to return all purloined documents, as the undisputed evidence of egregious conduct on the part of Relator and Fjelstad supported the decision.

III. ARGUMENT

A. The Trial Court Did Not Abuse Its Discretion in Disqualifying Fjelstad

Relator, as his first Assignment of Error, argues the trial court abused its discretion in disqualifying Fjelstad from representing Relator in the instant action. Relator argues Adverse Parties demonstrated no prejudice and that further balancing of the equities did not favor disqualification. Relator fails to provide any evidence to establish the trial court abused its discretion in disqualifying Fjelstad. Prior precedent, Relator's admissions in open court, and the evidence presented to the trial court provided sufficient evidence and reason to justify disqualification. *See Quillen v. Rosenburg Forest Products, Inc.*, 159 Or. App. 6, 10, 976 P.2d 91 (1999) ("Abuse of that discretion occurs when a court exercises its discretion in a manner unjustified by, and clearly against, reason and evidence").

1. The Trial Court has Discretion to Disqualify Counsel

A trial court has substantial discretion to disqualify a lawyer as part of its duties towards the "administration of justice in a court" pursuant to ORS 1.025. *Bryant*, 31 Or. at 638. Moreover, a trial court, may, in its discretion, disqualify counsel to preserve the integrity of the judicial system. While parties do have a right to counsel of their choosing, the paramount concern of the court must be

to preserve the public trust in the scrupulous administration of justice and the integrity of the bar.

When a party exercises "self-help" by taking another's documents, the court focuses on preserving the integrity of the discovery process. While Oregon's courts have not made any established rulings on "self-help" discovery, substantial persuasive authority exists establishing that purloining documents, regardless of the contents, taints the discovery process, and the trial court has substantial discretion to attempt to remedy any taint incurred. *See e.g., In re Shell Oil Refinery,* 143 F.R.D. 105, 108 (E.D. La. 1992) ("The Court is not concerned with Shell's internal problems—whether a Shell employee has breached his confidentiality agreement, how he obtained the documents, or why he is giving them to the PLC. The Court is concerned with preserving the integrity of this judicial proceeding."); *Williams v. Trans World Airlines, Inc.,* 588 F. Supp. 1937, 1945 (W.D. Mo. 1984) (the potential for unfair discovery of information through private consultation rather than through normal discovery procedures threatens the integrity of the trial process."); *Herrera* at *2 ("The discovery process is not meant to be supplemented by the unlawful conversion of an adversary's propriety information.").

The right to parties' choice of counsel must yield to the ethical considerations that affect the fundamental principles of the judicial process.

See e.g., Kennedy v. Eldridge, 201 Cal. App. 4th 1197, 1204, 135 Cal. Rptr. 3d 545 (2011). Relator's assertion that motions to disqualify counsel are generally disfavored by the trial court is accurate, and indeed, the trial court noted that it did disfavor motions for disqualification (SER 392). However, when presented with the undisputed evidence of Relator and Fjelstad's improper and egregious conduct, the trial court established disqualification of Fjelstad was proper.[4]

a. The Actions of Relator and Fjelstad Were Clearly Improper

The undisputed record before the trial court evidences significant misconduct on the part of Relator and Fjelstad in accepting and using purloined documents. Relator did not dispute he accessed confidential records through a computer without authorization and purloined over 1,500 confidential records (SER 217-218). Further evidence indicated Relator was in contact with Fjelstad as of December 2011 (SER 364). Fjelstad received those documents prior to or on April 19, 2012, and subsequently used those documents within the BOLI administrative action (SER 165) and the instant action (SER 334 n. 1). Fjelstad

[4] Amicus OTLA raises the argument that the sanction of disqualification should not be imposed without special findings in accordance with *Pamplin v. Victoria*, 319 Or. 429, 877 P.2d 1196 (1994). *Pamplin* specifically dealt with the necessities of findings on a sanction of dismissal based on the statutory construction of ORCP 46B(2)(c) and its federal counterpart, FRCP 37(b)(2)(C). No similar statute exists in the instant action, as the discretion of the trial court to disqualify counsel lies in common law equity. *Bryant*, 301 Or. at 639. In any event, no factual findings were made in *Pamplin* by the trial court, whereas in the instant action, the record is replete with undisputed evidence of misconduct on the part of Relator and his counsel.

did not ask Relator how he obtained the vast number of documents until November 14, 2012 (SER 343-344). Upon Adverse Parties request for the return of purloined documents, Relator instead opted to retain the documents, with full knowledge that the documents had been taken improperly.

Fjelstad knew or should have known how to handle the situation the moment his client presented him with purloined documents. The ethical obligations of an attorney presented with stolen property have been extensively documented and debated in the context of both criminal and civil litigation. *See* Model Rules of Prof'l Conduct R. 1.15 (2009); *see also* Brian S. Faughnan & Douglas R. Richmond, *Model Rule 1.15: The Elegant Solution to the Problem of Purloined Documents*, 26 Law. Man. Prof. Conduct 623, 627 (2010); Mark J. Fucile, *Smoking Gun: Receiving Property Stolen by a Client*, Multnomah Lawyer, December 2012 at 6 (a copy is attached at SER 192); Restatement (Third) of Law Governing Law § 60 cmt. m (2000); *see e.g. In re Ryder*, 263 F. Supp. 360 (E.D. Va. 1967) (attorney disciplined for taking possession of stolen property). It is well settled that an attorney presented with purloined documents should have (1) refused to accept the purloined documents, unless the purpose of the documents was to return them to Adverse Parties; (2) informed Relator about the potential illegality of his conduct; (3) recommended that Relator seek a criminal defense attorney; and (4) refrained from disclosing any information

