72597-1 72597-1

NO. 72597-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

(Whatcom County Cause No. 08-2-00035-1)

STANLEY SMITH,

Appellant,

vs.

TERRY MARTIN and M&M TECHNOLOGIES, INC.,

Respondents.

RESPONDENTS' RESPONSE BRIEF

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July 20, 2015

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INTRODUCTION

This is an appeal from a bench trial and corresponding findings of fact and conclusions of law. Following a five (5) day trial, the trial court found and stated:

> [T]hat a requirement to pay $550,000 to the SEC by M & M would have been within the purview of paragraph 12.1 (g) of the licensing agreement, and paragraph five of the R and D agreement. If such a claim existed, it would be a material claim that might have a material adverse effect upon the other party, but it didn't exist at that time.
>
> I would find that as of the time that these documents were signed in April, and as of the time that the parties had the meeting on the 15th of March that it was an **inchoate potential claim only**.

07/22/14 (Oral Decision) RP 11:6-16 (emphasis added).

Stanley Smith (Smith) appeals the trial court's interpretation of a "claim," as used in two identical paragraphs in the Licensing Agreement and the Option Agreement, both dated April 11, 2007. Courts interpret contracts "as a whole," and do not read ambiguities into contracts that are otherwise clear and unambiguous. *Grant Const'rs v. E. V. Lane Corp.*, 77 Wn.2d 110, 121, 459 P.2d 947 (1969). When the contracts are read as a whole, no "claim" existed at the time the contracts were signed on April 11, 2007. CP 14; F/F 3.22; Ex. 1; Ex. 2. Terry Martin (Martin) disclosed to Smith that Martin and M & M Technologies, Inc. (M&M), because of their former business relationships, may be the subject of an SEC investigation and may be named in the future as "relief defendants." CP 13; F/F 3.18. Smith and M&M moved forward in their negotiations and entered into three enforceable contracts on April 11, 2007. CP 10-11; F/F 3.06; F/F 3.07; F/F 3.08. On May 14, 2007, the SEC filed an amended complaint naming Martin and M&M as relief defendants. RP 266. No present claim existed at the time the parties entered into the three agreements. This Court should affirm the trial court's ruling.

RESTATEMENT OF THE CASE

A. Facts

This case involved three agreements between respondent M&M and appellant Smith. CP 10; F/F 2.01. Respondent Martin is the president and majority shareholder of M&M. CP 9; F/F 1.01.

In March and April of 2007, M&M was in financial difficulty, and in need of new investors. CP 11; F/F 3.04. This was disclosed to Smith. CP 13; F/F 3.18. Smith was introduced to Martin and Craig Forhan, the secretary, treasurer and CFO of M&M, in hopes of building a fortuitous business relationship. RP 144. Prior to entering into the three agreements, on March 14, 2007, Smith signed a confidentiality agreement that showed Smith was contemplating purchasing rights in intellectual property owned by M&M. CP 13; F/F 3.16; Ex. 12.

On March 15, 2007, Martin, Craig Forhan and Smith met to discuss their pending business arrangements, and certain intellectual property owned by M&M. CP 13; F/F 3.18. At this meeting, the following information was disclosed to Smith by Martin and M&M:

- M&M was subject to an investigation by the Securities and Exchange Commission (SEC) regarding its business relationships with GEM Manufacturing, Inc. (GEM), Mac Stevenson and/or International Fiduciary Corporation, S.A. (IFC);
- M & M Technologies, while not a relief defendant at the time, had the potential of becoming a relief defendant in an SEC action;
- The interruption of M&M's business relationship with GEM, caused by the SEC investigation, created a cash flow problem or crunch for M&M; and
- M&M may be required to repay the U.S. government an undetermined amount of money.

CP 13; F/F 3.18. Following the March 15, 2007, meeting and above disclosures, Smith paid M&M $200,000. CP 13; F/F 3.18.

