

1 HONORABLE RONALD B. LEIGHTON

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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT TACOMA

9 JARED PETER SMIDT and LAURA BETH  
RIDEOUT-SMIDT, et al.,

10 Plaintiffs,

11 v.

12 GEOFF MCPHERSON AND ROSIE  
13 MCPHERSON, et al.,

14 Defendants.

Case No. C09-5318RBL

15  
16 ORDER DENYING CROSS MOTIONS  
17 FOR SUMMARY JUDGMENT  
18 [Dkt. #s 35 and 41]

19 THIS MATTER is before the court on Defendant Shakotko and Maher Ingels Shakotko  
20 Christensen LLP's Motion for Summary Judgment [Dkt. #35], and Plaintiffs' Motion for  
21 Partial Summary Judgment [Dkt. #41].

22 Plaintiffs Jared Peter Smidt and Laura Beth Rideout-Smidt (together "Smidt") sue on  
23 their own behalf and purport to bring derivative actions on behalf of Brothers Northwest  
24 Investments, Inc., ("BNI") and Brothers Northwest Homes, LLC ("BNH"). The moving  
25 Defendants are Veronica Shakotko and her law firm (together "Shakotko"). Shakotko, an  
26 attorney, represented and otherwise provided legal services to BNI and BNH and the entities'  
27 individual shareholders and members beginning in 2006. Among other claims at issue in this  
28 lawsuit, Smidt alleges that Shakotko had undisclosed and non-waivable conflicts of interest,  
and that her negligence was a proximate cause of the damage Smidt claims to have suffered  
when various BNI and BNH real estate ventures failed. Shakotko seeks summary judgment on  
all of Plaintiffs' claims against her, arguing that the named Plaintiffs do not have standing to

1 bring derivative claims on behalf of the entities, and that there is no evidence that any  
2 professional failing on Shakotko's part caused Smidt or the entities any damage. For his part,  
3 Smidt seeks summary judgment on his claim that Shakotko is liable for the (undetermined)  
4 damages suffered by him.

5 The case involves a series of ultimately unsuccessful real estate ventures. The factual  
6 context is rich, complex, and disputed. In 2001, Smidt and Bruce Schmidt formed BNI. Each  
7 owned 50% of the company, and its initial purpose was to remodel homes. In 2004, they  
8 obtained a general contractor's license and began building new homes. In 2005, BNI  
9 purchased and sought to develop real property on the Key Peninsula. During that period, BNI  
10 built a home for, and then began a sort of loose business relationship with, defendant  
11 McPherson. Together, the three also formed another company, South J Street, LLC, which  
12 does not appear to be directly at issue.

13 In 2006, Smidt, Schmidt, and BNI retained Shakotko as general counsel. Another  
14 attorney in the Defendant firm (Casey Ingels) had previously done work for McPherson, and  
15 during 2006, Shakotko also represented McPherson and his own company, McPherson  
16 Development. Shakotko also represented the entities and their owners in various third party  
17 litigation, specifically the "Kohler" and "Bastian" lawsuits. Plaintiff testifies that he also  
18 thought Shakotko was representing him in the subsequent "Beattie" lawsuit, though he had  
19 hired his own attorney at that time.

20 In this time frame, BNI also hired McPherson to be its Chief Financial Officer, and  
21 McPherson and another man, Bliss, discussed becoming owners of BNI. The four decided to  
22 form a new entity, BNH, and Smidt claims that Shakotko provided legal advice to all of them  
23 regarding the formation of BNH, LLC in June 2006. Smidt, Schmidt, McPherson and Bliss  
24 each owned 25% of BNH. Plaintiff claims now that Shakotko had a conflict with respect to her  
25 representation of all of the owners of BNH, that she did not disclose the conflict, and did not  
26 obtain waivers with respect to it.

27 According to Plaintiff, BNH was formed in part to purchase and develop an Idaho resort  
28 venture known as Sunridge. BNH paid a nonrefundable \$400,000 down payment toward the

1 purchase of the land. The gist of Plaintiff Smidt's claim against Shakotko is that her concurrent  
2 representation of the two entities (BNI and BNH) and the four individuals (Smidt, Schmidt,  
3 McPherson and Bliss), and her acting in the interest of McPherson over the interests of Smidt  
4 and the two entities, resulted in the dilution and or destruction of Smidt's interest in the entities.