connecting Relator to inappropriate activities. Restatement (Third) of Law Governing Law § 60 cmt. m (2000) ("Where deceitful or illegal means were used to obtain the information, the receiving lawyer and that lawyer's client may be liable, among other remedies, for damages for harm caused or for injunctive relief against use or disclosure. The receiving lawyer must take steps to return such confidential client information and to keep it confidential from the lawyer's own client in the interim."). *See, e.g., Lipin v. Bender*, 84 N.Y.2d 564 (1994) (suspending counsel for making use of purloined documents); *Perna v. Elec. Data Sys., Corp.*, 916 F. Supp. 388, 392 (D.N.J. 1995) (dismissing action for making use of purloined documents). *See also* Fla. Ethics Op. 07-1 2007 WL 5404933 (Fla. State Bar Ass'n Comm. of Prof'l Ethics Sept. 7, 2007); D.C. Bar Legal Ethics Comm., Ethics Op. 318 (2002); Va. State Bar Ethics Comm., Legal Ethics Op. 1141 (1988). In using the purloined documents, Fjelstad "proceeded at [his] and [his] clients' peril." *Burt Hill, Inc. v. Hassan*, CIV.A. 09-1285, 2010 WL 419433 (W.D. Pa. Jan. 29, 2010). The trial court echoed the same sentiment (SER 393).

The Oregon State Bar ("OSB") touched on this issue in OSB Formal Op. No. 2011-186 (2011). It discussed whether a lawyer in an adversary proceeding should notify the opposing party or return to the opposing party documents that may have been stolen or otherwise taken without authorization from the

opposing party. The OSB noted that receipt of stolen documents from a client could be accepting "evidence of a crime" in violation of Oregon RPC 8.4(a)(4) and thus exposing an attorney and her client to criminal liability. The OSB also noted that the lawyer who reviews, retains, or attempts to use purloined documents could be subject to disqualification or sanctions by the court. *See* OSB Formal Op. No. 2011-186 at n. 5.

Further guidance from the OSB is found in Helen Hierschbiel's article, *Bar Counsel: Ill-Gotten Gains: Rules for Privileged or Purloined Documents*, Oregon State Bar Bulletin, July 2012 (hereinafter, "Hierschbiel") (a copy is available at SER 193). Using an example similar to the instant case, Hierschbiel advises that employee's counsel should not accept property from her client if the attorney determines that the property was stolen or taken without authorization. The only reason counsel should accept stolen property is to return the property to the victim of the crime. Counsel should advise her client of the possible criminal legal consequences and to seek advice from a criminal defense lawyer. Hierschbiel further elaborates counsel who obtains documents outside of the traditional means of discovery should not succumb to the temptation of reviewing those documents under threat of disqualification or sanctions from the court. Relator and Fjelstad's actions in using the purloined

documents in the instant case are the very issue that Hierschbiel warned may justify disqualification of counsel.

Relator, throughout motion practice, as well as briefing before this Court, never provides any authority or establish why he was justified or excused in committing such egregious misconduct. Relator never disputes that the misconduct occurred, but instead attempts to establish that the trial court abused its discretion in applying sanctions in light of the overwhelming evidence of misconduct provided by Adverse Parties. The evidence was sufficient to provide the trial court with the proper judicial discretion to exercise any number of sanctions available to address the misconduct, including disqualification. *See Lynn* at *5.

b. The Purloined Documents Are Confidential, and Not Public Records as Claimed by Relator

Throughout his brief, Relator asserts boldly that the purloined documents were not confidential or privileged, and therefore the trial court abused its discretion in disqualifying Fjelstad. Adverse Parties contend that the contents of the documents were not relevant, as the court had substantial discretion in disqualifying Fjelstad based on the overwhelming evidence of misconduct. In any event, Adverse Parties provided evidence that the purloined documents were confidential, and Relator's cavalier attitude towards the confidentiality of

the documents unduly exposed Adverse Parties' confidential information to unauthorized third parties and bypassed any ability to protect this information.

Relator provided no evidence to the trial court to indicate that the purloined documents are not confidential records. Confidential documents are generally regarded as documents containing information such as internal operations, business strategies, financial records, personnel records and so forth, which are not meant for general inspection. *O'Day v. McDonnell Douglas Helicopter Co.*,79 F.3d 756, 763 (9th Cir. 1996); *In re IBP Confidential Bus. Documents Litig.*, 754 F.2d 787 (8th Cir. 1985); *Herrera*, 1998 WL 229499; *Lynn*, 2011 WL 6260362. Relator noted the purloined documents contained "quality control records, test records, and other business data" (SER 72). Categories of documents Relator took included confidential information regarding customers; information regarding private projects undertaken on behalf of private clients; internal diagnostic testing and quality control data not publically available; data and reports regarding the volume of production; voids worksheets (gyratory data) and estimates of daily labor costs and energy expenses (SER 204). Many of these documents were company documents and were not disclosed to public entities (SER 204-205).

The documents purloined by Relator contain information not intended for general exposure, and KFJ had a strong interest in protecting this information.

See Lynn at *5. Upon Relator's claim that the purloined documents were not confidential, Adverse Parties provided the trial court with evidence to the contrary. Hicks, who evaluated each one of the purloined documents, declared that, of the 3,000 pages of purloined documents provided, only 286 pages were publically available (SER 359-360). The remaining documents contain various business data, including private quality control and cost data as well as other confidential information that would damage KFJ and undermine its ability to compete if released to the public (SER 359-360).