On March 28, 2007, after full disclosure by Martin and M&M of all information known by Martin and M&M regarding the SEC matter, Smith signed a three (3) page Letter of Intent, which letter outlined the points discussed by them regarding the potential terms and conditions of a potential future Licensing Agreement and Research and Development Agreement. CP 13; F/F 3.18; RP 226-27.

Sometime after March 28 but before April 11, 2007, M&M provided Smith with M&M's business plan for marketing the patented technology, which business plan disclosed expected losses of more than $37,000,000 in the first three years and potential significant profits thereafter. CP 14; F/F 3.20.

On April 11, 2007, M&M and Smith entered into a License Agreement Between M & M Technologies, Inc. and Stanley Smith (License Agreement). CP 10; F/F 3.01. On April 11, 2007, M&M and Smith entered into an Option Agreement Between M & M Technologies, Inc. and Stanley Smith (Option Agreement). CP 10; F/F 3.02. On April 11, 2007, M&M Technologies and Smith entered into a Research, Development & Testing Agreement Between M & M Technologies, Inc. and Stanley Smith (R&D Agreement). CP 11; F/F 3.03.

The parties changed Smith's $200,000 loan plus interest into a down payment towards the License Agreement. CP 13; F/F 3.17. All three agreements were enforceable and supported by consideration. CP 11-12; F/F 3.06-3.08.

On May 4, 2007, Smith proposed, in writing, that the Option Agreement be amended whereby Smith would purchase the exclusive licensing rights for the other 47 states for $6,000,000 instead of $94,000,000 as called for in the Option Agreement. CP 16; F/F 3.38; Ex. 5. The May 4, 2007, Smith proposal was signed only by Smith and was not accepted by M&M. *Id.*

On February 21, 2007, the SEC had contacted Martin and M&M requesting information regarding its investigation of International Fiduciary Corp., S.A. et al. Ex. 34. On March 9, 2007, Martin and M&M complied with the SEC's requests. RP 256-57; Ex. 37. In the correspondence between the SEC and Martin, the SEC disclosed it was investigating Martin's and M&M's involvement with the then named defendants in the SEC Action. Ex. 28; Ex. 34. In its initial letter, dated February 21, 2007, the SEC wrote:

> "The staff of the Securities and Exchange Commission (the 'Commission') is considering recommending that the Commission take legal action against you by naming you as a relief defendant in our pending lawsuit entitled SEC v. International Fiduciary Corporation S.A. et al., Civ. No. 1:06CIV1354, which was filed in the United States District Court for the Eastern District of Virginia on December 4, 2006."

Ex. 34. On May 14, 2007, the SEC served an Amended Complaint on Martin and M&M naming them as relief defendants. RP 266. On May 28, 2007, Smith was advised by his CPA that M&M had been named as a relief defendant in the SEC action. CP 16; F/F 3.40. On July 15, 2008, Martin and M&M settled all the SEC claims. Ex. 23. Prior to signing any agreement with M&M, Smith was made aware of the circumstances surrounding the SEC's investigation and the possibility that M&M and/or Martin could be named as relief defendants in that matter. CP 13; F/F 3.18.

On May 2, 2007, Smith formed a new corporation, NuPower. Ex. 45. On June 1, 2007, after full knowledge that Martin and M&M were named as relief defendants in the SEC action, Smith was willing to go forward with the deal under his new corporation NuPower. CP 16; Ex. 6; Ex. 45. However, M&M was not willing to allow Smith to assign any interest Smith had at the time to his new corporation, NuPower. RP 293.

On October 1, 2007, Smith and NuPower filed and served a Complaint in the Kitsap County Superior Court against Martin and M&M alleging breach of contract, breach of warranty, breach of implied duty of good faith, fraud/intentional misrepresentation, negligent misrepresentation, violation of the Consumer Protection Act and unjust enrichment. Ex. 24. On January 4, 2008, Martin and M&M filed a lawsuit in Whatcom County Superior Court, which lawsuit is the subject of this appeal. CP 43.