5 By 2007, these ventures were failing or had already failed. Plaintiff claims that in July  
6 2007, Shakotko presented documents to him designed to transfer his interests in BNH to  
7 McPherson and Schmidt, and at that time, for the first time, provided him with a written  
8 conflict waiver. He claims she did so for the stated purpose of "cleaning up the files for  
9 Idaho."

10 Smidt claims that he did not sign the waiver or the transfer, and that during this time,  
11 with Shakotko's assistance (and unbeknownst to him) Schmidt and McPherson were creating  
12 other LLCs to solicit investors in projects being undertaken by BNI and or BNH, and diverting  
13 those funds to their own personal uses. He claims they transferred corresponding liabilities to  
14 BNI, with the ultimate effect of diluting Smidt's interest in BNI and BNH. Ultimately the  
15 entities could not follow through on their purchases and lost the properties to foreclosure.  
16 According to Smidt, Shakotko was on notice of the other Defendants efforts to dilute his  
17 interest through the work of an accountant named Doug Collier. Collier told Shakotko that  
18 McPherson's activities were likely fraudulent, and that he was "kiting" funds.

19 Smidt contends that Shakotko sought to aid Schmidt and McPherson in diluting his  
20 interest, and assisted in denying him access to documentation of the various entities' financial  
21 accounting information.

22 Shakotko does not dispute that she represented the various entities, or that all of them  
23 failed, losing at least \$750,000 plus perhaps another \$100,000 in expenses. She contends that  
24 she was primarily a scribe, drafting documents reflecting agreements reached by the parties  
25 without her input. She also admits that by July 2007, the individuals with ownership interests  
26 in the entities had differing goals, and predictably, disputes about money. She contends that  
27 BNH had no assets, was insolvent by the end of 2006, and that Smidt's interest in it was "fully  
28 compensated" by virtue of the various distributions he had taken prior to the time he agreed to

1 transfer his interest to Schmidt and McPherson. By 2008, the properties were gone and  
2 Shakotko withdrew for lack of payment.

3 The parties hired accountant Collier in 2005 or 2006 to prepare BNI's tax returns, as  
4 well as the returns for BNH and other entities in which the owners had interests. He ultimately  
5 could not do so, and now testifies that the books were such a "mess" that returns cannot be  
6 prepared for either entity. Shakotko also relies on the expert testimony of accountant Neil  
7 Beaton, who is a defense expert who testifies that the records are incomplete, and that the  
8 parties' records are so intermingled that a full accounting is not possible. He does claim that  
9 BNI and its affiliated entities were insolvent by May 2006, and that BNH was insolvent by the  
10 end of 2006.

11 Beaton claims that because of the state of the records, an accounting is prohibitively  
12 expensive, if not impossible, and that therefore, it is not possible to determine if any party owes  
13 money to any other. He does purport to claim that Smidt has taken more money out of the two  
14 entities than has either Schmidt or McPherson, both as a whole and specifically in 2006 and  
15 2007. Smidt denies the bulk of these allegations.

16 On these facts (and many more detailed in the parties' respective filings and  
17 Declarations in support of them), Plaintiff seeks Summary Judgment on its claim that Shakotko  
18 breached her fiduciary duties to him, specifically with respect to conflicts of interest, and that  
19 she is liable to him in damages for those breaches.

20 Defendant Shakotko also seeks Summary Judgment, arguing that Smidt cannot maintain  
21 a shareholders derivative action on BNI's behalf, because he has failed to show that the entity  
22 was demanded to and failed to assert these claims itself. It also argues that neither Schmidt nor  
23 McPherson were shareholders or officers of BNI at the time this suit was filed, that only Smidt  
24 was an officer at that time, and that BNI could be but is not a party to this lawsuit.

25 Shakotko also argues that Smidt cannot bring a derivative suit on BNH's behalf,  
26 because his interests are divergent from those of other shareholders. Shakotko claims that  
27 Smidt's interests in the litigation are his own, and not the corporation's, as a matter of law.  
28

1 Specifically, she claims that his interest in BNI is greater than his interest in BNH, and that he  
2 seeks compensation primarily for that BNI interest, over the interests of BNH.

3 Shakotko also argues that the legal malpractice claim against her fails as a matter of  
4 law, because she did not represent the Smidt's but rather the entities', and because Smidt  
5 cannot, as a matter of law, show that her breaches (if any) proximately caused him any damage.