Relator further argues the purloined documents are not confidential as he had access to them and Adverse Parties took no steps to secure them. Relator's arguments mirror the arguments raised in *In re Marketing Investors Corp.*, 80 S.W. 3d 44 (Tex. App. 1998). In *Marketing Investors*, a terminated employee removed documents from his former office. During discovery requests, the employer realized employee had confidential documents in his possession. Upon request, employee returned the original documents but kept copies and refused to agree not to use the misappropriated documents. The employer moved for return of the documents, and disqualification.

The *Marketing Investors* court rejected the employee's claim that he was entitled to possess and use the employer's documents as he had access to the documents as an employee. It noted that the employee signed an agreement

establishing that all information was the employer's asset. *Id.* at 48. In the same manner, KFJ informed Relator of the confidential nature of documents accessed while he was a Quality Control Technician, and provided Relator with a secure computer access as well as a secured office to allow the access of confidential information (SER 202). He purloined the confidential documents surreptitiously by using a co-worker's computer without permission, an action which violated Adverse Parties' Computer Policy (SER 204, 209).

Marketing Investors further rejected employee's argument that any confidentiality no longer existed as he could view or possess the documents while employed by the employer. 80 S.W. 3d at 50. The court noted that when an employer terminated an employee, that employee no longer had permission to view or possess any confidential documents. *Id.* at 50. The same obligation exists in Oregon, as "Oregon law imposes on every employee a legal duty to protect an employer's trade secrets and other confidential information, an obligation that continues beyond the term of employment." *Union Pac. R. Co. v. Mower*, 219 F3d 1069, 1073 (9th Cir 2000). Relator was only entitled to view and access confidential documents solely for his role as Quality Control Technician and not after. *Marketing Investors*, 80 S.W. 3d at 48 n. 2. When KFJ transferred Relator to Plant Expeditor, he no longer had Adverse Parties' authorization to view or possess any confidential documents.

Marketing Investors relies heavily in its analysis on the fact that an employee who is terminated no longer has the right to access the employer's confidential information. In much the same manner, KFJ revoked Relator's authorization to access confidential information. Relator attempted several times to have a computer assigned to him but was rejected. Adverse Parties made it very clear to Relator he no longer had access to the type of documents he misappropriated. Relator had to compromise a computer and KFJ's network in order to access the confidential documents.

Even assuming arguendo that all of the documents were public records and not confidential, then, as the trial court observed, Relator could have obtained those documents legitimately through discovery requests and other means. The trial court noted:

> **THE COURT**: Well, won't your client, then have a right to go get them from a public entity instead of to take them off of [Adverse Parties'] computer?
>
> Whether he had a business purpose, and opportunity and – authority, I should say, to use them for his job or not, what authority is there for the proposition that your client had the right to take them off of defendant's computer even though they might have been in some public forum somewhere else? To self-help?
>
> **MR. FJELSTAD**: That's a hard question to answer except–
>
> **THE COURT**: I would imagine.

(SER 379). Even if the documents are not confidential, they are still the property of the employer and may not be retained by former employees. In *Lynn*, 2011 WL 6260362, the court did not distinguish between confidential and non confidential business records. The employee in *Lynn* copied over 39,000 emails, of which approximately 11 percent were privileged. *Id.* at *4. The court, however, demanded the return of all email as a sanction for the employee's action. Further, the court also disqualified employee's counsel. In the same manner as Relator, the employee in *Lynn* justified his behavior by stating the documents taken would be subject to a public records request. *Id.* at *6. The court rejected that argument. *Id.* ("The Court disagrees. . . . [T]he manner of acquisition of a document is important as one cannot obtain even non-exempt public documents through illegal conduct.") (internal citations omitted).

Relator further argues that the removal of confidential documents was justified as Relator simply presumes that Adverse Parties would not comply and attempt to subvert discovery requests (SER 387 Tr. 22:10-13). The mere fear of a party not providing documents through discovery does not justify Relator's actions of "self-help." *O'Day*, 79 F.3d at 763 (plaintiff's purloinment of documents not protected even though defendant had a history of destroying documents). In any event, Relator has failed to provide any evidence to support his claim that KFJ would not respond to any reasonable request for document

production, and further, fails to provide any authority on how Relator was entitled to purloin documents because he "had no faith" in KFJ producing documents.

The trial court, under Oregon law, must presume that Adverse Parties would comply with the law and produce discoverable documents. Absent evidence to the contrary, the trial court must presume that "[t]he law has been obeyed." ORS 40.135(1)(x). Relator's counsel conceded that he cannot ask the court to presume differently (387 Tr. 22:18-25).

Moreover, Relator provided no evidence Adverse Parties would not comply with the law. Relator argues the fact that Adverse Parties reasonably objected to some of his discovery requests evidences that the purloined documents "may never be seen in the context of this litigation again." The mere preservation of an objection to a document on grounds that it is burdensome, oppressive, and overly broad in no way establishes a party will not produce documents. If Relator feels Adverse Parties are not providing necessary documents, the proper remedy is to file a motion to compel, not self-help, concealing the theft of documents, and refusing to return the document purloined.

Adverse Parties provided ample evidence for the trial court to establish that the purloined documents were confidential. Regardless of whether

Adverse Parties' property was confidential, Adverse Parties' have the right to possess their documents without interference or theft until Relator submits a proper discovery request for the information. *Pillsbury, Madison & Sutro v. Schectman*, 55 Cal. App. 4th 1279, 1285, 64 Cal. Rptr. 2d 698 (1997).