The subject of this appeal is the interpretation, findings and conclusions related to paragraph 12.1(g) of the License Agreement and paragraph 5.1(g) under the Option Agreement, which both read:

> Each Party (the "Warranting Party") warrants and represents to the other Party that:
> . . .
> (g) the Warranting Party is not **presently** the subject of, nor the proponent of, any claim that would have a material adverse affect[sic] on the other Party;

Ex. 1; Ex. 2. (Emphasis added.) After a five (5) day bench trial, the trial court determined that:

> [T]hat a requirement to pay $550,000 to the SEC by M & M would have been within the purview of paragraph 12.1 (g) of the licensing agreement, and paragraph five of the R and D agreement. If such a claim existed, it would be a material claim that might have a material adverse effect upon the other party, **but it didn't exist at that time**.
>
> I would find that as of the time that these documents were signed in April, and as of the time that the parties had the meeting on the 15th of March that it was an **inchoate potential claim only**.

07/22/14 The Court's Oral Decision 11:6-16. (Emphasis added.)

After trial, the Court entered the following unchallenged findings of facts:

> 3.01 On April 11, 2007, M & M Technologies and Smith entered into a valid contract, titled license Agreement Between M & M Technologies, Inc. and Stanley Smith.
>
> 3.02 On April 11, 2007, M & M Technology and Smith entered into a valid contract, titled Option Agreement Between M & M Technologies, Inc. and Stanley Smith.
>
> 3.03 On April 11, 2007 M & M Technologies and Smith entered into a valid contract, titled Research, Development & Testing Agreement Between M & M Technologies, Inc. and Stanley Smith.
>
> . . .
>
> 3.06 The April 11, 2007 license Agreement Between M & M Technologies, Inc. and Stanley Smith is an enforceable agreement supported by consideration.
>
> 3.07 The April 11, 2007 Option Agreement Between M & M Technologies, Inc. and Stanley Smith is an enforceable agreement supported by consideration.
>
> 3.08 The April 11, 2007 Research Development & Testing Agreement Between M & M Technologies, Inc.

and Stanley Smith is an enforceable agreement supported by consideration.

. . .

3.10 Smith has repudiated all three agreements.

3.11 On or about March 15, 2007, Smith loaned M & M Technologies $200,000.00.

3.12 The terms of the loan were not properly documented, although there were some discussions regarding the ability for Smith to double or triple his money in two to four months.

3.13 Except for some handwritten notes on a stock certificate, there is no document containing sufficient information for this Court to determine the terms and conditions of the original loan.

3.14 No terms or conditions of the loan were documented because the parties, very early on, changed the discussion and converted the loan to an initial payment of $200,000 toward the funds due M & M Technologies from Smith for the License Agreement The loan conversations were subsumed by the License Agreement.

. . .

3.17 The initial $200,000 paid by Smith to M & M Technologies, was clearly converted by M & M Technologies and Smith into part of the $5,000,0009 due M & M Technologies from Smith upon execution of the Licensing Agreement.

3.18 On March 15, 2007, before Smith paid M & M Technologies $200,000, Martin, Smith and Craig Forhan, accountant for M & M Technologies, met and discussed their pending business arrangement(s) and certain confidential intellectual property. At this meeting the following information was disclosed to Smith:

A. M & M Technologies was subject to an investigation by the Securities and Exchange Commission (SEC) regarding its business relationships with GEM Manufacturing, Inc. (GEM), Mac Stevenson and/or International Fiduciary Corporation, S.A. (IFC).

B. M & M Technologies, while not a relief defendant at the time, had the potential of becoming a relief defendant in the SEC action;

C. The interruption of M & M Technologies' business relationship with GEM, caused by the SEC investigation, had created a cash flow problem or crunch for M & M Technologies; and,

D. M & M Technologies may be required to repay the U.S. government an undetermined amount.

. . .

3.19 On March 28, 2007, after full disclosure by M & M Technologies to Smith of all information known by Martin and M & M Technologies regarding the SEC matter, M & M Technologies and Smith signed a three (3) page Letter of Intent, which letter outlined the points discussed by them regarding the potential terms and conditions of a Licensing Agreement and Research and Development Agreement.