6 For the reasons that follow, the Motions for Summary Judgment are DENIED.

## 7 **Discussion.**

### 8 **1. Summary Judgment Standard.**

9 Summary judgment is appropriate when, viewing the facts in the light most favorable to  
10 the nonmoving party, there is no genuine issue of material fact which would preclude summary  
11 judgment as a matter of law. Once the moving party has satisfied its burden, it is entitled to  
12 summary judgment if the non-moving party fails to present, by affidavits, depositions, answers  
13 to interrogatories, or admissions on file, "specific facts showing that there is a genuine issue for  
14 trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). "The mere existence of a scintilla of  
15 evidence in support of the non-moving party's position is not sufficient." *Triton Energy Corp.*  
16 *v. Square D Co.*, 68 F.3d 1216, 1221 (9<sup>th</sup> Cir. 1995). Factual disputes whose resolution would  
17 not affect the outcome of the suit are irrelevant to the consideration of a motion for summary  
18 judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In other words,  
19 "summary judgment should be granted where the nonmoving party fails to offer evidence from  
20 which a reasonable [fact finder] could return a [decision] in its favor." *Triton Energy*, 68 F.3d  
21 at 1220.

### 22 **2. Disputed issues of material fact preclude Plaintiff's Motion for summary** 23 **Judgment on liability.**

24 Plaintiff argues that Shakotko had, and failed to disclose, conflicts of interest with  
25 respect to her work for BNI, BNH, and its various owners. He seeks a ruling as a matter of law  
26 that she is liable for damages caused by the breach(es), and that the fees paid to her should be  
27 disgorged.

1 Defendant argues that Smidt has not established that Shakotko represented him, and  
2 make hearsay objections to the evidence relied upon by the plaintiff to establish the existence  
3 of an attorney client relationship and the various conflicts of interest claimed. She also makes  
4 hearsay and foundational objection to the declaration of John Strait<sup>1</sup>, plaintiff's expert,  
5 regarding these issues.

6 The resolution of this Motion does not require the court to delve into the legal  
7 intricacies of the parties' various arguments. The record before the Court is, like BNI and  
8 BNH's accounting, a "rat's nest." It is bursting with disputed issues of fact. Some are  
9 fundamental: who did Shakotko represent, and when, and what was she retained to do? When  
10 did she know, and when should she have known, that the parties' accounting practices were  
11 hopelessly insufficient? And others are more esoteric: would it have been futile for Smidt to  
12 demand that BNI institute a suit against its shareholders officers and attorney at the time this  
13 suit was commenced? What were her obligations to make that discovery? To provide advice  
14 about it? Shakotko reluctantly concedes at least part of this point in her Opposition to the  
15 Plaintiff's Motion, arguing that "at a minimum, there is a material issue of fact as to the  
16 existence of conflicts of interest when the Plaintiff fails to establish the identity of the client."

17 [Dkt. #46]

18 Shakotko also seeks summary dismissal of Smidt's disgorgement claim, based on the  
19 argument that there was no ethical violation as a matter of law, and that there is no evidence of  
20 dishonesty. This too presents numerous issues of fact.

21 Plaintiff's Motion for Summary Judgment is DENIED.

22 **3. Numerous issues of fact similarly preclude Shakotko's Motion for Summary**  
23 **Judgment.**

24 Shakotko's Motion suffers from the same fatal flaws. With or without BNI as a  
25 Plaintiff, Smidt has sufficiently alleged conflicts of interest, monetary shenanigans, and  
26 damages. Viewed in the light most favorable to him, the evidence establishes each of these  
27 claims. It will be up to the fact finder to determine whether Smidt's claim that Shakotko

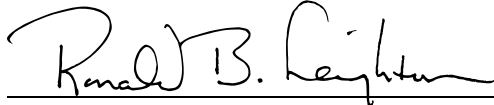
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28 <sup>1</sup> Defendant's Motion to strike this expert Declaration is DENIED.

1 represented him personally was reasonable, and whether she knew or should have known of the  
2 accounting issues, whether she acted in Schmidt and McPherson's interest over the interests of  
3 Smidt and the entities', and, if so, what damages, if any, were proximately caused by these  
4 actions. The Defendants' Motion for Summary Judgment is DENIED.

5 **IT IS SO ORDERED.**

6 Dated this 21<sup>st</sup> day of October, 2010.

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8 RONALD B. LEIGHTON  
9 UNITED STATES DISTRICT JUDGE