2. Disqualification is a Proper Remedy to Maintain the Integrity of the Discovery Process and the Judicial Process

Relator argues, based on *Bryant*, 301 Or. at 639, and other Oregon appellate cases (*see e.g.*, *Collatt*, 99 Or. App. at 465 n. 1) dealing with attorney disqualifications, that a strong consideration for disqualification is the equitable balancing of prejudices. However, Relator does not address that, in both *Bryant* and *Collatt*, the parties sought disqualification due to inherent conflict of interests held by the counsel. In those cases where a conflict of interest is asserted as the basis for disqualification, a finding of prejudice is necessary.

The instant case does not raise the issue of a conflict of interest. Instead, Adverse Parties sought Fjelstad's disqualification due to misconduct in the use of purloined documents. Contrary to Relator's assertion, a trial court need not find prejudice to another party to grant a motion for disqualification when a lawyer's conduct threatens the integrity of the discovery process. Rather, the order may be granted to preserve the integrity of the judicial process without considering the interests of any specific party:

> The purpose of an order addressed to a lawyer (rather than to a party) may be to protect a party, or it may be to *preserve the functioning and the integrity of the legal process apart from the interests of any party*. For instance, a court may enforce its orders, ORS 1.010(2), or a duty imposed by law "in matters relating to the administration of justice in a court," ORS 1.025(1), and may act on professional misconduct that constitutes contempt, ORS 33.010(1)(a), *whether or not any party is prejudiced or objects.*

Bryant, 301 Or. at 638-639 (emphasis added).

a. Richards *Favors Disqualification*

Relator also espouses a balancing test under *Richards*, 168 F. Supp. 2d at 1205, in order to balance the equities in disqualification. Adverse Parties contend that the six-factor test outlined in *Richards* was made in reference to a specific case, and, in any event, a balancing of the equities under *Richards* favors disqualification.

Relator first contends that disqualification is improper, as disqualification is reserved for the removal of privileged, not confidential documents. No authority supports this contention. A review of authority only establishes that the *Richards* six-factor test is applied for when an attorney receives privileged materials, and does not preclude the application of disqualification in other cases. *See In re Meador,* 968 S.W.2d 346, 352 (Tex. 1998) ("these factors apply only when a lawyer receives an opponent's privileged materials outside the normal course of discovery") *accord Richards*, 168 F. Supp 2d at 1205. Disqualification of an attorney resides at the discretion of the trial court.

Whether the trial court followed a six-factor test does not necessarily establish that the trial court abused its discretion. An "'abuse of discretion standard tests only whether the trial court made a decision within the permissible range of choices[.]'" *Page v. Parsons*, 249 Or. App. 445, 456, 277 P.3d 609, 616 (2012) *quoting State v. G. N.*, 230 Or. App. 249, 254, 215 P.3d 902 (2009) (quoting *State v. Hewitt*, 162 Or. App. 47, 52, 985 P.2d 884 (1999), *rev. dismissed*, 330 Or. 567, 10 P.3d 943 (2000)) (brackets in *G. N.*). Relator still does not provide any evidence that establishes that the trial court abused its discretion in disqualifying Fjelstad.

In any event, the *Richards'* test favors disqualification. In *Richards*, the court adopted a test outlined in *In re Meador,* 968 S.W.2d at 352 in determining whether disqualification was proper under the concepts of "prejudice, bad faith and knowledge elucidated by the Washington Supreme Court as elements to be weighted in evaluating a motion to disqualify." *Richards*, 168 F. Supp. 2d at 1205, *citing In re Firestorm*, 129 Wash. 2d 130, 916 P.2d 411 (1996); *First Small Business Investment Co. of California v. Intercapital Corp. of Oregon*, 108 Wash.2d 324, 331, 738 P.2d 263 (1987). The factors evaluated were

1) whether the attorney knew or should have known that the material was privileged;

2) the promptness with which the attorney notifies the opposing side that he or she has received its

privileged information;

3) the extent to which the attorney reviews and digests the privileged information;

4) the significance of the privileged information; i.e., the extent to which its disclosure may prejudice the movant's claim or defense, and the extent to which return of the documents will mitigate that prejudice;

5) the extent to which movant may be at fault for the unauthorized disclosure;

6) the extent to which the nonmovant will suffer prejudice from the disqualification of his or her attorney.

Id. at 1205 *citing In re Meador*, 968 S.W.2d at 351–52.

In terms of confidentiality, Relator's actions establish that the trial court had proper discretion to order disqualification under the *Richards'* test. Under the first prong of the test, Fjelstad knew, or should have known that the material provided was confidential in nature. Fjelstad states that he was unaware of the confidential nature of the materials, but failed to investigate Relator's possession of approximately 1,500 documents until November of 2012 (SER 343-344). Such questionable actions necessarily impose a duty upon counsel to investigate further before reviewing and using the documents in litigation. *See Burt Hill, Inc.*, 2010 WL 419433 at *5 (attorney's receipt of documents from an

anonymous source "would raise 'red flags' for any reasonable attorney under the circumstances presented").

Under the second prong, Relator failed to inform Adverse Parties of the receipt of the confidential documents, as Adverse Parties were not informed until 11 months later, after Fjelstad reviewed and used the confidential information within the documents (SER 72). Instead of immediately informing Adverse Parties, Fjelstad, as noted under the third prong, immediately reviewed and digested the confidential documents (SER 334 n.1). Evidence provided to the trial court indicated that Relator's counsel used the confidential documents in the BOLI proceeding (SER 165), in the drafting of the complaint (SER 393), and the drafting of discovery requests specifically targeting information provided through the confidential documents (SER 16, 32, 120, 189-190).