3.20 Sometime after March 28 but before April 11, 2007, M & M Technologies provided Smith with M & M Technologies' business plan for marketing the patented technology, which business plan disclosed an expected loss of more than $37,000,000 in the first three years and potential significant profits thereafter.

. . .

3.26 Smith paid nothing on the Research, Development & Testing Agreement, which Agreement required $110,000 per month for six years beginning as soon as Smith paid the $5,000,000 due M & M Technologies on the License Agreement

3.27 Smith paid $100,000 for the Option Agreement, granting Smith on a state by state basis, the option to license the technology in the other 47 states not listed in the licensing Agreement upon the payment of $2,000,000 per state.

3.28 Smith never exercised any rights provided in the April 11, 2007, Option Agreement.

3.29 Other than signing the Option Agreement and paying $100,000, Smith took no further action to trigger the Options contained in the Option Agreement.

3.33 Smith agreed, under paragraph 7.l(c) of the Option Agreement that M & M Technologies shall not be required to return to Smith any amounts paid by Smith to M & M Technologies pursuant to the Option Agreement.

3.34 Smith has not paid the balance of the $4,500,000 owing on the License Agreement.

3.35 Smith is in material breach of the License Agreement.

3.36 Smith has made no payment on the Research, Development & Testing Agreement.

. . .

3.40 On May 28, 2007, Smith was advised by his CPA that M & M Technologies had been named a relief defendant in the SEC matter.

3.41 The Assignment Agreement demonstrates that Smith, after learning that M & M Technologies was a relief defendant in the SEC action, was willing to go forward with the deal under his corporation NuPower.

3.42 Smith's attempt to assign his rights and obligations in the three contracts to his corporation NuPower failed because it was not agreed to or consented to by M & M Technologies.

3.43 Because the assignment was not effective, NuPower has no rights in any of the contracts and has no basis for any legal claims against Martin or M & M Technologies.

3.44 If Smith was not in material breach of all three (3) contracts before October 1, 2007, Smith and NuPower's filing and service of its Complaint in the Kitsap County Superior Court, was intended by Smith as a repudiation of all three contracts and was a material breach of the License Agreement.

. . .

3.50 Neither Smith nor NuPower have any right, title, or interest in any one of the three April 11, 2007 contracts: license Agreement; Option Agreement; or Research, Development & Testing Agreement or any right title or interest in any of the technology, patents or intellectual property described therein.

4.01 M & M Technologies has prevailed on its breach of contract claim against Smith on the License Agreement Smith has materially breached the License Agreement

4.03 Smith has not prevailed on his misrepresentation claim against Martin or M & M Technologies. Neither M & M Technologies nor Martin have intentionally or negligently misrepresented any material fact to Smith.

4.04 Smith has not prevailed on his breach of implied good faith claim against Martin or M & M Technologies. Neither M & M Technologies nor Martin were involved in bad faith in their business relationship(s) with Smith.

4.05 Smith has not prevailed on his fraud claim against either Martin or M & M Technologies. Neither M & M Technologies nor Martin were involved in any fraud upon Smith.

. . .

5.01 The Court has not been asked to and has not attempted to determine whether or not, in equity, the liquidated damage provision is a reasonable forecast of fair damages and whether the provision is appropriate because the harm caused by the breach is likely incapable or very difficult of accurate estimation.

5.02 Because M & M Technologies has selected to keep only the payments made pursuant to other terms of the two contracts, the Court has not been asked or attempted to determine if forfeiture or liquidated damages are mutually exclusive remedies requiring M & M Technologies to make a selection.

CP 10-19. The Court entered the following findings of facts which were improperly challenged by Smith:

3.09 M & M Technologies has not breached any of the three (3) agreements referenced above.

3.21 Smith's claims in this matter rely upon paragraph 12.1(g) of the License Agreement and 5.1(g) of the Option Agreement, which both read: "the warranting Party (M & M Technologies) is not presently the subject of, nor the proponent of, any claim that would have a material adverse effect on the other Party (Smith)."