The trial court found sufficient evidence that the conduct of Relator and Fjelstad caused prejudice to the Adverse Parties. Adverse Parties, in their initial motion requesting sanctions, identified that they had already suffered due to Fjelstad's extensive knowledge of the purloined documents. Indeed, Relator did not deny that he used the purloined documents substantially in his initial BOLI claim, as well as in drafting the complaint, and subsequently drafting extensive discovery requests and subpoenaing third parties. The trial court reviewed the evidence and found the same. The court noted that "[Relator] and

his lawyer . . . unfairly benefitted from Gaylor's improper conduct to the detriment of [Adverse Parties] by retaining and using the information in the 1,500 documents in litigating this case" (SER 403 Tr. 38: 22-25). Relator cannot claim that the trial court abused its discretion by failing to find any prejudice on the part of Adverse Parties when Adverse Parties specifically stated the prejudice it suffered in its initial motion, and the court subsequently made a finding establishing that Adverse Parties had suffered prejudice due to Relator and Fjelstad's conduct.

Relator claims, under the fifth prong of the *Richards'* test, that Adverse Parties took no measures to protect the confidential documents. Adverse Parties did inform Relator several times about the confidential nature of the documents and further had the confidential documents only accessible to certain parties. Adverse Parties cannot be faulted for the disclosure of confidential documents obtained through Relator's intrusion into KFJ's computer network for which he had no authorized access. Indeed, Relator's theory that he had a right to take the documents because KFJ did not secure the documents is a "novel theory, which amounts to an assertion that anything not nailed down can permissibly be stolen." *Herrera*, 1998 WL 229499 at *2.

A similar issue occurred in *Pillsbury,* 55 Cal. App. 4th at 1283. The *Pillsbury* court rejected the argument that an employee's interest in using an

employer's records to prove his claims in litigation trumps an employer's interest in ownership of its documents – even if those documents are not trade secrets or do not implicate privacy interests:

> Schectman's assertion of an interest or justification superior to any interest grounded "solely on the basis of ownership" is not readily distinguished from a pickpocket's interest in a stranger's purse. Whether or not he might be able to articulate an end justifying the means he proposes-which is no less than to lay claim to documents which do not arguably "implicate any personal privacy interest"-he would still fail to state a sufficient reason to subvert society's interest in preserving private property, as well as maintaining the jurisdiction of the courts to administer the orderly resolution of disputes. The trial court properly rejected these claims under the authority of the Claim and Delivery Statutes, which are based not only upon fundamental common law concepts of property ownership and conversion, but also upon a recognition of the court's inherent authority to administer disputes over possession of chattels.

Id. at 1288. Adverse Parties cannot be held at fault for Relator's improper actions.

Under the sixth prong, any prejudice suffered by Relator may suffer due to the disqualification of his counsel is self-inflicted, as noted extensively at Part III.A.2.b. *infra*.

Under the factors outlined in *Richards*, the trial court had sufficient evidence to warrant disqualification of Fjelstad. Relator does not provide any evidence to establish that the trial court abused its discretion in ordering disqualification.

b. Any Prejudice to Relator is Self-Inflicted

Although Relator may suffer prejudice by having to find new counsel, this is not a reason for the trial court to deny disqualification, especially when the resultant prejudice is attributable to the conduct of Relator and Fjelstad. Relator's initial conduct of purloining the documents was of his own accord. Fjelstad's conduct of using the purloined documents was directly attributable to Fjelstad. When Fjelstad was offered the opportunity to cure several times via return of the documents, he steadfastly refused to do so. While Relator will be deprived of his counsel of choice by disqualification, "this is not a case where [Relator is] losing [his] counsel through some action on the part of opposing counsel or a third party. Plaintiffs are directly responsible . . . , and thus, the deprivation of counsel of choice does not weigh heavily against disqualification." *See Richards*, 168 F. Supp. 2d at 1208.

i. Relator Had the Option to Cure Improper Conduct but Refused

Adverse Parties demanded the immediate return of all purloined documents and records along with copies on three occasions: November 15, 2012, November 19, 2012, and January 4, 2012 (SER 31, 146, 151-152). Fjelstad declined to comply with these demands. With no other options, Adverse Parties moved the trial court for the return of documents as well as sanctions.

The duration of time Fjelstad continued to retain possession of the taken information is a relevant factor to consider in determining whether disqualification is an appropriate remedy. *Richards*, 168 F. Supp. 2d at 1200 (holding "eleven months of access to privilege material creates an impropriety and so taints the proceeding that the harsh remedy of disqualification is justified"). The facts demonstrate Fjelstad received the purloined documents on at least April 19, 2012, if not before, and filed some of those documents with a public agency in April 2012 with full knowledge that filing these documents would expose them to a public information request.

Contrary to all ethical and judicial precedent of proper use of stolen property by attorneys, Fjelstad made full use of the purloined information. Fjelstad sought numerous categories of documents based upon the contents of the purloined documents, which were wrongfully taken by Relator (*Compare* SER 204 *with* SER 189-190). Fjelstad freely admitted that his client took Adverse Parties' property home and copied it onto his computer where he stored it (SER 395 Tr. 30:4-9)("**MR. FJELSTAD**: -- what happened is the original CD was taken at the – their site. My client took it home, transferred it to his computer, and then made – and there it still sits . . . [o]n his computer."). This admission indicated to the court that Relator took the documents from Adverse Parties without its knowledge or permission, and used that purloined

information for the commencement and continuation of the litigation. Indeed, this is exactly what the trial court found:

> **THE COURT:** I think it's clear to me that you have – in representation of your client, you have benefitted from your client's improper conduct to the defendant – detrimental to the defendant, and there's no –
>
> **MR. FJELSTAD:** How so?
>
> **THE COURT:** By having the benefit of the knowledge of the contents of over 1,500 documents that you shouldn't have had the knowledge of in the work that you've been able to do on behalf of your client so far in this case.