3.22 At the time of the first disclosures regarding the SEC on March 15, 2007, and at the time of the signing of the contracts, a SEC claim against M & M Technologies, as a relief defendant for $550,000, was an inchoate potential claim only, and no amended complaint naming M & M Technologies as a relief defendant had been filed or served by the SEC.

3.23 M & M Technologies had no duty to warn of the potential claim under any contract provision. M & M Technologies correctly warranted that there was no actual claim against it by the SEC.

3.24 It was disclosed to Smith what Martin and M & M Technologies actually knew, for the warranting provision to be violated there needed to by[sic] an actual claim and there was not.

. . .

3.45 M & M Technologies, by stipulation at the beginning of trial seeks no additional damages against Smith, except M & M Technologies' right to keep the $500,000 paid toward the License Agreement and the $100,000 paid for the Option Agreement.

. . .

3.47 M & M Technologies is entitled to retain the first $250,000 paid toward the license Agreement and the $100,000 paid for the Option Agreement.

4.02 Smith has not prevailed on his breach of warranty claim against M & M Technologies. Neither M & M Technologies nor Martin have breached any express or implied warranty provided to Smith in any contract.

> 5.03 The liquidated damage provision of the license Agreement allows M & M Technologies to retain the additional $250,000 of the payments made by Smith.

CP 12-19.

B. Assignments of error not separately assigned.

Smith assigns error to 9 of the trial court's findings of fact, (See Appellant's Opening Brief, p. 5), but he does not have a separate assignment of error for each finding of fact Smith contends. Accordingly, they are verities on appeal. *Kever & Associates, Inc. v. Randall*, 129 Wn.App. 733, 741, 119 P.3d 926 (Div. 3, 2005), rev. denied, 157 Wn.2d 1009 (2006) (regardless of an assignment of error, if the issue is not argued or briefed by citation to authority or to the record, the argument is deemed waived). To the extent Appellants sufficiently raised challenges to any of the Findings of Fact, they are supported by substantial evidence.

ISSUE(S) PRESENTED

Whether identical paragraphs 12.1(g) of the License Agreement and 5.1(g) of the Option Agreement were breached by Martin and/or M&M, or more specifically, whether Martin and/or M&M were **presently** the subject of, or the proponent of, any claim that would have a material adverse effect on Smith on April 11, 2007. [No.]

LEGAL ARGUMENT

A. Standards of Review

1. Findings of Fact

Unchallenged findings of fact are verities on appeal. *Robel v. Roundup Corp.,* 148 Wn.2d 35, 42-43, 59 P.3d 611 (2002). A finding of fact erroneously described as a conclusion of law is reviewed as a finding. *Willener v. Sweeting,* 107 Wn.2d 388, 393-4, 730 P.2d 45 (1986). Individual findings of fact must be read in the context of other findings of fact and of the conclusions of law. *In re Hews,* 108 Wn.2d 579, 595, 741 P.2d 983 (1987). Findings of fact which are properly challenged are reviewed for substantial evidence in the record. *Burrill v. Burrill,* 113 Wn.App. 863, 868, 56 P.3d 993 (Div. 1, 2002), *rev. denied,* 149 Wn.2d 1007 (2003).

2. Conclusions of Law

An unchallenged conclusion of law becomes the law of the case. *King Aircraft v. Lane,* 68 Wn.App. 706, 716, 846 P.2d 550 (Div. 1, 1993). Challenged conclusions of law are reviewed *de novo. Robel,* 148 Wn.2d at 43. However, when an appellant challenges conclusions of law not based on the law itself, but in alleging insufficient evidence supports those conclusions, *de novo* review is not appropriate. Instead, appellate review is limited to determining whether the findings are supported by substantial evidence, and if so, whether those findings support the conclusions. *American Nursery v. Indian Wells,* 115 Wn.2d 217, 222, 797 P.2d 477 (1990), *citing, Willener v. Sweeting,* 107 Wn.2d at 393.

B. The errors assigned to the Findings of Fact were not properly challenged in this Court, and thus they are verities on appeal.

> (g) Special Provision for Assignments of Error. . . A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

RAP 10.3(g). "RAP 10.3 requires an appellant to present argument to the reviewing court as to why specific findings of fact are in error and to support those arguments with citation to relevant portions of the record." *In re Disciplinary Proceeding Against Whitney*, 155

Wn.2d 451, 466, 120 P.3d 550 (2005). When challenges to findings of fact are insufficiently briefed, we decline to address those challenges and consider the findings verities on appeal. *Id.* at 467.

Appellants raise 9 assignments of error relating to the Findings of Fact. (See App. Opening Brief at 5). If not properly challenged, the findings are not reviewed on appeal. *In re Estate of Palmer*, 145 Wn.App. 249, 265, 187 P.3d 758 (Div. 2, 2008).

Smith's brief fails to address the majority of the Findings to which he assigns error. Smith has the burden of demonstrating why specific findings of fact are not supported by substantial evidence through citation to the record. *Palmer*, 145 Wn.App. at 265. Moreover, Smith has failed to either type out the material portions of the challenged findings verbatim or append them to his brief, another prerequisite to properly raising a challenge to findings. *Id.*; 10.4(c) (If a party presents an issue which requires study of a . . . finding of fact . . . or the like, the party should type the material portions of the text out verbatim or include them by copy in the text or in an appendix to the brief.)

This Court has the discretion to waive technical violations when the briefing makes the nature of the challenge perfectly clear. *Palmer*, 145 Wn.App. at 265. However, strict adherence to the rules is not just a "technical nicety." *Id.* The rules exist to avoid requiring the court to "comb the entire record" and construct arguments for the Appellants. *Id.* citing, *In re Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998). The Assignments of Error challenging the trial court's Findings should be treated as verities.

C. Paragraphs 12.1(g) of the License Agreement and 5.1(g) of the Option Agreement should be interpreted "as a whole."

"The contracting parties' intent is determined by construing the terms of the contract as a whole, in light of the circumstances under which it is made." *Postlewait Constr. v. Great American Ins.*, 106 Wn.2d 96, 99-100, 720 P.2d 805 (1986).

> [T]he courts are in nearly universal agreement in construing written contracts that the primary purpose of a judicial interpretation is to ascertain the parties' intentions, give effect to them and make the parties' intentions controlling. The intentions of the parties should be ascertained from the entire writings, and, if at

> all possible, all parts of the writings shall be construed so as to harmonize with one another.
>
> Thus, it follows that the courts cannot and ought not make contracts for the parties and, assuredly, cannot make a contract for them which they did not make for themselves. Courts should take care under the guise of interpretation not to rewrite the contract for the parties, or create a new one.
>
> Therefore, unless there is an ambiguity, parol evidence or proof of extrinsic circumstances to explain the meaning in arriving at the parties' intentions is inadmissible. Courts should not find an ambiguity in order to construe the contract, and an ambiguity will not be read into a contract where it can reasonably be avoided by reading the contract as a whole. Accordingly, even though some of the words used in the contract may be said to be ambiguous, **if the terms of the contract taken as a whole are plain and unambiguous, the meaning should be deduced from the language alone without resort to extrinsic evidence.**

Grant Const'rs v. E. V. Lane Corp., 77 Wn.2d at 120-22.

The use of different language between clauses in a contract, infers that the clauses have different meanings. The California Appeals Court addressed this issue and explained:

> The words 'for residence purposes only' in the deed before us were specifically used in contradistinction to business or commercial purposes. Had those words stood alone, the latter uses would be impliedly excluded. But the grantor obviously did not want to leave such an excluded use to implication, hence we have the express provision that the premises are to be occupied in 'nowise

> for business purposes.' It is apparent that the grantor took pains to define the use to which the property could be put and the limitations on such use. It is therefore significant that no limitation, restriction or qualification is placed upon the character or type of 'residence purposes' to which the property may be devoted.