(SER 403 Tr. 38:16-39:1). That wrongful conduct warranted the trial court's ruling of disqualification and the return of documents, and was the Relator's own doing.

ii. Relator Did Not Undertake Any Action to Mitigate His Ethical Impropriety

Relator argues that *Nesselrotte v. Allegheny Energy, Inc.*, CIV.A. 06-01390, 2008 WL 2890832 (W.D. Pa. July 23, 2008) and its progeny, *Burt Hill, Inc*, 2010 WL 419433, support not disqualifying counsel. In both cases, Relator overlooks that the potential disqualified attorneys took reasonable steps to mitigate the improper conduct that allowed the balance to weight in favor of not disqualifying counsel. Such steps were not taken in the instant action.

In *Nesselrotte*, 2008 WL 2890832 at *1, plaintiff, an employee of defendant, purloined hundreds of documents after she received notice of the

termination of her employment. In ruling against disqualification, the court noted that counsel had taken reasonable steps to ensure that his actions were proper, including reviewing relevant legal research on the ethical issues in removal of the documents and retaining an expert to advise himself on the issue. *Id.* at *6. In addition, the court, in denying the motion for disqualification, placed substantial weight on plaintiff's counsel declaration stating that he had not reviewed the documents personally. *Id.* at *6 n.13. In a similar manner, in *Burt Hill*, 2010 WL 419433 at *1, the court denied the motion to disqualify based on counsel's action in mitigating any potential ethical impropriety which would taint the adversarial proceedings. Upon obtaining purloined documents, counsel did not review the documents, but provided the documents to an expert, who retained and reviewed the documents for the proceeding. *Id.* at *6.

Fjelstad did not undertake any steps to mitigate or proscribe any potential misconduct that resulted from his receipt of purloined documents. The trial court made note of Fjelstad's failure to mitigate any misconduct, and further noted the proper steps that Fjelstad should have taken upon receipt of the purloined documents:

> **THE COURT:** You should have never looked at [the documents]. You should have asked your client if he took them off the premises of defendant while he was employed and, if the answer to that was yes, you should have said they're to be put in a

> sealed envelope – put in a sealed envelope and returned immediately without you seeing them.

(SSER 386 Tr. 21:12-18). *See, e.g.*, *Conn v. Superior Court*, 196 Cal. App. 3d 774, 242 Cal. Rptr. 148 (Ct. App. 1987) (return upon receipt of purloined documents is proper). Absent any evidence of mitigation, Relator fails to provide any evidence that the balancing of the equities would favor his position.

Throughout his first Assignment of Error, Relator fails to illustrate any evidence the trial court abused its discretion in disqualifying counsel. The record is replete with undisputed evidence of egregious conduct on the part of Relator in purloining confidential documents and evidence of Fjelstad's extensive use of those documents throughout the litigation. Relator has not established that the Order disqualifying counsel was in any manner not rationally supported by the evidence provided within the trial court's record. *EMC Mortgage Corp.*, 174 Or. App. at 528. As such, Adverse Parties submit that the Order disqualifying Relator's counsel was proper.

B. The Trial Court Properly Acted Within Its Discretion in Ordering Relator to Return the Removed Documents

Relator contends in his second Assignment of Error that the trial court abused its discretion in ordering the return of purloined documents as "the trial court had no legal authority supporting this determination."

As noted in Part I.F.2 *supra*, this Assignment of Error is not properly before this Court. In any event, Relator's arguments ignore the panoply of authority made by courts that establishes that "self-help" discovery by a party in litigation should not be rewarded. Regardless of the confidentiality of the purloined documents, the trial court had more than adequate legal authority to order the return of the purloined documents.

1. Courts Have Repeatedly Required the Return of Documents in Instances Where Self-Help Has Tainted the Discovery Process.

While Oregon's courts have not made any established rulings on "self-help" discovery, substantial persuasive authority exists establishing that purloining documents, regardless of their contents, is seen as tainting the judicial process, and that the trial court has substantial discretion to attempt to remedy any taint incurred in the judicial process.

For instance, in *Conn*, 196 Cal. App. 3d at 774, , the Court ordered the return of approximately 10,000 pages of purloined documents taken for litigation as "[parties] have, and have always had, the right to keep their own documents until met with proper discovery requests or ordered to disclose them by the [c]ourt." Indeed, the court in *Conn* noted that the prudent and good faith action for counsel retaining the purloined documents was to "immediately return[] the documents" *Id.* at 781. In *In re IBP Confidential Business Documents Litig.*, 754 F.2d at 787, the Eight Circuit reversed an order denying

an injunction for the return of purloined documents. In *Furnish v. Merlo*, CV 93-1052-AS, 1994 WL 574137 (D. Or. Aug. 29, 1994), the plaintiff committed misconduct when she removed documents without authorization. In *Pillsbury*, 55 Cal. App. 4th at 1283, the court affirmed an injunction for the return of purloined documents, and issued a scathing warning to any parties who undertake "self-help" discovery for the purposes of litigation:

> [W]e will state clearly our agreement with those courts which have refused to permit "self-help" discovery which is otherwise violative of ownership or privacy interests and unjustified by any exception to the jurisdiction of the courts to administer the orderly resolution of disputes. Any litigant or potential litigant who converts, interdicts or otherwise purloins documents in the pursuit of litigation outside the legal process does so without the general protections afforded by the laws of discovery and risks being found to have violated protected rights. The least sanction cognizable in these circumstances would appear to be the one chosen by the trial court here: the return to the status quo existing at the time the documents were taken.

Id. at 1289.

Relator, and amicus OTLA, contend Relator obtained protection from his improper acts of purloining documents through Oregon's whistleblowing statute (ORS 659A.199). It is well settled that employees do not have any rights to retain documents and remove them from the employer's premises. *See Jeffries v. Harris County Community Action Ass'n*, 615 F.2d 1025, 1036 (5th Cir. 1980) (copying and disseminating confidential documents is not a protected

activity). Multiple courts have held repeatedly that employees who unreasonably appropriate records, even for litigation, are not protected. *See Hodgson v. Sec'y of Labor*, 440 F.2d 662, 663 (5th Cir. 1971); *see also Niswander v. Cincinnati Insurance Co.*, 529 F.3d 714 (6th Cir. 2008); *Laughlin v. Metropolitan Washington Airports Authority*, 149 F.3d 253 (4th Cir. 1998); *O'Day*, 79 F.3d 756 (9th Cir. 1996).

Relator maintains that the conduct of Relator in removing the documents was proper as these documents were used for non-business purposes and were not subject to a confidentiality agreement or policy. However, the court was not concerned about the contents of the documents, but if the documents were improperly obtained. This is why the trial court below was "shocked" by the position advocated by Fjelstad as he provided no authority for Relator's right to remove the documents (SER 388 Tr. 23:13-19). The sheer volume of documents removed by Relator, along with the egregious methods used by Relator to obtain the documents were sufficient evidence for the court to issue sanctions.

2. Relator's Reliance on *Bedwell* and *Quinlan* Is Misplaced.

Relator relies on two specific cases, *Bedwell v. Fish & Richardson, P.C.*, 07-CV-0065-WQH (JMA), 2007 WL 4258323 (S.D. Cal. Dec. 3, 2007), and *Quinlan v. Curtiss-Wright Corporation*, 204 N.J. 239, 8 A.3d 209 (2010) in his

argument that the trial court abused its discretion in ordering the return of the purloined documents. However, neither of these cases establishes that the trial court abused its discretion in light of the evidence presented by Adverse Parties. Indeed, both of these cases involve specific issues that are readily distinguishable from the instant case.

a. Bedwell *Is Readily Distinguishable From the Instant Action*

Relator contends that, in *Bedwell,* 2007 WL 4258323, the trial court "declined . . . to order the return of documents that did not contain confidential or privileged information." Relator's Opening Br. at 20. A careful review of *Bedwell,* however, indicates that the ruling was much narrower than espoused by Relator.

In *Bedwell*, defendant law firm sought the return from former employee of several confidential documents. *Id.* at *1. The trial court ordered the return of all documents except for those specifically relating to the plaintiff's individual status as defendant's employee, such as her requests to transfer. *Id.* at *2. The trial court noted that the emails to be retained by plaintiff were specifically "communications directed to and from Plaintiff regarding her individual status as an employee at the firm." *Id.* at *2 (emphasis in original). Relator has never claimed that any of the purloined documents were these types of communications, and indeed, evidence provided by Adverse Parties indicate

that none of the purloined documents would fit into this narrow exception in which Relator would be allowed to retain purloined documents.

Perhaps more determinative, the court in *Bedwell* distinguished the issue from another similar case *Pillsbury*, 55 Cal. App. 4th at 1279, discussed at Part III.A.2. *supra*. When the *Bedwell* court allowed the plaintiff to retain certain documents, it specifically noted that there was no evidence of "self-help" discovery in the facts in *Bedwell*, whereas in *Pillsbury*, the plaintiff had engaged in "self-help" discovery for the purposes of litigation. *Bedwell*, 2007 WL 4258323 at *2. In the same manner, Relator in the instant case readily admits he engaged in "self-help" discovery and purloined documents purely for the purposes of litigation. In light of the evidence establishing Relator's removal of the documents without authority, and the vast body of authority in which the courts have frowned upon self-help discovery, the trial court was well within its discretion to order the return of all purloined documents.

b. Quinlan's *Balancing Test Favors Return of Purloined Documents*

Relator also relies heavily on *Quinlan v. Curtiss-Wright Corporation*, 204 N.J. 239, and its framework of factors in order to justify misappropriating documents from Adverse Parties. The facts of this present case before the Court do not categorically favor Relator's position as he asserts through the application of the factor balancing test.

In *Quinlan*, the female employee alleged sexual discrimination after the employer promoted a recent male hire to a superior position. Without informing her counsel, the employee reviewed and copied files showing her employer engaged in discrimination. The employee gathered over 1,800 pages of documents containing employees' personal and confidential information. During the discovery process, the employer discovered employee had copied confidential documents and terminated the employee for theft of company property in violation of the employer's confidentiality policy.

Quinlan set a multiple factor balancing test for evaluating whether employee was protected in purloining documents. First, the court reviewed how the employee came into possession of the document. The court noted that "the employee who finds a document by rummaging through files or by snooping around in offices of supervisors or other employees will not be entitled to claim the benefit of this factor." 204 N.J. at 269.

Relator did not obtain the documents solely during the course of his employment. Adverse Parties transferred Relator from a position where he had access to the documents. Relator opted to compromise a computer assigned to another employee multiple times in order to obtain the purloined documents.