Weber v. Graner, 137 Cal.App.2d 771, 775-76, 291 P.2d 173 (1955) (cited by *Burton v. Douglas County*, 65 Wn.2d 619 (supra)).

Reading the WARRANTIES AND REPRESENTATIONS section, the parties distinguish between <u>future</u> warranties and representations and <u>present</u> warranties and representations. E.g. paragraph 12.1(d) of the License Agreement reads: "except as provided herein, the warranting Party **will not** enter into any agreement, the execution and/or performance of which violate any term of this License Agreement;" where 12.1(g), the paragraph in dispute, reads: "the Warranting Party **is not presently** the subject of, nor the proponent of, any claim that would have a material adverse affect[sic] on the other Party." Ex. 1.

The two contract provisions show that the parties intended paragraph 12.1(g) to be construed at the time of signing only.

/ / /

D. Potential claims are not present claims.

Black's Law Dictionary gives the following definitions of the word "claim":

> 2. The assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional <the spouse's claim to half of the lottery winnings>.
> 3. A demand for money, property, or a legal remedy to which one asserts a right; esp., the part of a complaint in a civil action specifying what relief the plaintiff asks for. — Also termed claim for relief (1808).

Black's Law Dictionary (10th ed. 2014). On April 11, 2007, the SEC had no "right to payment," from Martin or M&M. On April 11, 2007, the SEC had not made a "demand for money" from Martin or M&M. The SEC was simply investigating the matter at that time. Ex. 28; Ex. 34. The SEC's letters to Martin and M&M clearly demonstrate that it was in the middle of investigating its case against International Fiduciary Corp., S.A. et al. Ex. 28; Ex. 33; Ex. 34. The SEC was trying to determine whether or not to recommend that Martin and M&M be named as relief defendants in the SEC action. I.e. the SEC was determining at that time (February through April of 2007) whether or not it had a claim against Martin and/or M&M. Regardless, the SEC's investigation of

International Fiduciary Corp., S.A. et al., and the fact that Martin and M&M might be named as relief defendants was fully disclosed to Smith prior to entering into the three agreements. CP 13; F/F 3.18; RP 311-12. Smith is attempting to relate-back the fact that Martin and M&M ended up being named as relief defendants in the SEC action to show a breach by Martin and M&M prior to Smith's own breach. No present claim existed at the time the three agreements were executed.

CONCLUSION

For the reasons stated above, this Court should affirm the trial court.

RESPECTFULLY SUBMITTED THIS 20th day of July 2015.

SHEPHERD and ABBOTT

Douglas R. Shepherd, WSBA #9514
Bethany C. Allen, WSBA #41180
Kyle S. Mitchell, WSBA #47344
Of Attorneys for Respondents
Martin and M&M

DECLARATION OF SERVICE

I, Heather Shepherd, declare that on July 20, 2015, I caused to be served a copy of the foregoing: **Respondents' Response Brief,** in the above matter, on the following person, at the following address, in the manner described:

Kenneth Karlberg, Esq. Karlberg & Associates, PLLC 909 Squalicum Way, Suite 110 Bellingham, WA 98225 ken@karlberglaw.com	(X) U.S. Mail ( ) Fax ( ) Messenger Service ( ) Personal Service (X) Email

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 20th day of July, at Bellingham, Washington.

Heather Shepherd

APPENDIX A

RAP 10.3(g)

SPECIAL PROVISION FOR ASSIGNMENTS OF ERROR.

A separate assignment of error for each instruction which a party contends was improperly given or refused must be included with reference to each instruction or proposed instruction by number. A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

APPENDIX B

RAP 10.4(c).

TEXT OF STATUTE, RULE, JURY INSTRUCTION, OR THE LIKE.

If a party presents an issue which requires study of a statute, rule, regulation, jury instruction, finding of fact, exhibit, or the like, the party should type the material portions of the text out verbatim or include them by copy in the text or in an appendix to the brief.

RAP 10.4(c).

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APPENDIX B