Second, the court considered if the employee shared the documents with an attorney in order to evaluate a claim or whether the document was

disseminated to third parties. *Id.* at 270. In this case, Relator shared the purloined documents with Fjelstad and with outside parties. Fjelstad took the extraordinary step of sharing the misappropriated documents with BOLI. These documents were made part of the agency's public files.

Third, the court discussed if the nature and content of the documents in question weighed in the favor of the employer's interest in keeping it confidential. "If it reveals a trade secret or similar proprietary business information, or if it includes personal or confidential information such as Social Security numbers or medical information about other people, whether employees or customers, the employer's interest will be strong." *Id.* Adverse Parties provided extensive evidence that the purloined documents contained confidential information at stated in Part III.A.1.b. *supra.* Adverse Parties have a very strong interest in protecting this confidential information from their competitors.

Fourth, the court considered whether there is a clear company policy on confidentiality *or* whether there is a common law duty of loyalty to the employer. *Id.* Although Adverse Parties did not have a confidentiality policy in place, Relator was require to abide by the Computer Policy. Relator violated the policy when he accessed the purloined documents on an unauthorized computer.

Fifth, the court balances whether the disclosure of the documents unduly disrupts the employer's business against whether the documents are central to the employee's claim against the employer. *Id.* Adverse Parties do not deny the social value of a whistleblower discrimination claim. However, Relator did not confine disclosure of the confidential documents to Fjelstad in exploring the merits of his claim. Instead, Relator exposed confidential documentation to a third party state agency that then made public this documentation. Indeed, throughout the litigation, Relator has expressed a cavalier attitude about Adverse Parties' confidential documents by referring to all purloined documents as "public documents." Relator's actions are highly disruptive to Adverse Parties' business as they threaten to expose proprietary internal practices to competitors in a highly aggressive industry.

Sixth, the *Quinlan* Court considered whether:

> "in the absence of the employee's act of copying the document, there was a likelihood that the employer would not maintain it, or would have discarded it in the ordinary course of business, that it would have been destroyed, or that its authenticity would be called into doubt. As part of this evaluation the court may also consider whether the document would be critical to the case, like the true "smoking gun," such that the employee's perceived need to preserve it would be entitled to greater weight in light of the significance of the risk of its loss."

Id. at 271.

Here, Relator argues these documents constitute "smoking guns" relating to Relator's whistleblower discrimination claim. However, the *Quinlan* court measures this relative to the risk of loss of the documents or the likelihood of their destruction. At no time has Relator provided evidence that there was a risk or likelihood Adverse Parties would not maintain the documents in question either through past business practices or otherwise. Indeed, Relator offers conjecture that the purloined documents "may never be seen in the context of this litigation again" but never offers any evidence that Adverse Parties would attempt to withhold documents requested via a proper discovery request.

Finally, the court considered 1) the remedial purpose of the laws pertaining to the employee's claim and 2) the effect of its actions regarding the documents as it impacts the rights of the employee and employer. On note, the court considered this issue specifically in regard to the statutory construction and legislative intent of New Jersey's anti-discrimination law. Relator has not espoused that the statutory construction or legislative intent of Oregon's whistleblower law (ORS 659A.199) would allow similar protection. While whistleblower discrimination claims contain inherent social value in exposing certain business practices to public scrutiny, Relator's actions eroded Adverse Parties' rights to protect their confidential and proprietary information. Had

Relator requested these documents through proper discovery, Adverse Parties could have requested a protective order in order to protect against disclosure of confidential information. Adverse Parties have a strong interest in preserving their rights during the discovery process and protecting trade secrets from public disclosure. Relator's rights in pursuing a whistleblower discrimination claim via purloining documents cannot supplant those rights.

IV. CONCLUSION

Throughout the course of motion practice and oral argument, Adverse Parties provided overwhelming evidence establishing the misconduct of Relator and his counsel. For all the reasons provided, this Court should hold that the trial court acted within its discretion in disqualifying Relator's counsel and ordering the return of purloined confidential documents. Accordingly, Adverse Parties respectfully request that this Court affirm the decision of the trial court, deny Relator's request for a peremptory writ, and dismiss the alternative writ of mandamus.

Submitted this 22nd day of November, 2013

Ankur H. Doshi
OSB No. 101668
K. Vathana Sivanesan
OSB No. 060080

Attorneys for Defendants-Adverse Parties

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

BRIEF LENGTH

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b)(i) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 13,437 words.

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I certify that the size of the type in this brief is no smaller than 14 point for both the text of the brief and the footnotes as required by ORAP 5.05(4)(f).

By
An 568
K. [illegible]
OSB No. 060080

Attorneys for Defendants-Adverse Parties K.F. Jacobsen & Co., Inc. and Ross Island Sand & Gravel Co.

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of November 2013, I served the foregoing DEFENDANT'S-ADVERSE PARTIES ANSWERING BRIEF on the following parties at the following addresses:

Eric J. Fjelstad
Smith & Fjelstad
722 N. Main Avenue
Gresham, OR 97030

Walter J. Ledesma
Hand & Ledesma, P.C.
970 N. Cascade Dr.
PO Box 377
Woodburn, OR 97071

by causing the same to be mailed to them a true and correct copy thereof.

By _____
Ankur H. Doshi, OSB No. 101668
K. Vathana Sivanesan
OSB No. 060080
6605 S.E. Lake Road
Portland, OR 97222
adoshi@pamplincorp.com
Telephone: (503) 546-5118
Facsimile No.: (503) 546-5179
Attorneys for Defendants-Adverse Parties K.F. Jacobsen & Co., Inc. and Ross Island Sand & Gravel Co.